

with your Lordship that as soon as the petitioner died the action could not be insisted in by Mr Brand. The ground of her claim was being the mother of the child. She could not transfer that character to Mr Brand or to anybody else. The action should have been then dismissed. It may well be that Mr Brand may have a title to apply for the delivery of the child in another process. It appears to me more than doubtful, however, if he can proceed in the Sheriff Court.

LORD KINNEAR concurred.

LORD MURE and LORD SHAND were absent from illness.

The Court pronounced this interlocutor—

“Recal the Sheriff’s interlocutor of date 29th September 1887: Find that the comparing pursuer Brand has no title to sue: Therefore dismiss the conjoined actions and decern: Find the said comparing pursuer Brand liable in expenses in both Courts,” &c.

Counsel for the Appellant—R. V. Campbell—W. Campbell. Agent—W. B. Glen, S.S.C.

Counsel for the Respondents—Sir C. Pearson—Maconochie. Agents—J. & F. Anderson, W.S.

Friday, February 24.

## FIRST DIVISION.

THE MAGISTRATES OF GREENOCK *v.* THE EDUCATIONAL ENDOWMENTS COMMISSIONERS.

*Trust—Educational Endowment—Educational Endowments (Scotland) Act, 1882 (45 and 46 Vict. c. 59)—Whether Property irrevocably dedicated to Charitable Uses.*

A piece of ground was feued out in 1813 to the bailies, treasurer, and councillors of a burgh, and their successors in office, “for the sole and express purpose of building accommodations for charitable institutions.” The feuars were taken bound to pay a feu-duty of £2, 0s. 8d. so long as the ground and buildings should be used for charitable purposes, but if they used or disposed of the ground or buildings for any other purpose, then they and their successors in office were to pay a feu-duty of £18, 6s. Charity schools were built on the ground feued, the cost being paid out of the burgh funds. These schools were maintained partly out of the burgh funds, and partly by voluntary subscriptions, for a period of fifty-nine years. Subsequent to the passing of the Education Act of 1872, they were let to the school board at a rent sufficient to cover the feu-duty, taxes, and expenses of maintenance. In 1884 the subjects were acquired under the Lands Clauses Act by a railway company. In fixing the amount of the compensation, deduction was made of the capitalised value of the feu-duty of £18, 6s.

The amount of the compensation claimed by the Educational Endowments Commissioners having been claimed as an educational endowment within the meaning of the Educational Endowments Act of 1882—*held*, on a construction of the feu-contract, that as it was within the power of the magistrates to make use or dispose of the subjects for other than charitable purposes on paying the higher rate of feu-duty, the subjects were not vested in them as an irrevocable gift in favour of the public for charitable purposes, and therefore did not fall within the operation of the Educational Endowments Act.

For some years before 1813 two charity schools, one for boys and the other for girls, were carried on in Greenock, and were supported by subscriptions and the annual proceeds of certain bequests. The first of these was conducted in a building which was granted for this purpose by the Magistrates, and the latter in a building rented by the subscribers.

By feu-contract, dated 15th and 19th September 1813, between Sir Michael Shaw Stewart and the Bailies and Council of Greenock it was agreed—“That the said Sir Michael Shaw Stewart, in consideration of the feu-duties and others after specified, has sold and disposed, like as he hereby sells, disposes, and in feu farm and heritage for ever lets and demits, to and in favour of the said Hugh Crawford, Alan Ker, John Galt, Quintin Leitch, John Buchanan junior, Hugh Hamilton, David Hyde, Robert Bannatyne, and Robert Steele, Bailies, Treasurer, and Councillors foresaid, and to their successors in office, for the purposes after mentioned, heritably and irredeemably, all and whole that piece of ground lying on the west side of Anne Street and on the east side of Sir Michael’s Lane . . . But it is hereby expressly declared and agreed to between the said parties that the said piece of ground above disposed is given by the said Sir Michael Shaw Stewart to the said Bailies and Council and their successors in office for the sole and express purpose of building accommodations for charitable institutions. . . . For which causes, and of the other part, the said Bailies and Council bind and oblige themselves, and their successors in office, to pay to the said Sir Michael Shaw Stewart and his fore-saids, or to their factors and chamberlains, in name of feu-duty, the sum of £2, 0s. 8d. sterling yearly, at the term of Martinmas, beginning the first term’s payment at Martinmas 1813, and so forth yearly at the said term so long as the said piece of ground, with the erections made thereon, shall be used for charitable purposes: But in the event, at any future period, the said Bailies and Council shall make use of or dispose of the said ground or erections for any other purpose, then, and in that event, they oblige themselves, and their successors in office, in place of the feu-duty above mentioned, to pay the sum of £18, 6s. sterling of yearly feu-duty, and that at the first term of Martinmas after the said occupation, and so forth yearly thereafter in all time coming, with the due and ordinary annual rent thereof from and after the same becomes due, aye and until payment.”

The Town Council between 1814 and 1819 erected certain buildings on the ground feued,

and for that purpose expended the sum of £2760, 14s. 2d. out of the burgh funds. On the foundation-stone was the following inscription:—“By the favour of Almighty God, the foundation-stone of this building, erected by the town of Greenock for the education of poor children, was laid upon the 10th day of June in the year of our Lord 1814.”

The charity schools above referred to were conducted in this building as before, the feu-duty being paid by the Magistrates and Council, who also bore the expense of alterations and additions from time to time. For this purpose a sum of £150 was raised by subscriptions in 1860, and a sum of £300 in 1864. The buildings were entered in the annual accounts of the burgh as part of the common good.

After the passing of the Education Act of 1872 the Town Council passed this resolution, as recorded in the following minute—“18th June 1873—That in order to afford time for the Council maturely considering and ascertaining whether these buildings should ultimately be transferred to the School Board or be devoted to some charitable purpose other than educational, and in order that the operations of the said board under the Education Act may be in no way impeded, the committee recommend the Council to lease the Charity School and School of Industry to the School Board for a period of two years from Whitsunday last, at a yearly rent not exceeding the actual sum which may be expended by the Council on or for said schools during the term of the lease. The sum expended to be held to include the feu-duty which may be payable by the Council, also all sums expended in maintaining and upholding said schools, insuring the same, and all public rates and burdens during the currency of said lease.”

The School Board accordingly occupied the buildings until 1884, when the Caledonian Railway Company acquired the ground under the Lands Clauses Act, and the sum of £8494, 4s. was ascertained to be the compensation payable by the railway company as the value of the lands and buildings, under deduction of the capitalised value of the feu-duty at the rate of £18, 6s. This sum was consigned in bank in terms of the Act. The Endowment Commissioners included it in a scheme framed by them for educational endowments in Greenock, and to this the Magistrates objected.

This was a special case for the opinion of the Court, to which the Magistrates were the parties of the first part, and the Educational Endowments Commissioners the parties of the second part.

The first parties averred that the subjects taken by the railway company were part of the common good of the burgh, and that the same character attached to the consigned money, and that neither the one nor the other was an educational endowment in the sense of the Act. It was contended for the second parties that the buildings, and the money as a *surrogatum* for them, was an educational endowment.

The following questions were submitted:—“(1) Whether said subjects in Ann Street, and Sir Michael Street, or said consigned money, or any part thereof, was or is an educational endowment in the sense of the said Educational Endowments Act? (2) Whether

the said scheme so far as it includes the said sum of money awarded as compensation for the said subjects consigned in bank as aforesaid is not within the scope of the Educational Endowments Act, 1882, and is contrary to law?”

Argued for the first parties—Under the statute an educational endowment must, in the first place, be dedicated to charitable purposes; and secondly, must be applied or be applicable to educational purposes. There was here only the latter of these elements, for there was no dedication to charitable purposes. The property must be irrevocably destined to such a purpose, but this feu-contract contemplated such other purposes as the Magistrates pleased, and two rates of feu-duty were exigible according to the use to which the buildings upon the feu were put. The Magistrates could not be compelled to devote the buildings to charitable purposes because the superior had agreed to accept a higher feu-duty if any other use were made of them. This case was different from *Gold v. Houldsworth*, February 16, 1870, 8 Macph. 1006, 42 Scot. Jur. 617. There the vassal was forbidden to use his premises as a public-house, and the additional rent was imposed as a penalty to be renewed on each offence. The occupation of the School Board was not charitable, for they received fees. Further, the subjects had been sold by the Magistrates under deduction of the higher rate of feu-duty.

Argued for the second parties—The higher feu-duty was a fence or irritancy to prevent the subjects being diverted from charitable purposes—[LORD PRESIDENT—But this is a title of property, and there is no irritancy in the event of a contravention.] A penalty was stipulated for in the event of contravention, but that did not imply a right to contravene on paying the penalty. Such was the law in cases of penalties for mis-cropping. The case of *Gold v. Houldsworth* was an instance of the same rule in the case of a property title—[LORD PRESIDENT—But that was the case of a lease]. Yes, but one for 999 years, and it was treated as a feu-contract. This view was accepted by Lord Watson—*Earl of Zeland v. Hislop*, June 12, 1882, 9 R. (H.L.) 40, per Lord Watson, p. 49. The “sole and express” purpose of the feu was declared to be charitable. Long usage was dedication as strong as express grant—*Sanderson v. Lees*, November 25, 1859, 22 D. 24, per Lord Deas, p. 31, 32 Scot. Jur. 14. There was long usage here; the dedication on the foundation-stone, and the subscriptions of the supporters indicated a charity. The School Board’s occupation was no evidence to the contrary. The superior took from them the lower rate of feu-duty. An endowed school did not lose its character by being lent or leased to a school board—*M’Culloch v. Kirk-Session and Heritors of Dalry*, February 21, 1876, 3 R. 1182.

At advising—

LORD PRESIDENT—The question in this case is whether certain subjects in Greenock, or the price of them—for they have been sold to the Caledonian Railway Company—was or is an educational endowment in the sense of the Educational Endowments Act?

Now, the Act in question, which is the 45th and 46th Vict. c. 59, is entitled “An Act to re-organise the Educational Endowments of Scot-

land," and the preamble sets out that "Whereas it is desirable to extend the usefulness of educational endowments in Scotland, and to carry out more fully than is done at present the spirit of the founders' intentions," and so forth; and the first section of the statute, which has been commented on largely in the argument, begins as follows—"Educational endowment shall mean any property, heritable or moveable, dedicated to charitable uses, and which has been applied, or is applicable, in whole or in part, whether by the declared intention of the founder or the consent of the governing body, or by custom or otherwise, to educational purposes," and so on. Now, it appears to me that the meaning of this section is not that the property, heritable or moveable, dedicated to charitable uses shall fall within this statute whether it has been applied to educational purposes or not, but that its effect is merely to limit the class of educational endowments to which the statute applies. In other words, every endowment must be educational. There are a great many chairs founded which are not dedicated to charitable uses, and the purpose of the section therefore is to limit the educational endowments which fall under the operation of the statute to those dedicated to charitable uses, and which have been applied or are applicable to educational purposes.

But we must consider whether this is an educational endowment in any sense. Now, I understand an endowment to be an irrevocable gift, and if this clearly is not an endowment or irrevocable gift it does not fall under the statute. In applying this construction to the present case, we find that the history of this property is not left in doubt. We have the original title under which the Magistrates held the property from the beginning. It is in the shape of a feu-contract between the Magistrates and Sir Michael Shaw Stewart. The conveyance is made to the Magistrates and their successors in office, containing proof that the property was such as might be held by the Magistrates for public purposes. Then there is a clause expressing the condition under which the grant is made—"But it is hereby expressly declared and agreed to between the said parties that the said piece of ground above disposed is given by the said Sir Michael Shaw Stewart to the said Bailies and Council, and their successors in office, for the sole and express purpose of building accommodations for charitable institutions." Now, if there were nothing more, there would be strong grounds for holding that this grant was made under the express condition that the property was to be held in all time coming for charitable uses. But there is the *reddendo* clause, which gives a different colour to the matter, and it commences in the following terms:—

"For which causes, and of the other part, the said Bailies and Council bind and oblige themselves, and their successors in office, to pay to the said Sir Michael Shaw Stewart and his foresaids, or to their factors or chamberlains, in name of feu-duty, the sum of £2, 0s. 8d. sterling yearly, at the term of Martinmas, beginning the first term's payment at Martinmas 1813, and so forth yearly at the said term so long as the said piece of ground, with the erections made thereon, shall be used for charitable purposes." Now, it is there clearly contemplated that the time may come when the ground and the buildings are not to be

used for charitable purposes; and the deed goes on to provide for the obligations of the Magistrates in that event—"But in the event, at any future period, the said Bailies and Council shall make use of or dispose of the said ground or erections for any other purpose, then, and in that event, they oblige themselves, and their successors in office, in place of the feu-duty above mentioned, to pay the sum of £18, 6s. sterling of yearly feu-duty, and that at the first term of Martinmas after the said occupation, and so forth yearly thereafter in all time coming." Now, here again it is plainly implied that the Magistrates may make use or dispose of the ground for other than charitable purposes, and in that event they are to pay a feu-duty which it may be taken represented the true value of the ground; and when once the subjects are dissociated from charitable purposes, then the feu-duty is to be £18, 6s. in all time coming. In short, the moment the Magistrates elect to use or dispose of this subject for other than charitable purposes it becomes an absolute feu in their hands for any purpose they choose to devote it to.

Now, the question comes to be, whether this subject is vested in the Magistrates as an irrevocable gift in favour of the public for charitable purposes, or whether it is not held by the Magistrates to be used by them for charitable purposes only so long as they may deem it advisable? I have no hesitation in saying that the latter is the true construction of the deed, and that the Magistrates hold the subject to use it in their own discretion either for charitable or for more beneficial purposes for the community and the corporation.

It is not immaterial to observe that the property has been disposed of, although no doubt compulsorily, and that the disponees, the Caledonian Railway Company, can hold only as absolute owners, bound to pay the larger feu-duty, and that the price was calculated on the footing that the subjects conveyed were to be burdened with this larger feu-duty. The price therefore now in the hands of the Magistrates is not the price of subjects dedicated to charitable purposes. The *surrrogatum* is the price of the subjects burdened with the larger feu-duty.

The circumstance that this property has been devoted for a long time to charitable uses does not affect the question. Nobody can say that the Magistrates have not been exercising a wise discretion, and therefore that circumstance cannot derogate from their title to dispose of the subjects as they thought right.

On the whole matter I do not entertain any doubt that this is not an educational endowment in the sense of the Act.

LORD ADAM—The question here is, whether certain subjects in Ann Street, Greenock, do or do not form an educational endowment in the sense of the Educational Endowments Act? If this is an educational endowment there is no doubt it falls within the scope of the Act, and no objection is taken to the scheme which has been prepared on that assumption. That takes us back to the provisions of the Act to see whether the subject in question is an educational endowment. That depends upon a construction of the first section of the statute—[reads section].

Now, it is obvious that two things are requisite—*First*, that the property shall be dedicated to charitable uses; and *second*, that it has been applied to educational purposes. It is quite obvious that the fact that the property has been applied to educational purposes is not of itself sufficient. In this case I have no doubt as regards the second requisite that this fund complies with the conditions contained in it. But the question remains, was the property dedicated to charitable uses? Now, I think to make it so it must be irrevocably destined, and not capable of being diverted without a breach of trust. The answer to the question depends entirely upon the construction of the feu-contract, and I have no doubt, on a proper construction of the feu-contract, that this fund is not so destined. I think the Magistrates have an option to apply this fund either to charitable purposes or to any other purpose they may think right. [*His Lordship here read the clauses in the feu-contract quoted by the Lord President.*] It appears to me that nothing can be clearer than that the Magistrates could use the subjects for other than charitable purposes, if they paid the larger feu-duty.

Now, supposing the Magistrates had made up their minds to apply the subjects to other than charitable uses, who could have prevented this? Sir Michael Shaw Stewart could have had no answer, and if the founder had no title to interfere, who else could object? I think nobody could have objected. This case appears to me to be simply one where the Magistrates held property to be used by them for charitable uses, or otherwise as they might in their discretion think proper.

I think this case is quite different from that of *Gold v. Houldsworth*, 8 Macph. 1006. In that case there was a permanent prohibition against using the property in a certain way, and that prohibition was fortified by a penalty, and therefore it was held in that case that the superior or proprietor had a right to insist that the property should be applied to no other purpose.

Upon the whole matter I agree with your Lordship that this is not an educational endowment in the sense of the statute.

**LORD KINNEAR**—I think an educational endowment in the sense of the statute means an irrevocable gift, and that it must be (1) dedicated to charitable uses, and (2) applied or be applicable to a particular form of charity, *i.e.*, educational purposes.

I entirely agree that the question whether the money received in this case as compensation falls under the statute really depends on a construction of the title, and we have to decide whether the Magistrates held the property as trustees for charitable uses or as ordinary administrators for the burgh. I agree with the latter interpretation, which is the one your Lordships have put on this feu-contract. The ground is conveyed for a certain purpose, and it becomes clear on reading the whole deed that the reason for specifying the particular purpose is simply to make clear the special agreement for a variation of the feu-duty in certain events. What Sir Michael Shaw Stewart stipulates for is that he shall be entitled to a small feu-duty if the subjects are used for charitable purposes, and to a larger one if they are diverted from these purposes.

I entirely agree with your Lordships.

The Court pronounced this interlocutor:—

“Find and declare that the subjects in Ann Street and Sir Michael Street, Greenock, and the consigned money, being the price thereof, are not an educational endowment in the sense of the Educational Endowments Act, 1882; and find and declare that the scheme, so far as it includes the said sum of money, the price of the said subjects, consigned in bank, is not within the scope of the Educational Endowments Act, 1882, and is contrary to law, and decern.”

Counsel for the First Parties—Sir C. Pearson—Dickson. Agents—Cumming & Duff, S.S.C.

Counsel for the Second Parties—Darling—C. N. Johnston. Agent—Donald Beith, W.S.

Saturday, February 25.

## SECOND DIVISION.

[Sheriff of Lanarkshire.]

CLARK *v.* KEIR AND ANOTHER.

*Lease—Hypothec—Hypothec Abolition (Scotland) Act, 1880 (43 Vict. cap. 12).*

Under the lease of a dairy farm there were let separately, and for separate rents, the lands, which exceeded two acres in extent, and the dwelling-house, with byres, milk-house, stable, and garden, which were adjacent to, but not situated on the lands. *Held* that the provisions of the Hypothec Abolition Act, 1880, did not apply to the rent for the house, byres, milk-house, stable, and garden.

The Hypothec Abolition (Scotland) Act, 1880 (43 Vict. cap. 12), *sec. 1*, provides that from and after 11th November 1881 “the landlord’s right of hypothec for the rent of land, including the rent of any building thereon, exceeding two acres in extent, let for agriculture or pasture, shall cease and determine.”

By a memorandum of lease, dated 22d January 1887, Andrew Clark, farmer, High Fossil, near Glasgow, let to Finlay Keir and Walter Keir, dairymen, residing at Colston House, Bishopbriggs, “the dwelling-house of Colston, with byres, milk-house, three stalls in stable, and garden, for one year, from Whitsunday 1887 to Whitsunday 1888, at the rent of £30 sterling, payable at Martinmas, also three grass fields, namely, West Hill, Barn Park, and Todhole Park, 25 acres, till Martinmas, at the rent of £70 sterling, payable at Martinmas.” The buildings were not upon the grass fields.

The rent was not paid at Martinmas 1887, and upon 12th November 1887 Clark presented a petition in the Sheriff Court at Glasgow, in which he prayed the Court “(first) to sequester and to grant warrant to officers of Court to inventory and secure the whole fittings, stock, furniture, goods, and other effects, so far as subject to the pursuer’s hypothec, which are or have been in the dwelling-house of Colston, with byres, milk-house, and three stalls of stable, near Bishopbriggs, Glasgow, occupied by the de-