premises of the said company at or near Errol Railway Station aforesaid, or elsewhere in the county of Perth to the prosecutor unknown, wickedly and feloniously, and in breach of the trust reposed in you as aforesaid, embezzle and appropriate to your own uses and purposes the said sum of £50 sterling or thereby, or part thereof, . . . the property or in the lawful possession of the said company; or otherwise, time or times and place or places above libelled, you did, wickedly and feloniously, steal and theftuously away take the said sum of £50 sterling or thereby, or part thereof, . . . the property or in the lawful possession of the said company."

Counsel for the panel objected to the relevancy of the indictment in respect that as it set forth that the accused received the money in his capacity of manager, the charge of theft was irrelevant. A person who appropriated for his own uses money which he received in a fiduciary character was guilty of breach of trust and embezzlement only—*The Lord Advocate* v. *Fleming*, February 21, 1885, 22 S.L.R. 435, and 12 R. (Just. Ca.) 23.

Answered for the Crown—The charge of theft was relevantly stated. It was inserted alternatively, and nothing was alleged as to manage-agement, trust, or agency. The only averment was that the sum taken was the property of others. It could not be affected by the preceding charge of embezzlement. It was a mere accident that the two alternative charges related to the same money. The charge of breach of trust was itself clearly relevant. It averred that it was the prisoner's duty "to account for or pay or apply the said sum," and the indictment provided for either contingency.

At advising—

LORD CRAIGHILL—I adopt the views which the Advocate-Depute has just expressed. The fact that a man is a manager does not prevent him stealing. It depends entirely on the facts as they may arise whether the crime is embezzlement or theft. It is embezzlement if the manager ought to account for money received, and fails to do so; and it is theft if it was his duty to hand over to his employers the very sums he received, and if instead of doing so he kept them. The prosecutor does not know which set of facts may arise, and he is right, if he thinks it necessary, to be prepared for either. He leaves it to the jury to say upon the facts as they appear whether the crime was one of embezzlement or of theft.

I think that the prosecutor would in this case have been safe enough had he trusted to the first charge alone, but the course he has taken is safer still, for he provides for both contingencies.

Counsel for H.M. Advocate—M'Kechnie, A.-D. —Boyd. Agent—M. Jameson, P.-F.

Counsel for Panel—Craigie. Agent—Robert Mitchell, Solicitor, Perth.

COURT OF SESSION.

Saturday, July 2.

FIRST DIVISION.

Lord Trayner, Ordinary.

LESLIE (MURRAY'S TRUSTEE) *v.* WOOD AND OTHERS.

Right in Security — Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 61, *Schedule O—Clause of Reference—Omission of Date of Recording the Deed referred to.*

Schedule O of the Conveyancing Act 1874 gives the form of a clause of reference to a particular description of lands contained in a prior conveyance, deed, or instrument. Sec. 61 of the Act provides that the reference shall be in, or as nearly as may be in, the form set forth in Schedule O, which specifies that the deed referred to was "recorded in the (*specify register of sasines*) on the day of ." A bond and disposition in security, dated 13th and recorded 20th November 1882, referred to a feu-charter as "dated the 6th and 7th, and recorded in the Division of the General Register of Sasines applicable to the county of Aberdeen, on the , all days of November 1882."

Held that the omission to specify the day of the month was not fatal to the validity of the deed.

On 6th January 1887 the estates of Peter Murray, farmer and builder, Rivehill, Aberdeenshire, were sequestrated, and Robert Downie Leslie, advocate in Aberdeen, was appointed trustee thereon. The bankrupt was at the time of his death proprietor of certain heritable properties. All these properties were burdened, there being four bonds upon them, of which one was held by Miss Elizabeth Wood and one by Mr and Mrs Hutcheon.

The description of the subjects of the security was the same in both bonds, viz.—"All and Whole that piece of ground fronting Baker Street of Aberdeen, in the burgh and county of Aberdeen, being the subjects and others particularly described in the feu-charter thereof granted by Basil John Fisher, &c., in my favour, dated the 6th and 7th, and recorded in the Division of the General Register of Sasines applicable to the county of Aberdeen, on the , all days of November 1882." These bonds were recorded on the 20th of November 1882.

The heritable creditors having taken no steps to sell these properties, it was resolved by the trustee and his commissioners to expose the same for sale. The properties were sold, and thereafter the trustee made up a scheme of ranking and division of the claims on the prices of the heritable properties so sold. In making up this scheme he disallowed any ranking in respect of the bonds of Miss Wood and Mr and Mrs Hutcheon, on these grounds, (1) that it was not possible from the description in the bonds to identify the subjects of the security; and (2) that "the short description authorised by section 61 of the Conveyancing (Scotland) Act of 1874 having been adopted, it was absolutely essential

that the date of recording the prior deed referred to, containing the particular description of the subjects, should be given, and that had been omitted in both bonds."

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 61, provides that "Section eleven of The Titles to Land Consolidation (Scotland) Act 1868 is hereby repealed; and it is provided that in all cases where any lands have been particularly described in any conveyance, deed, or instrument of or relating thereto, recorded in the appropriate register of sasines, it shall not be necessary in any subsequent conveyance, deed, or instrument, conveying or referring to the whole or any part of such lands, to repeat the particular descriptions of the lands at length; but it shall be sufficient to specify the name of the county, and when the lands were held by mortgage or by any similar tenure prior to the commencement of this Act, the name of the burgh or county in which the lands are situated, and to refer to the particular description of such lands as contained in such prior conveyance, deed, or instrument so recorded, in or as nearly as may be in, the form set forth in Schedule O hereto annexed. . . ."

Schedule O is as follows—"The lands [*or* subjects] and others [*or* the lands delineated and coloured on a copy of the Ordnance Survey map hereto annexed, and signed as relative hereto], [*or* the lands of *A* and others], [*or* the house No. 10 Street and others], [*or other like short description*], in the county of [*or* in the burgh of and county of *as the case may be*], being the lands [*or* subjects] particularly described in the disposition [*or other conveyance, deed, or instrument, as the case may be*], granted by *C D*, and dated [*insert date*], and recorded in the [*specify register of sasines*], on the day of [*or* as particularly described in the instrument of sasine *or* notarial instrument recorded, &c., *or as the case may be. If part only of lands is conveyed, describe such part as above, and add,* being part of the lands particularly described, &c., *or thus,* being the lands [*or* subjects] as particularly described, &c., with the exception of, and [*describe the part excepted*]."

Miss Wood and Mr and Mrs Hutcheon lodged objections to the trustee's scheme of ranking and division, in which they maintained—(1) That the subjects were sufficiently identified; and (2) that the omission of the day of recording did not invalidate the bonds. On 4th June 1887 the Lord Ordinary (TRAYNER) pronounced an interlocutor sustaining these objections.

"*Opinion.* — The bankrupt Peter Murray was proprietor of certain heritable subjects in Baker Street, Aberdeen, which have been sold by his trustee. The property was burdened; there were four bonds upon it, two of which are held by the objectors Miss Wood and Mr and Mrs Hutcheon; and these two are, if valid, preferable to the others. In the scheme of division and ranking which the trustee presents to the Court for approval, he proposes to disallow any ranking to the objectors on the price obtained for the property, on the ground that the bonds held by them are invalid, in respect that '*ex facie* of these bonds it is not 'possible to identify the subjects of the security.' The description of the 'subjects of the security' is the same in both bonds.

"I am of opinion that the view maintained by the trustee is wrong.

"1. The subjects are described as 'fronting Baker Street of Aberdeen, in the burgh and county of Aberdeen, being the subjects and others particularly described in the feu-charter thereof granted by Basil John Fisher, &c., in my favour, dated the 6th and 7th, and recorded in the Division of the General Register of Sasines applicable to the county of Aberdeen on the , all days of November 1882.' If the exact date of recording the feu-charter referred to had been inserted instead of being left blank, there can be no doubt that this description would have been sufficient under the provisions of 37 and 38 Vict. cap. 94, section 61, which provides for the description of heritable subjects by reference to other deeds where the subjects are particularly described. But I regard what has been done in the present case as a substantial if not exact compliance with the provisions of that statute. The deed referred to is recorded in the appropriate Register of Sasines, and is recorded prior to the recording of the bond making reference to it; the reference made to it is such as will enable anyone reading to find it, for it is said to be recorded in the month of November 1882. Further, it appears from the bond that the deed referred to was executed on the 6th and 7th days of November 1882, while the bond in which the reference is made was recorded on the 20th November 1882, so that the search for the deed referred to is limited to the period between 7th and 20th November 1882. This appears to me to be such a reference as will enable anyone to find the deed referred to, and I think the statute does not require more to be done. No doubt the statute requires the reference to be as nearly as may be in terms of the schedule thereto annexed, which runs 'recorded in the on the day of .' But in my opinion it would be straining the Act (in the present case with an unjust result) to say that no reference will fulfil its requirements unless the exact day of recording is stated. The purpose of the Act was to save the necessity for long descriptions where such descriptions could be got from a deed duly recorded, and which was referred to in such terms as would enable anyone to find it.

"But assuming that I have taken too liberal a view of the requirements of the Act, I am still of opinion that the trustee is wrong. The description of the property is given in a heritable bond, for the purpose of identifying the subject of the security, and in my opinion there can be no doubt about the identity of the subjects over which the bonds in question were granted.

"In the first place, the subjects are described as Murray's property in Baker Street, Aberdeen, and it is not said that Murray had any property in that street except one. In the second place it it is not only Murray's property in Baker Street, but the property conveyed to him by certain persons, fully designed by a certain deed fully described. I think these things which appear *ex facie* of the bonds are quite sufficient to identify the subject of the security— *Cattanach's Trustee* v. *Jamieson*, 11 R. 972."

The trustee appealed, and argued—(1) That a party desiring to take the benefit of a short form prescribed by statute must observe it accurately—

Johnston v. *Pettigrew*, June 16, 1865, 3 Macph. 954; (2) that the description was insufficient to identify the subjects—*Belches and Murray* v. *Stewart*, January 21, 1815, F.C.; *Cattanach's Trustee* v. *Jamieson*, June 25, 1884, 11 R. 973. The description was really the short description which the statute allowed, but which was not sufficient unless the reference was good.

The objectors were not called upon.

At advising—

LORD PRESIDENT—I cannot see any grounds for differing from the Lord Ordinary on the first question in this case, and that being so, it is unnecessary to consider the second. The reference is made in a bond dated 13th November 1882, and the feu-contract referred to is dated the 6th and 7th November 1882. It is clear therefore that at that date the feu-charter had been obtained, and the money for which the bond had been granted. In these circumstances both the feu-charter and the bond required to be recorded in order to render the transaction effectual. They were taken to the register, and received there on the same day, the feu-charter being presented first in order to preserve the proper order between the deed making the reference and the deed referred to. Now, all that is quite regular and in terms of the statute. The only omission is that the precise day on which the feu-charter was recorded was not mentioned in the bond. The question is whether that omission is fatal to the validity of the deed.

Now, it is quite clear that the reference gives the information that the deed referred to must have been recorded in the Register of Sasines, and that that registration must have been effected somewhere between the date of the charter and the date of recording the bond, that is, within an interval of about fourteen days. And, accordingly, the facility for finding the deed is ample. Had there been a difficulty as to finding the deed referred to, that would have been a substantial and important objection. But if there is no difficulty, then the objection resolves itself into a merely technical objection as to whether the statute has or has not been literally complied with. No doubt Schedule O contemplates the date being set out. But I can find nothing in the statute which makes it necessary, and a statutory requisite to state the precise day—the month and the year being given. Section 61 makes no provision to that effect. It merely refers to Schedule O. I do not say that the blank should not have been filled in, but I cannot think that the omission is fatal.

LORDS MURE, SHAND, and ADAM concurred.

The Court adhered.

Counsel for the Reclaimer—J. C. Thomson—Glegg. Agent—Thomas M'Naught, S.S.C.

Counsel for the Respondent—D.-F. Mackintosh—Craigie. Agents—Philip, Laing, & Traill, S.S.C.

Saturday, July 2.

SECOND DIVISION.

BROUGH *v.* BROUGH OR ADAMSON AND OTHERS.

Succession—Conjunct Fee and Liferent—Husband and Wife.

The destination in a conveyance of heritage by a father to his married daughter and her husband, "for love, favour, and affection . . . and for certain other good causes," was in these terms—"I hereby give, grant, alienate, and dispone from me, my heirs and successors, to myself in liferent, for my liferent use allenarly, and to the saids Lilias Greig or Brough and William Brough, in conjunct fee and liferent, and to the children procreated or to be procreated of the marriage betwixt them, equally share and share alike, whom all failing, to the heirs and assignees whomsoever, of the longest liver of the saids Lilias Greig or Brough and William Brough in fee." There were children of the marriage, and the husband survived the wife. *Held* that the fee was vested in the wife.

This was a Special Case which raised, *inter alia*, the question of the construction of the following clause contained in a disposition of heritage dated 9th January 1834, viz.—"I, William Greig, . . . for the love, favour, and affection which I have and bear to Lilias Greig or Brough my daughter, spouse of William Brough, . . . and to the said William Brough, as well as to the children procreated or to be procreated of the marriage betwixt them, and for certain other good causes and considerations, have alienated and disponed, as I hereby give, grant, alienate, and dispone from me, my heirs and successors, to myself in liferent for my liferent use allenarly, and to the saids Lilias Greig or Brough and William Brough, in conjunct fee and liferent, and to the children procreated or to be procreated of the marriage betwixt them, equally share and share alike, whom all failing, to the heirs and assignees whomsoever, of the longest liver of the saids Lilias Greig or Brough and William Brough in fee," certain heritable subjects, consisting of the eastmost half of a tenement in Morrison Street, Edinburgh. Infeftment was taken on the disposition in favour of "the said William Greig, Lilias Greig or Brough, and William Brough, for their respective rights of liferent and fee aforesaid."

William Brough *Primus*, designed in the disposition, survived his wife, and died leaving a *mortis causa* disposition and settlement with a codicil, by which he disponed to his son William Brough *Secundus*, and his heirs and assignees, the subjects in question. There were also four daughters of the marriage who survived. William Brough *Secundus* died, leaving a son, William Brough *Tertius*, his heir-at-law.

The parties to the case were, of the *first* part, William Brough *Tertius*, and of the *second* part, the surviving children of the marriage between William Brough *Primus* and Lilias Greig.

The first party maintained that William Brough *Primus* was fiar of the subjects in question under the disposition by William Greig,