Counsel for the Appellants—Sandeman, K.C.—A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Macmillan, K.C.—C. H. Brown. Agents—Smith & Watt, W.S.

Tuesday, May 16.

SECOND DIVISION.

[Lord Anderson, Ordinary.

MITCHELL *v.* ALLARDYCE AND OTHERS.

Diligence — Friendly Society — Validity of Charge—Chargers not Connected by Legal Evidence with Creditors in Bond and Disposition in Security — Friendly Societies Act 1896 (59 *and* 60 *Vict. cap.* 25), *sec.* 50.

A bond and disposition in security in favour of three persons, the "present" trustees of a friendly society and their successors in office, was registered for execution, and the debtor charged on the extract to make payment to three different persons, the trustees at the date of charge. *Held* that in the absence of legal evidence connecting the two sets of persons the charge was not properly authorised, and suspension *granted.*

The Friendly Societies Act 1896 (59 and 60 Vict. cap. 25), section 50, enacts—"Upon the death, resignation, or removal of a trustee of a registered society or branch, the property vested in that trustee shall, without conveyance or assignment, and whether the property is real or personal, vest, as personal estate subject to the same trusts, in the succeeding trustees of that society or branch either solely or together with any surviving or continuing trustees. . . ."

Robert Mitchell, Glasgow, ropemaker, *complainer*, brought a note of suspension against Wiliam Allardyce, caretaker, Robert Hamilton, cartwright, and Fleming Jackson, woodcarver, all of Glasgow, *respondents*, seeking to suspend a charge to make payment of the principal sum of £800 contained in a bond and disposition in security granted by him at Whitsunday 1896, to Thomas Dickie, bellhanger, Glasgow, Donald Ross, blacksmith, Partick, and John Archibald Macmillan, manager to wine merchant, Glasgow, the then trustees of the St Mungo Lodge of the Loyal Order of Ancient Shepherds.

The complainer, *inter alia*, pleaded—"(3) The respondents not being the creditors specified in the bond, were not entitled to charge the complainer without first having obtained letters of horning."

The *facts* are given in the *opinion* (*infra*) of the Lord Ordinary (ANDERSON), who on 9th December 1915 repelled the complainer's third plea-in-law.

Opinion.—"At Whitsunday 1896 the then trustees of the St Mungo Lodge of Ancient Shepherds lent to the complainer, on the security of heritable subjects, the sum of £800. The bond and disposition in security granted by the complainer, and duly recorded for publication in the Division of the General Register of Sasines applicable to the county of the barony and regality, was duly recorded. At the date of the said bond the trustees of St Mungo Lodge, which is a friendly society registered under the Friendly Societies Act 1875, were Thomas Dickie, Donald Ross, and John Archibald Macmillan. . . .

"On 24th September 1914 intimation was made to the complainer on behalf of the present trustees of the Lodge, who are the respondents called in this action, that repayment of the said loan would be required at the expiry of three months from the date of the intimation. A correspondence thereupon ensued between the complainer on the one hand and the secretary of the Lodge, and thereafter the Society's solicitors, on the other.

". . . The position, however, taken up by the complainer in July 1915 was, in effect, a refusal to pay the sum due.

"The respondents accordingly on 8th July 1915 registered the bond for execution in the Sheriff Court books of the county of Lanark and obtained an extract.

"On 10th July the respondents applied, under the Courts (Emergency Powers) Act 1914, to the Sheriff of Lanarkshire at Glasgow for leave to proceed with diligence against the complainer for the enforcement of the decree contained in said extract registered bond. The complainer opposed this application, but after proof had been led the Sheriff-Substitute on 22nd July granted the application.

"On 23rd July the respondents charged the complainer, on an *inducice* of six days, to make payment to them of (1) the principal sum of £800 contained in the bond; (2) a fifth part more of liquidate penalty incurred through failure in the punctual payment thereof; and (3) interest of the said principal sum at the rate of five pounds sterling per centum per annum from the term of Whitsunday last until payment.

"The complainer, in the argument which was addressed to me, maintained that a debtor in the position of the complainer is entitled to be assured of his creditor's identity so that he may receive a proper discharge of his debt—that is to say, in the present case, that the respondents are duly appointed trustees of St Mungo Lodge and the successors of the three trustees who were parties to the bond. I entirely assent to this, but it is for the debtor to take the necessary steps to satisfy himself on this point. If there had been dubiety as to this matter the complainer could have raised the point in the proceedings before the Sheriff-Substitute or in this process, but he has not done so. On the contrary, his averment in statement 1 is that the respondents are the present trustees of the Lodge. I must therefore proceed upon the footing that the respondents were properly appointed trustees of the Lodge, and that they are the successors in office of the grantees of the bond.

"The complainer's reasons of suspension are highly technical and thus are not cal-

culated to evoke sympathetic consideration, but they require to be weighed and determined as propositions of law.

"The complainer did not insist on his second plea-in-law, which is based on the provisions of the Act 1693, cap. 12, but he maintained that he was entitled to suspension of the diligence on the ground (1) that the charge ought to have proceeded on letters of horning, and (2) that the complainer ought not to have been charged to make payment of the liquidate penalty specified in the charge.

"I. On the first point the law seems to be well settled to the following effect—If the original creditor in a bond has died or assigned his right before registration of the bond the executor or assignee must register the bond, obtain an extract, and then apply in the Bill Chamber for letters of horning, on which diligence then proceeds. The executor or assignee in the case supposed is debarred from obtaining a warrant of diligence by following the procedure prescribed by the Personal Diligence Act (1 and 2 Vict. cap. 114), sections 7 and 12, that procedure applying only to cases where an extract of the registered bond has been transferred.

"On the other hand, summary diligence is competent, not only by a contracting party, but by one in whose favour a clause in a deed is conceived—*Lord Whittinghame* v. *Spence*, M. 14,999.

"The complainer maintains that there has been a change of creditors, and that as the respondents have not connected themselves with the original creditors by any document produced, they were not entitled to do summary diligence by the method resorted to.

"The respondents, founding on the contract contained in the bond and on section 50 of the Friendly Societies Act of 1896, assert their right to proceed in the manner adopted.

"I am of opinion that the respondents' contention is right. If the terms of the bond be considered, it appears that the complainer agreed to subject himself to summary diligence at the instance of the three persons therein named, 'and the survivors and survivor of them, and their respective successors in office for the time being, as trustees and trustee for behoof of the said Saint Mungo Lodge.' The creditors in the bond are thus declared to be the trustees of the Lodge, whoever they may be.

"Section 50 of the Friendly Societies Act 1896 provides that . . . [*quotes, v. sup.*] . . .

"The test as to whether it is necessary to apply for letters of horning seems to be whether a conveyance, assignation, or other deed is necessary to connect the person desiring to do summary diligence with the original creditor. Thus in the case of an executor a confirmation is necessary, of an assignee an assignation, of a new trustee a deed of assumption, and so in all these cases letters of horning must be applied for. A public statute, assuming that the provisions of the Act of 1896 are necessary to complete the respondents' right to the bond, is in a different position from the deeds before mentioned, and does not require to be produced and founded on as evidence of title. On the foregoing test, accordingly, the respondents are not in the position of successors who require to connect themselves by deed with their authors, and do not therefore require to proceed by letters of horning.

"II. The second point taken by the complainer had reference to that part of the charge which demands payment of a fifth part of the principal sum as liquidate penalty. He maintained that this part of the charge was bad, and that it ought to have been limited to the amount of the expenses actually incurred by the respondents. I am against the complainer on this point. . . ."

The complainer reclaimed, and argued—The point was whether there was a valid charge. This could not be maintained by the respondents unless they connected themselves by proper legal evidence with the trustees of Saint Mungo Lodge named in the bond and disposition in security. The charge was at the instance of the trustees of the Lodge as at 23rd July 1915, but they were entirely different persons from the trustees named in the bond and disposition in security. No proper legal evidence connecting the trustees in 1896 with the trustees in 1915 was narrated in the charge as founded on or produced. The Friendly Societies Act 1896 (59 and 60 Vict. cap. 25), section 25 (2), provided for trustees being appointed at a meeting of the society, and by a resolution of those present entitled to vote, and by sub-section (3) for the sending to the registrar of a copy of every resolution appointing a trustee, signed by the trustee himself and by the secretary. Similar information had to be sent to the registrar under section 9. Section 50 merely transmitted property to the successive trustees, and did not dispense with a document of appointment of trustees to act from time to time. Failing the production of a document of appointment, the title to use diligence was defective, and letters of horning could not proceed without such a connecting link. The Personal Diligence Act 1838 (1 and 2 Vict. cap. 114), by sections 7 and 12, required that legal evidence of an acquired right must be produced before diligence could be used. No difficulty existed to prevent the respondents producing legal evidence of the acquired right claimed by them, but no such legal evidence had been produced. This was a case where some other document besides the decree of Court or of registration was required, and letters of horning were necessary.

Argued for the respondents—There was no change of creditors. The lodge was the creditor. It was a statutory body with perpetual succession by statute, as distinguished from a private trust. In any event, section 94, sub-section 3, of the Friendly Societies Act 1896 (*cit.*), showed that the respondents had a good title. It also showed the distinction between a friendly society, which the Lodge was, and an ordinary litigant, and gave perpetual succession to the Lodge. Section 25 of the Act provided for a return of officials, but no provision existed

for giving out the names of trustees. In the case of assumed trustees a deed of assumption was necessary to complete title, but in the case of friendly societies no deed was necessary. Sections 7 and 12 of the Personal Diligence Act 1838 (*cit.*) did not apply to the present case, but to the case where a right to extracts had been acquired.

LORD JUSTICE-CLERK—This case raises a very technical point, but on the other hand it is of importance as affecting diligence where precision and exactness are among the first essentials. But it is not one that is calculated to arouse any sympathy, for the complainer admits that he knew that the new trustees were in point of fact properly appointed. The extract itself takes no notice of these new trustees, but runs as it must do exactly in terms of the bond; and it was handed to an officer with written or verbal instructions to the effect that though the bond had been originally granted to A, B, and C as trustees of the society, their places had been taken by D, E, and F as new trustees.

Section 50 of the Friendly Societies Act 1896 (59 and 60 Vict. cap. 25) expressly provides that "upon the death, resignation, or removal of a trustee of a registered society or branch the property vested in the trustee shall, without conveyance or assignment, and whether the property is real or personal, vest, as personal estate subject to the same trusts, in the succeeding trustees." While the effect of that section is quite clearly to dispense with a conveyance or a deed of transmission, I do not think, when we come to deal with matters of diligence, that it dispenses with the necessity for the new trustees connecting themselves with the old trustees by proper legal evidence.

In this case it appears to me that even if letters of horning were not the appropriate method by which to proceed, proper legal evidence would have been a copy of the resolution appointing these new trustees certified by a proper official, either by the registrar or, it may be, by the secretary of the society; but as that has not been produced I think the charge in the form in which it was given was not properly authorised, and accordingly that the complainer is entitled to have it suspended.

LORD DUNDAS—I agree with your Lordship. One must feel some regret in coming to this conclusion, because the complainer's plea, which I think we are bound to sustain, is admittedly of a purely technical nature. But as your Lordship has pointed out, the case affects diligence, and we must look strictly into the matter. I am afraid the Lord Ordinary has gone wrong in so far as he has repelled the third plea-in-law for the complainer, and we must alter the interlocutor accordingly.

LORD SALVESEN—I am of the same opinion. I have reached the conclusion at which your Lordships have arrived without any difficulty. It seems to me that in a bond where the debtor has consented to registration for execution it is only the creditor mentioned in the bond who can extract the bond, and without more ado instruct a sheriff-officer to charge the debtor upon it. If the person who desires payment, and who is *de facto* in right of the bond, is not mentioned in it, he must take some means of certiorating the debtor that he is the person now entitled to receive the payment which the debtor contracted to make to the person originally named in the bond.

It is admitted that an assumed trustee or an executor, although his title to the bond is just as good as the title of the original trustee, cannot proceed by ordering a simple charge upon the extract in the name of the original body of trustees or of the person from whom the executor derives his right. I can see no distinction between that case and the present. In the case of trustees being assumed, or a whole body of trustees having died and new ones having taken their places, the circumstances may be known to the debtor, and there would be no ground for sympathy with him; but when it comes to a question of charging, the debtor must, so to speak, go by the book and must take the means provided by statutory enactment.

Now I think the object of the section in the Personal Diligence Act (1 and 2 Vict. cap. 114), sec. 7, to which we were referred, is to certiorate the debtor that he is in safety to pay to the person who now maintains that he is in right of the bond or other document of debt upon which diligence is about to proceed. If it were otherwise the debtor would have to acquaint himself with the correctness of the facts set forth. The respondents here appear to have satisfied the sheriff-officer that they were the persons who were the present trustees. But that is not what the Act contemplates, and it is not an equivalent to letters of horning. Before letters of horning are issued the responsible officer of this Court will see in the first place that the extract is in order, and in the second place that the persons who are intending to use diligence upon the extract have duly connected themselves with the original creditors and are entitled to payment. The debtor has thus the benefit of an independent investigation by the Bill Chamber Clerk, and is in safety to pay to the person designated in the letters of horning as his proper creditor.

I think the Lord Ordinary has failed to apprehend the distinction between the necessity for evidence of the appointment of the successors of trustees and evidence of assignation or conveyance to them. The latter is dispensed with by section 50 of the Friendly Societies Act (59 and 60 Vict. cap. 25), but it might well be that the sheriff-officer had been wrongly informed as to who were the present trustees, or that there has been informality or irregularity in their appointment, and in that case the debtor would have no defence against a second application for payment by the creditors truly in right of the debt.

LORD GUTHRIE — I agree. The Lord Ordinary assumes that the terms of the Personal Diligence Act (1 and 2 Vict. cap. 114), sections 7 and 12, apply to the respon-

dents. The respondents disputed that, and I think unsuccessfully. The Lord Ordinary proceeds only on the terms of the 1896 Act as taking the respondents out of the rule which would otherwise be applicable. Your Lordship in the chair has held it sufficient that they have produced nothing that will be equivalent to what section 7 of the Personal Diligence Act calls "legal evidence," and has rather indicated that they might, without letters of horning, have produced evidence of their appointment which might have been sufficient. Lord Salvesen, I think, considers that letters of horning are necessary, but it does not appear to me that we need decide that question, because, whether that view is correct, or whether something else might have been sufficient, that something else has not been put forward, and therefore it is sufficient to hold that the respondents were not entitled to do what they did. In answer 6, they take up the position that a friendly society is like a corporation, and that there has been no change of creditors, but it is quite clear that they are not entitled to take up that position, and it cannot be maintained that they are in any intermediate position which would take them out of the result at which your Lordships have arrived.

LORD JUSTICE-CLERK—With reference to what Lord Guthrie has said, I did not intend to express an opinion on the question whether letters of horning were necessary or whether a connecting link would have been sufficient. It is, I think, enough that neither the one nor the other is present in this case.

The Court recalled the interlocutor of the Lord Ordinary, and suspended the charge *simpliciter*.

Counsel for the Reclaimer—C. H. Brown. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Respondents—Moncrieff, K.C.—King Murray. Agents—Sang & Moffat, S.S.C.

Tuesday, May 23.

SECOND DIVISION.

[Sheriff Court at Linlithgow.

SCHELE AND OTHERS *v.* LUMSDEN & COMPANY.

Ship—Charter-Party—Demurrage—Exceptions—Strikes—Discharge Delayed through Increased Price of Coal Due to Coal Strike.

A charter-party for the carriage of a cargo of pit-props provided that the ship being loaded with a cargo of pit-props "shall therewith proceed to a good and safe place in the Firth of Forth . . . and deliver the same on being paid freight . . . (strike, lock-out, the act of God, the enemies of the King, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted). . . . Ten working days are to be allowed the said merchant for loading and nine like days for discharging, and any days on demurrage over and above the said laying-days at £5 per day, to be paid day-by-day as it becomes due." At the time when the vessel arrived at the Firth of Forth there was a general strike of coal miners in the United Kingdom, and the railway company would only supply waggons, without which discharge was impossible, on being supplied with the coal necessary for haulage, which had risen to a high price. The charterers declined to pay this price. *Held* (1) that the strike clause, looking to its terms and position, was solely in favour of the shipowners, and could not be appealed to by the charterers, and (2) that even if it could it did not apply.

Th. Schele, ship broker, Halmstad, Sweden, and others, registered owners of the sailing vessel "Atlantic," of Halmstad, *pursuers*, brought an action in the Sheriff Court at Linlithgow against Lumsden & Company, pitwood merchants and timber importers, Bo'ness, *defenders*, for payment of £85 for demurrage in respect of failure to discharge the ship in nine days as required by the charter-party.

The pursuers pleaded, *inter alia*—"(4) The exception clause founded on by the defenders not being inserted in the charter-party for their benefit, or available to them, and it being inapplicable to the circumstances of the present case, the defenders' fifth plea-in-law should be repelled."

The defenders pleaded, *inter alia*—"(5) *Separatim*—Any delay in discharging the cargo having been occasioned by a strike within the meaning of the exceptions in the charter-party, the defenders are not liable for demurrage."

The clause in the *charter-party* out of which the claim arose was in the following terms—"That the said ship . . . shall, with all convenient speed, sail and proceed to the loading-place in Halmstad, or so near thereunto as she may safely get, and there load always afloat . . . a full and complete cargo (including deck load at full freight) of short pit-props; . . . and being so loaded shall therewith proceed to a good and safe place in the Firth of Forth, . . . as ordered on signing bills of lading, or so near thereunto as she may safely get, and deliver the same on being paid freight . . . (strike, lock-out, the act of God, the enemies of the King, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage always excepted). . . . Ten working days are to be allowed the said merchant (if the ship is not sooner despatched) for loading and nine like days for discharging, and any days on demurrage, over and above the said laying-days, at £5 per day, to be paid day by day, as it becomes due. . . . The cargo to be brought to and taken from alongside the ship as customary at merchant's risk and expense, where she can always safely lay afloat. . . ."