

value of the services rendered. I am therefore for adhering.

LORD DEAS—This case has been very fully and carefully argued, and after all that has been said I am very clearly of opinion with your Lordship that it is a case of salvage, and must be dealt with as such. In looking at the principles involved, and the authorities which determine this question, four elements have to be considered—1st, The enterprise and risk incurred; 2d, the degree of peril of the salvaged ship; 3d, the amount of labour and time expended; 4th, the value of the ship salvaged. Now, viewing this case in the light in which it has been presented to us, and considering the principles involved in these four elements, I do not feel called upon to interfere with the discretion of the Lord Ordinary in this matter, and I therefore concur with your Lordship in leaving the judgment undisturbed.

LORD MURE—This is clearly a case of salvage, and not of towage, seeing that the salvaged vessel was discovered in a disabled condition in the North Sea at a considerable distance from shore, and unable to make any way. There was no doubt some risk and danger to be incurred by the relieving vessel, but this is not enough to entitle the salvor to demand a sum equivalent to what he would have received if great risk had been incurred in taking the disabled ship safely into port. Nor does it appear to me that the danger of the salvaged ship was such as to warrant us in interfering with the amount which has been fixed by the Lord Ordinary, and therefore I see no reason for differing from the conclusion at which your Lordship has arrived.

LORD SHAND—The object of this reclaiming note is really to determine the amount of salvage which is allowed, for it is not in dispute that the service rendered was of that nature. There can be no doubt that this ship was in some danger, but it was not immediate; she was becalmed, drifting, and could not make headway sufficient to enable her to be steered. The case for the pursuers is that the cargo was of a valuable description, and besides that there was a large number of human lives in danger. Now, it seems to me that the service rendered by the salvaging vessel on this occasion may very fairly be estimated by the time she was delayed from the prosecution of her voyage at the time when the "Vulcan" discovered the "Berlin." It is said that the weather was favourable; it was a dead calm; but it was just the calm which rendered it impossible for the "Berlin" to move, and it is urged that her peril was great because with such sails as she had, and with her propeller jammed, it was impossible for her to reach any port, as she could not answer her helm. The owners of the disabled vessel, on the other hand, say this is not so, and that with favourable weather the "Berlin" could easily have made Leith or some English port. These seem to be the extreme opinions held upon either side. That there was no existing cause to produce immediate damage to or destruction of the ship may be true enough, but nevertheless she was at the mercy of the waves. Upon the whole case it seems to me that the claimer has failed to show sufficient ground to warrant us in disturbing this interlocutor, and

I agree with your Lordship in thinking that the decision of the Lord Ordinary ought to be adhered to.

The Lords adhered.

Counsel for Pursuers and Reclaimers—Guthrie Smith—Keir. Agents—T. & W. A. M'Laren, W.S.

Counsel for Defenders and Respondents—Trayner—Dickson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Friday, July 7.

FIRST DIVISION.

(Before Lord President Inglis and Lords Deas and Shand.)

[Lord Kinnear, Ordinary.]

CLARK v. CITY OF GLASGOW BANK.

Public Company—Liquidation—Compromise—Obligation on Contributory making Complete Surrender.

The liquidators of a company which was in course of liquidation accepted a compromise from a shareholder who was unable to meet the second call upon stock held by him, and agreed to grant him his discharge upon the footing of a complete surrender of his estate. At the date of this agreement the shareholder held *pro indiviso* along with his partner in business certain heritable property, but subsequently he and his partner executed an agreement and declaration of trust, and the shareholder a disposition, by which deeds the said heritable property was conveyed to the two partners in trust for their benefit, each to the extent of one-half. The Court held that the liquidators were not bound to accept an assignation of the contributory's interest in the trust, and that the agreement between them and the shareholder would not be implemented by anything short of a disposition of the heritable subjects upon which infertment could proceed.

George Wilson Clark, the complainer, was a shareholder of the City of Glasgow Bank, and held at the time of its stoppage in October 1878 £2500 of stock of the bank. The first call of £500 per £100 of stock held by Clark was paid by him, but he was unable to pay in full the second call of £2250 per £100 of stock, which on the stock held by him was £56,250. In the month of May 1879 a compromise was entered into between him and the liquidators, whereby, on the conditions therein specified, he was discharged of the said second call, and of a balance standing at his debit in account-current with the bank.

Part of the estate which Clark undertook to hand over to the liquidators in exchange for his discharge consisted of heritable property, and it was with reference to the transfer of that heritable property that the present case arose.

For many years Clark had carried on business in Glasgow as a corn factor in partnership with a Mr Robert Gibson, under the firm of Gibson & Clark. This partnership was dissolved in 1864, when Gibson retired from business. In 1855, during the subsistence of the partnership, certain

properties were purchased in St Vincent Street, Glasgow, the title to which was taken in Clark's name, but in which Gibson had an equal interest with Clark. At the dissolution of the partnership Clark undertook to pay the company debts, but as this property was not required for that purpose the title to it continued to stand in Clark's name, and so stood at the stoppage of the bank. Upon that event taking place a declaration of trust was entered into between Gibson and Clark, defining their respective interests in the St Vincent Street property, and setting forth the extent to which the property was burdened. It appeared that Clark's interest in this property was, everything estimated, about £14,000; this he offered to convey to the liquidators by assignation, and they demanded that he should give them a regular feudal title to the one *pro indiviso* half of this heritable property.

About the same time as the declaration of trust was executed, Clark by disposition conveyed the subjects to himself and Gibson, the survivor and the heirs of the survivor, as trustees for the purposes of their copartnership, and he maintained that if he assigned his right and interest under this deed to the liquidators they would then be in a position to compel Mr Gibson to convey one-half *pro indiviso* of this subject to them. The liquidators maintained that that was not the understanding upon which Clark had obtained his discharge, and that the agreement was that there was to be as complete a delivery of the heritable subjects as there was of the moveables, and that Clark was therefore bound to give them a disposition upon which they could be infeft.

It appeared that Clark and his old partner Gibson were on bad terms with one another, and the latter refused to render any assistance in the matter. A charge was made by the liquidators for payment of the amount due under the second call. The complainer Clark suspended, and on 23d February 1882 LORD KINNREAR found, *inter alia*, that the complainer was bound to deliver to the respondents a valid conveyance of one-half *pro indiviso* of the subjects in St Vincent Street, Glasgow, and superseded consideration of the cause for fourteen days to allow the complainer an opportunity of procuring and delivering such conveyance.

Against this interlocutor the complainer reclaimed, and argued that the arrangement which had been entered into with the liquidators had been fully implemented. He was willing to resign the trust, and put the liquidators into his own position, and the subject as he could give it had an adequate market value. That the action of the liquidators was incompetent; they could now repudiate the transaction when so much had been done under the contract.

It was argued for the respondents—There was nothing in the deeds to show that Clark had any interest in this property. There was only joint property but no trust here. This was an agreement with a contributory to which the Court's consent is essential, and the Court has not sanctioned any such agreement as is here urged.

Authorities—*Anderson v. Liquidators of City of Glasgow Bank*, November 5, 1880, 8 R. 44; *Jamieson and Others v. Mitchell*, November 26, 1880, 8 R. 135.

At advising—

LORD PRESIDENT—The complainer in this case has been charged by the liquidators of the City of Glasgow Bank to make payment to them of a sum of £56,250, which is the amount due by him, in respect of £2500 of stock held by him, under the second call made by the liquidators of £2250 per £100 of stock. There is no doubt that the complainer is one of the contributories in the liquidation, and was, if he be not still, under a liability to make this payment. But he maintains that he is in effect discharged of this debt by a compromise which was entered into between him and the liquidators in the month of May 1879, by which, as he says, he agreed, in exchange for the discharge of this sum, and of the balance standing at his debit on current account with the bank, to surrender his interest in the bank's assets, and to pay in cash and by bill and make over property belonging to him amounting in all to £37,957, 15s. 8d. He alleges, further, that he has fulfilled the condition upon which he was to be discharged of this liability, by handing over all the assets which were in his possession and the cash which he has stipulated to pay, and granting a bill, which is still in currency, for a certain amount, and by offering the conveyance of a heritable property which formed part of his estate. It is with reference to this heritable property that the only difficulty has arisen between the parties. The items which make up the sum of £37,169 are given in a schedule which was framed by Mr Clark, the complainer, and handed to the liquidators in the course of the arrangement for the compromise, and among other things there is this entry—"St Vincent Street property held jointly with Mr Gibson, valued by J. Dempster as worth, exclusive of old material and store, £25,000," one-half of which belongs to complainer. But there is deducted from that £8500, being one-half of a bond which constitutes a first security over the property, and under which bond he and his partner Mr Gibson were jointly liable. There is a second bond for £5000, in which the complainer is himself alone liable, and which constitutes a second security over the subject. These securities being deducted, leave as the value of Mr Clark's interest in the property £11,500, and there falls to be added to that the value of the machinery, one-half of the value of which, £2500, brings out as the result a value of £14,000. Now, the complainer says he has made an offer to convey to the liquidators by assignation his whole interest in this subject; they, on the other hand, demand that he shall give them a regular feudal title to the subjects—that is to say, to one-half *pro indiviso* of the heritable property. The difficulty of his complying with that demand seems to be that he and his partner, or former partner, Mr Gibson, are not on good terms, and Mr Gibson refuses to act with him in the matter.

The position of the title seems to be that these two partners were originally interested in this subject jointly to the extent of one-half each, and that the title was taken in the name of complainer. But then afterwards there was a minute of agreement entered into between them in March 1879 defining their interests in this subject, and at that time the complainer executed a disposition of the subject by which he conveyed it to himself and Mr Gibson, and to the survivor and the heirs of the survivor as trustees, for the purposes of their copartnership. Then he says that

if he assigns his right and interest under this trust to the liquidators that will enable them to take such steps as may be necessary to put an end to the trust and compel Mr Gibson to convey one-half *pro indiviso* of this subject to them. To this proposal the liquidators answer that that is not what they bargained for. Mr Clark represented that he was joint proprietor of this estate with Mr Gibson, and that he was therefore in a condition to convey his half *pro indiviso* of this subject to them.

Now, such being the nature of the contention, I agree with the Lord Ordinary in the opinion he has formed upon the subject. I think the bargain between the parties plainly was, that there was to be complete delivery of this heritable subject, as there was to be of the moveables and money which were also given to the liquidators under the compromise, and that Mr Clark is just as much bound to give a disposition upon which the liquidators can be infert in the heritable subjects as he is bound to make delivery of the moveables and to grant the bill which he entered into, and to pay over the money in cash which it was stipulated he should pay. In short, there must be complete delivery of all that Mr Clark undertook to give them, in such a way as to put them in undoubted possession of the whole subjects transferred.

What the result of the complainers' contention would be is very obvious. It would not give the liquidators a title to this subject; it would merely give them a claim against Mr Gibson, and that claim might be resisted and they might be involved in a litigation with Mr Gibson in prosecuting this claim. Now, that is plainly not what was stipulated in the compromise referred to, and therefore I am for adhering to the interlocutor.

LORD DEAS—I have no doubt that, unless the conditions of this compromise are fulfilled, the liquidators are entitled to give the charge they have given for the payment of the whole sum, and therefore the only question is whether the conditions are fulfilled or not. This property is undoubtedly represented to be, and in point of fact is, I understand, a heritable property, heritable or feudal as it may be according as there is an infertment or not—at all events, a heritable property which can only be validly conveyed by a disposition and conveyance. Now, there is no doubt it is made a condition of the compromise that it shall be conveyed, and the fact that the liquidators were to pay the expense of the conveyance only goes to show that what was in contemplation of the parties was not an assignation in the ordinary and proper sense of the term—an assignation of a personal right—but it was to be a conveyance of a heritable estate. A *pro indiviso* title to a subject does not make a subject less heritable, and I am clearly of opinion that it cannot be conveyed in any proper sense and vested in the liquidators unless this conveyance is granted, and I cannot doubt that the party who obtained the compromise undertook to grant that conveyance. Without any doubt I agree with the view stated by your Lordship.

LORD SHAND—I concur in the judgment to be pronounced, and in the reasons given by your Lordships and by the Lord Ordinary.

LORD MURE was absent.

The Lords adhered, and remitted the case to the Lord Ordinary.

Counsel for Complainer—Guthrie. Agents—J. & J. Ross, W.S.

Counsel for Respondent—Lorimer. Agents—Davidson & Syme, W.S.

Friday, July 7.

FIRST DIVISION.

(Before Lord President Inglis and Lords Deas and Sband).

[Lord M'Laren, Ordinary.

DEANS AND OTHERS *v.* STEVENSON AND OTHERS.

Municipal Election—Ballot Act 1872 (35 and 36 Vict. c. 33), sec. 13, schedule 1—Rules for Conduct of Elections.

Circumstances in which a municipal election was *sustained* although serious irregularities had taken place in the conduct of the election, on the grounds—that the irregularities complained of, after being pointed out, were not continued; that the rules annexed to the Act are not imperative enactments, but regulations for the guidance of those who are to administer the statute; that the election had not been conducted in a manner inconsistent with the principles of the Ballot Act; and that in point of fact the irregularities complained of had not affected the result of the election.

Opinion (per Lord Deas) that there might be a violation of the rules annexed to the statute of so gross a kind as to void the election.

Municipal Election—Order of Retiring from Council.

In determining the validity of a municipal election the Court will not consider whether the result of the irregularities complained against might be to alter the order in which the elected members have to retire from the council.

In 1881 there were seven councillors of the royal burgh of Haddington who retired or fell to go out of office, and various parties offered themselves as candidates for the vacancies. As the number of persons proposed for election as councillors exceeded the number of vacancies, a poll was fixed to take place within the Town Hall of Haddington on Tuesday, November 1, 1881, between the hours of eight in the morning and four in the afternoon. An election accordingly took place on the above date, at which William M'Kay, one of the bailies of the burgh, acted both as presiding and returning officer, under and in terms of sections 20 and 21 of the Ballot Act of 1872.

By section 2 of this Act it is provided that in case of a poll the vote shall be given by ballot, the ballot-papers being to be marked on both sides at the time of voting with an official mark, and then used as prescribed—“Each ballot-paper shall have a number printed on the back, and shall have attached a counterfoil, with the same