

Counsel for the Appellants—Jameson—
Craigie. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Respondents—Salvesen.
Agents—Irons, Roberts, & Company, S.S.C.

Tuesday, March 17.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

MACKIE v. PRESBYTERY OF EDIN-
BURGH AND OTHERS.

*Process—Declarator—Relevancy—Trust—
Competency of Declarator where there is
no Civil Right—Church.*

A church in an English town was vested in trustees, under an indenture providing that the managers should collect the seat-rents and subscriptions, and apply the money to the repair, maintenance, management, and endowment of the church, and pay the surplus to the minister, who was to be a party to the indenture, and to be elected by the congregation. The indenture conferred upon the trustees power to sell the church, and declared that the trustees should hold the money arising from such sale "for such purposes as the majority of the members for the time being of the Presbytery of Edinburgh at a meeting of the said Presbytery may in writing direct."

The trustees exercised the power of sale, and the congregation was in consequence dissolved. The proceeds of the sale lay unappropriated in the hands of the trustees.

The minister of the church raised an action against the Presbytery of Edinburgh and the trustees, to have it declared that the Presbytery might lawfully direct that a part of the money arising from the sale should be paid to him or applied for his benefit. He averred that a majority of the members of the Presbytery were favourable to his claim.

Held (aff. judgment of Lord Kincairney) that the action was irrelevant, and must be dismissed, on the ground that the pursuer had failed to set forth any civil right as an object of the trust, and that he was not entitled to declarator that an application of the money which the Presbytery had not proposed to make was lawful.

Opinion (per Lord M'Laren) that the minister or members of the dissolved congregation would, in the event of a proposal by the Presbytery to misapply the trust-funds, have a title to enforce the limitations of the trust, and that the Presbytery would have a title to declarator that the mode in which they might propose to execute the power conferred on them was a good execution of the trust.

By indenture dated 16th March 1863 the Scotch Church, Rushholme Road, Man-

chester, was vested in trustees for certain trust purposes which may be summarised as follows:—Worship in the church was to be conducted in accordance with the forms of the Established Church of Scotland by a minister in full communion with that Church, and any minister who might be elected to the church was to sign the indenture and thereby acknowledge his liability to the jurisdiction of the Church of Scotland. On a vacancy the right of electing a minister was to belong to the communicants above eighteen years old, being seat-holders. The managers for the time were to collect the seat-rents, collections, and subscriptions, and apply them in the repair, maintenance, management, and endowment of the church, as the managers with consent of the trustees might direct, and any surplus was to be paid to the minister.

The indenture further provided that at any time the trustees, with consent of the majority of the Presbytery of Edinburgh, might sell the premises, and it was declared that the trustees "should hold the moneys to arise from such sale . . . for such purposes as the majority of the members for the time being of the said Presbytery, at a meeting of the said Presbytery, may in writing direct."

In 1881 the Reverend James Mackie, the pursuer of this action, was duly appointed minister of the congregation worshipping in the Scotch Church.

On 29th February 1892 the church and effects were sold by the trustees with consent of the Presbytery of Edinburgh, and the money resulting from the sale continued to lie in the hands of the trustees under the indenture, subject to the directions of the said Presbytery. By the sale of the church the congregation was dissolved.

On 12th June 1895 Mr Mackie raised an action against the Presbytery of Edinburgh and the trustees under the indenture, concluding for declarator that the said trustees "hold certain sums of money, being the proceeds arising from the sale of the Scotch Church in Manchester . . . upon trust for such purposes as the majority of the members for the time being of the said Presbytery of Edinburgh, at a meeting of the said Presbytery, may in writing direct;" that a majority of the defenders, the said Presbytery, for the time being present at a meeting of the said Presbytery, "may, under and in virtue of the powers conferred on them by said indenture, lawfully and competently in writing direct the defenders, the trustees, to apply any part of the money held by them under the indenture arising from the sale of the said Scottish National Church, Manchester, or of the income accruing therefrom, in making payment to the pursuer of such sum or sums as such majority may appoint, and that by way of compensation to the pursuer in respect of the interruption of his pastorage by the sale of said church, or in lieu of stipend or by way of retiring allowance or otherwise, and that at such time or times and under such stipulations or conditions as such majority may so direct," and that in the event of such

majority of the said Presbytery for the time being present at a meeting of said Presbytery so directing them in writing, it shall be lawful to and incumbent upon the trustees "to make payment to the pursuer out of the money held by them as aforesaid of such sum or sums at such time or times, and under such stipulations or conditions as such majority shall have in writing so directed."

The pursuer averred—"(Cond. 1) . . . At the time of pursuer's appointment [as minister of the Scotch Church] it was proposed by the elders and managers of said church that his stipend should be at the rate of not less than £300 per annum, and arrangements were made for guaranteeing this amount for two years. For that period pursuer's stipend was duly paid at the said rate. (Cond. 4) After the month of September 1883 the payments to the pursuer of his stipend became most irregular, and after some time ceased to be made altogether. . . . (Cond. 9) Consequent upon said sale, the congregation of the Scottish National Church has been irretrievably dissolved, and the pursuer, although appointed to be its minister *ad vitam aut culpam*, conformably to the constitution of the Church of Scotland, has been deprived of the means of earning his stipend. No part thereof has been paid to him for several years, and he has now no means of effectually enforcing payment thereof." After narrating certain applications made by him to the Church Courts, the pursuer went on to aver—"(Cond. 11) In October 1894 the pursuer again presented a petition to the said Presbytery craving it, *inter alia*, to direct the defenders, the said trustees, to pay to the pursuer out of the moneys in their hands as the proceeds of the sale of the said trust property, such a sum as should, in the opinion of the Presbytery, be a fair and equitable allowance to him in respect of the period during which he has been deprived of his income, and further to direct them to pay him in future such an annual allowance out of the said trust funds, or the income thereof as should be reasonably sufficient to enable him to support himself and his family in proper comfort. This petition came before the said Presbytery for consideration at its meeting on 31st October 1894, when a motion was carried by a large majority of the votes of the members present expressing sympathy with the pursuer in his necessitous circumstances, and remitting it to the Law and Ordinances Committee of the Presbytery to consider whether it was competent for the Presbytery to direct the trustees in terms of the petition. For this motion thirty-one members voted as against thirteen for dismissing the petition. At a subsequent meeting held on 26th December 1894 a report was submitted by said committee negating the competency of directing the trustees in terms of the petition, and the adoption of this report *simpliciter* was carried by a narrow majority of the members present, only eleven votes being recorded in its favour. (Cond. 12) This

last petition of the pursuer was thus dismissed entirely in consequence of the report of the said committee against the competency of making to him any payment out of the money arising from the sale of the said church held by said trustees under the indenture. The pursuer, however, believes and avers that a large majority of the defenders, the members of the Presbytery of Edinburgh, would be quite prepared to direct the trustees to apply part of the trust funds in making a payment or allowance of some sort to the pursuer were they only satisfied of the competency of doing so, and the pursuer has thus a substantial interest in having the declaratory conclusions affirmed. In consequence of the circumstances already set forth he has been under the necessity of bringing this action to have the powers of the Presbytery over the trust estate judicially determined."

The pursuer pleaded—"(1) The defenders, the Presbytery of Edinburgh, having upon a sound construction of said indenture, power through a majority of the defenders, its members for the time being present at a meeting of Presbytery, to direct in writing the defenders, the said trustees, to the effect set forth in the summons, the declaratory conclusions ought to be affirmed. (2) The pursuer having a substantial interest in the affirmation of the declaratory conclusions of the summons has a good and sufficient title to pursue this action."

The defenders denied that the pursuer was appointed to be minister of the church *ad vitam aut culpam*; referred to the proceedings of the various Church Courts; and explained (Ans. 12) that "the trustees have no power to devote any part either of the capital or income of the fund in making any payment or allowance such as the pursuer claims."

The defenders pleaded—"(1) No title to sue. (2) The action as laid is incompetent. (3) The pursuer's averments are irrelevant, and insufficient to support the conclusions of the summons."

On 19th December 1895 the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor sustaining the first, second, and third pleas-in-law for the defenders, and dismissing the action.

Opinion.—"This action of declarator is, so far as I am aware, unprecedented—at least no example of such an action was referred to. The pursuer began his argument by quoting a well-known passage in Stair's Institutes, iv. 3, 47, where he says that 'declarators may be pursued for instructing and declaring any kind of right relating to liberty, dominion, or obligation.' . . . 'Parties may call whom they please, the conclusion being to hear and see it found and declared that the party had such a right.' But the unique peculiarity of this action is that it does not seek to have any right of the pursuer or any obligation of the principal defenders, the Presbytery of Edinburgh, declared or enforced. It is an action without relation to civil right or civil obligation. No such

action has as yet, so far as I am aware, been entertained in our Courts.

“The defenders plead that the pursuer has no title to sue, that the action is incompetent, and the averments irrelevant. In considering these pleas the averments of the pursuer must be accepted so far as consistent with the document on which they are based.” [*Here his Lordship recapitulated the terms of the indenture, as above set forth, and the averments of the pursuer.*]

“From this narrative it appears that the only obligation which the Presbytery of Edinburgh undertook towards the pursuer was to allow him to conduct worship in the Scotch Church. He was not appointed by the Presbytery, but by the communicants. He was not admitted by the Presbytery of Edinburgh, but by the Presbytery of Liverpool. The defenders came under no engagement to provide him with a stipend.

“There was some discussion as to the tenure on which the pursuer held his office, and as to his present position in regard to it. He maintained that his position was strictly analogous to that of the minister of a parish in Scotland, and that he held his office like such a minister, *ad vitam aut culpam*; and he referred to various provisions in the indenture in support of that position; and in particular, to the clause which has been quoted as to his ‘deposition or deprivation according to the usages of the said Church of Scotland.’ The defenders denied that he was still minister of the congregation, or that he held his office *ad vitam aut culpam*, maintaining that no office was so held, unless that were so expressed or necessarily implied, or unless the office was, as this was not, a *munus publicum*, as laid down by the Lord President (Ingles) in *Hastie v. M’Murtrie*, 4th June 1889, 16 R. 715. I think this contention is not material to the case stated on record. I think it impossible to contend that the pursuer held his office *ad vitam aut culpam*, for the reasons stated by the defenders, and also for the plain reason that the defenders had full power at any time to sell the Church. But the pursuer avers that he is the minister of the congregation, and I find no averment that he was dismissed from that position, and I am inclined to take the argument on the footing that the pursuer holds that position or would hold it if a congregation existed. But the pursuer takes nothing by that concession for he does not say that any obligation by the defenders results from that state of the facts; and this is not an action to enforce such an obligation. If this had been an action concluding that the Presbytery were bound to furnish the pursuer with some other building in which to conduct his ministrations to his congregation, the consideration that he was still the minister of the congregation might be relevant, although I do not suggest that that position would be maintainable. Under this record the allegation that he is still the minister of the congregation can be little more than the statement of a ground for an appeal to the bounty and favourable consideration of the Presbytery.

“The pursuer referred to various cases, as shewing that the Court will entertain an action of a declarator of a right before it has become exigible, and even while it is contingent. That has no doubt been done in one or two exceptional cases, such as *Fleming v. Maclagan*, 28th January 1879, 6 R. 588, and *Chaplin’s Trustees v. Hoile*, 30th October 1890, 18 R. 27. The case of *Falconer Stewart v. Wilkie*, 15th March 1892, 19 R. 630, quoted by the pursuer, was not a case of that kind, for the Court found that the right there declared was immediately exigible. But although the Court may have pronounced a decree of declarator in regard to a right which was contingent, they have never done so where the pursuer had no right at all, whether present, future, or contingent.

“The pursuer must contend either that the Presbytery hold this fund in their absolute discretion, or that they hold it under the limitations of a trust. The pursuer’s pleas-in-law do not shew which of these views he maintains. If the former, then the pursuer is a mere stranger and an applicant for charity; and I am of opinion that an action cannot be maintained to the effect that the defenders hold a fund at their pleasure, and are free if they choose, to bestow it on the pursuer. If the pursuer’s case be that the fund is held under the limitations of a trust, then I think that the pursuer must bring himself within the trust, and shew himself to be an object of the trust, as in the well-known case of *Ross v. Heriot’s Hospital*, 14th February 1843, 5 D. 589, *rev. 5 Bell’s App. 37*. But in my opinion the pursuer cannot invoke the interference of the Court in an action like this. It is impossible to say that the pursuer is a direct object of the trust, if trust there be. The immediate object of this trust has apparently failed, at least for the present. I do not say whether it would be possible or not to bring the pursuer’s claim within a scheme authorised by the Court for the administration of this fund on the *cy-pres* principle. But such a scheme, if settled by the Court at all, would be settled in the Inner House, and probably the views of the Liverpool Presbytery would be considered. But I do not think that I can pronounce any judgment in the present condition of the case affirming the competency of paying this fund or any part of it to one who is not a primary object of the supposed trust, and I do not see that I am bound to pronounce any decision to the contrary.

“I think the action should be thrown out, because, as I said at the beginning, it raises no question either of civil right or of civil obligation.

“Further, the pursuer’s allegations as to the favourable views of the defenders are far too vague to form the ground of any judgment. He says that a large majority of the Presbytery are in his favour, but the extent to which they favoured him does not appear. But if this be really the case, and if the majority of the defenders are, as well as the pursuer, desirous to ascertain the extent of their powers in order to enable them to afford relief to the pursuer, it might

not be impossible so to shape the case as to raise a proper *lis* on which the Court might be able to adjudicate."

The pursuer reclaimed, and argued—The pursuer was entitled to declarator on the principle laid down by Stair in the passage quoted by the Lord Ordinary (iv. 3, 47). The pursuer was a party to the indenture, and was minister of the church; and the money realised by the sale was just a *surrogatum* for the church. Though the pursuer might not be a beneficiary under the deeds, he laid the foundation of a patrimonial right in his averment, which was not denied, and which was proved by a minute of the Presbytery, that a majority of the Presbytery would give him the money if they thought it lawful for them to do so. It was quite competent for a pursuer to establish such a contingent right by declarator—*Mackenzie's Trustees v. Mackenzie's Tutors*, July 1, 1846, 8 D. 964; *Earl of Mansfield v. Stewart*, July 3, 1846, 5 Bell's App. 139, per Lord Brougham, p. 160; *Fleming, &c. v. M'Lagan, &c.*, January 28, 1879, 6 R. 588; *Chaplin's Trustees v. Hoile*, October 30, 1890, 18 R. 27.

Argued for defenders—The pursuer had averred no patrimonial right. The power of the Presbytery to deal with the money was absolute, or limited only by the terms of the trust-deed under which the pursuer was not a beneficiary. The conclusions of the summons imposed no obligation on the defenders. The action was therefore irrelevant and incompetent—*Haldane's Trustees v. Haldane*, December 12, 1895, *supra*, p. 206; *Skerret v. Oliver and Others*, January 30, 1896, *supra*, p. 323.

At advising—

LORD M'LAREN—The pursuer has instituted this action in the character of minister of the Scottish National Church, Manchester, against the Presbytery of Edinburgh, with which his congregation was connected, concluding that the Presbytery may lawfully direct that a part of the money arising from the sale of the church at Rusholme Road, Manchester, should be paid to him or applied for his benefit.

The church in Manchester—I mean the place of worship—is held by trustees under an indenture, in which it is provided that the managers for the time shall collect the seat-rents, collections, and subscriptions, and apply the money in the repair, maintenance, management, and endowment of the church, and that the surplus shall be paid to the minister. It is further provided that at any time the trustees, with the consent of the majority of the Presbytery of Edinburgh, may sell the property, and it is declared that the trustees shall hold the moneys to arise from such sale "for such purposes as the majority of the members for the time being of the said Presbytery at a meeting of the said Presbytery may in writing direct."

The pursuer in 1881 was appointed minister of the congregation in accordance with its constitution, and it is stated that under the arrangement between the congregation and himself he was paid a stipend

at the rate of £300 for two years, and thereafter at a lower rate. But in January 1892, in the exercise of the power which I have narrated, the property of the congregation, including the church, was sold, and the price remains unappropriated in the hands of the trustees. By the sale of the church property without any arrangement having been made for the acquisition of another place of worship the congregation was in effect dissolved, and the theory of the pursuer's case is that he is entitled to be compensated out of the proceeds of the sale of the church property for the loss of his living. As I read the summons, this claim is not put forward as a matter of absolute right. The pursuer only proposes that the payment of compensation to himself should be declared to be a proper application of the trust-fund, consistent with the provisions of the trust-deed and the power of sale, leaving it to the trustees to act upon the power or not, as they may see fit.

Now, the Lord Ordinary has discussed very fully the legal bearings of this claim, and I agree with his Lordship that the pursuer's claim is unsupported either by principle or authority. In order that the pursuer should obtain the declaratory judgment which he desires it is necessary that he should show that he is an object of the powers given by the deed of foundation to the Presbytery of Edinburgh. But this is of course impossible, because the power of the Presbytery to direct the application of the fund is unlimited, and the pursuer has failed to show that he has an interest in its disposal distinguishable from that of any other member of the public.

I wish, however, to be understood as referring only to the particular conclusion which is before us, under which the pursuer claims a personal interest in the fund. While the power given to the Presbytery is unlimited in form, it may very well be that the nature of the trust imposes a limitation which might if necessary be enforced by a decree of this Court. The subscribers, on whose credit the church at Manchester was purchased, doubtless left the disposal of the proceeds of the sale of the church to the Presbytery of Edinburgh, because they had confidence in the Presbytery, and believed that under its direction the money would be applied to purposes cognate to those for which it was subscribed.

But if it were proposed to misapply the money—and I am very far from suggesting that this is at all probable—I think we should hold that the minister, or a committee of members of the dissolved congregation, would have a title to enforce the trust, that is, to restrain the misapplication of the funds. Again, I do not say that the Presbytery would not have a title to have it declared by decree of this Court that the mode in which they may hereafter propose to exercise the power is a good execution of their trust. But the Presbytery has not proposed to make an award of compensation to the pursuer out of this fund, because I cannot accept the statement that individual members of that body are favourably disposed to the pursuer's claim as having

any relevancy in a question of this nature, and we are invited to affirm the proposition, not that the pursuer has a right to a share of the money as a beneficiary under the trust, but that an application of the money which the Presbytery are not proposing to make, is lawful. I am very clearly of opinion that the pursuer has no right to such a declarator, and therefore that the action is bad on the ground of want of relevancy.

I propose that we should only sustain the third plea-in-law, which is sufficient for the disposal of the case, and that with this variation we should adhere to the Lord Ordinary's interlocutor.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

The Court sustained the third plea-in-law for the defenders, and *quoad ultra* adhered.

Counsel for Pursuer—C. K. Mackenzie—J. R. Christie. Agents—Simpson & Marwick, W.S.

Counsel for Defenders—Cheyne—C. N. Johnston. Agents—Menzies, Black, & Menzies, W.S.

Tuesday, March 17.

FIRST DIVISION.

[Sheriff of Perthshire.

HENDERSON v. GRANT.

Diligence—Pounding—Bankruptcy—Preference.

A creditor who had pointed her debtor's goods but had not completed the diligence by sale of the pointed goods, held not entitled to a preference in the debtor's *cessio* granted eighteen months after the execution of the pointing.

Process—Sheriff—Appeal—Value of Cause—Affidavit and Claim in Cessio.

The competency of an appeal under the Sheriff Court Act 1876, sec. 26, sub-sec. 4, and the Debtors Act 1880, sec. 9, sub-sec. 4, to *cessio* is, as regards the Court of Session in a process of value of the cause, to be determined by the debt alleged to be due in the affidavit and claim upon which the deliverance appealed from is pronounced.

Observations by Lord M'Laren on the right of appeal by reclaiming-note under 6 and 7 Will. IV. cap. 56, in processes of cessio.

This was an appeal against a judgment of the Sheriff of Perth by which he sustained a deliverance of the respondent, the trustee in the *cessio* of Robert Laing, refusing a preferable ranking to the appellant.

On the 11th March 1892 the appellant obtained decree against Robert Laing for the inlying expenses and aliment of an illegitimate child, with the expenses of

process, and on the 13th July thereafter he was duly charged to make payment thereof. On the 25th July 1893 certain goods belonging to him were pointed at her instance, and the execution of pointing was duly reported by the sheriff officer on the 29th July thereafter. In the report of the pointing the value of the goods was stated to be £18.

On the 3rd August 1893 the appellant obtained a warrant to sell the pointed goods, but this warrant was inept in respect that it did not specify the date at which the sale should take place, as required by the Personal Diligence Act 1838 (1 and 2 Vict. c. 114), secs. 25 and 26.

No further proceedings took place in the process of pointing, but the pointed goods were sold by the respondent, the trustee in the *cessio*, who was appointed on 15th December 1884, under reservation of the pleas of parties.

The appellant lodged an affidavit and claim in the *cessio* for £42, and claimed a preference to the effect of receiving full payment of the debt out of the effects pointed by the deponent on 25th July 1893.

The trustee issued a deliverance in which he rejected the claim to a preferable ranking, but admitted it to an ordinary ranking.

The claimant objected to this deliverance.

On 17th May 1895 the Sheriff-Substitute (GRAHAME) sustained the deliverance of the trustee.

The claimant appealed to the Sheriff (JAMESON), who on 14th December adhered to the interlocutor of the Sheriff-Substitute.

Note.—"Notwithstanding the very high authority of Professor Bell (Com., 7th ed. pp. 61, 62), I feel bound by decided cases to hold that a pointing is not completed so as to operate as a transference of the property of the pointed effects until a sale has taken place under the pointing, although when such sale has taken place, the effect of the pointing goes back to the date of execution. In my opinion this doctrine is established by the cases of *Tullis v. White*, June 18, 1817, F.C.; *Samson v. M'Cubbin*, 1 S. 407; *Lyle v. Greig*, 5 S. 845; and *Scoullar v. Campbell*, 3 S. 77. I may also refer to Lord Ivory's note to Erskine on this subject. As no sale took place under the pointing founded on by the appellant, her objection to the trustee's deliverance must be disallowed."

The claimant appealed to the First Division of the Court of Session. The respondent objected to the competency of the appeal.

Argued for respondent—An appeal in a process of *cessio* was subject to the same restrictions as to the value of the cause as that in an ordinary Sheriff Court action—Sheriff Court Act 1876 (39 and 40 Vict. cap. 70), sec. 26, sub-sec. 4; Sheriff Court Act 1853 (16 and 17 Vict. cap. 80), sec. 22. The sum contained in the report on the appellant's pointing formed the real fund in dispute between the parties, and was therefore the true value of the cause. The true test of such value was the amount which the pursuer might hope to get out of the