

court to be held in April, and if he had got a licence at that date it would have lain with him to secure the premises. There is also this difficulty, that at the date of the licensing court in April it was known to both parties that Dalrymple had been warned out, and that, notwithstanding that, M'Cormick proceeded to make his application on 17th April. If therefore the letters of 14th January had stood alone, they might have been read as meaning that M'Cormick was to take the whole risk of securing the premises. But the subsequent actings of parties and the letters of 18th May make it plain that a further effort was made to carry out the contract. In pursuance of the arrangement come to on that date M'Cormick applied on 20th May for a licence, though knowing that the premises were to be sold in a few days. Before the application was made it was agreed that the purchase price should remain on deposit until October, till it was seen if the licence, if granted in May, would be confirmed. This necessarily depended on whether or not M'Cormick succeeded in leasing or buying the premises. But this he failed to do. He attended the sale, made a bid of the upset price and £250 more, and did all that could reasonably be expected of him to carry out the arrangement which was come to after seeing that Dalrymple had been warned out. I think he might have repudiated the contract in April, but in any event, after his failure to obtain the premises I think he was entitled to repayment of the sum deposited. On the whole matter I think the Lord Ordinary has arrived at a right conclusion.

The Court adhered.

Counsel for the Claimant and Real Raiser and Respondent Thomas M'Cormick—Mackenzie, K.C.—W. Thomson. Agents—Sang & Moffat, S.S.C.

Counsel for the Claimant and Reclaimer William Paterson Dalrymple—Campbell, K.C.—Munro. Agents—St Clair, Swanson, & Manson, W.S.

Agents for the Pursuers and Nominal Raisers—Melville & Lindesay, W.S.

*Friday, May 27.*

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

### JOHNSTON *v.* JOHNSTON.

*Donation—Whether Grant of "Use of" Dwelling-House during Grantee's Life Constituted Liferent Right.*

A by holograph letter granted to his brother B "the use of" a dwelling-house "during the natural period of his life . . . in consideration of him loosing his eyesight." *Held (aff. judgment of Lord Kyllachy) that the letter referred to did not constitute any life-*

rent right in favour of B, but only a right of personal occupation during his life.

This was an action at the instance of Thomas Johnston, contractor, East Main Street, Armadale, against William Johnston, sometime colliery manager, Boyd's Buildings, Darvel, Ayrshire, and Alexander Johnston, carting contractor, East Main Street, Armadale. The pursuer sought to establish a right to a liferent of a certain house in East Main Street, Armadale; the summons concluded for declarator of that right and for an accounting in respect of intromissions by the defenders with the rents of the house.

The pursuer founded on the following holograph letter of 25th February 1898 received by him from the defender William Johnston, the then proprietor of the house in question, viz.—"This is to certify that I do hereby, of my own free will and accord, grant the use of the room and kitchen now occupied by John M'Kinnon—who must remove at first term—to my brother Thomas Johnston, free of any rent during the natural period of his life, or period of his natural life, with liberty to add a back place such as a small room or kitchen to it. He to have the piece of ground as a garden, which is right behind the house. This I do in consideration of him loosing his eyesight. And he is to act jointly with my brother Alexander in looking after and keeping them in order as a factor would do. (Signed) WILLIAM JOHNSTON."

The pursuer entered into possession of the subjects referred to and occupied them himself from Whitsunday 1898 to Whitsunday 1900. He then let them. In the present action he averred—" (Cond. 4) On 10th April 1902 the defender William Johnston, by letter addressed to the pursuer and duly received by him, sought to cancel the said holograph letter dated 25th February 1898. About the same time the said defender prohibited the tenant from paying the rent due by him to the pursuer, and both defenders have since intromitted therewith. Thereafter the defender William Johnston disposed the said subjects to the defender Alexander Johnston, by disposition dated 31st July and recorded 12th August, both in the year 1903. This disposition was granted by the defender William Johnston and accepted by the said defender Alexander Johnston in the full knowledge by both of the pursuer's liferent right and interests constituted by the holograph letter above referred to, and subsequent possession."

The defenders maintained that no liferent had been conferred upon the pursuer, but only a right to use the house in question.

On 6th February 1904 the Lord Ordinary (KYLACHY) pronounced the following interlocutor:—"Finds that on a just construction of the letter referred to on record, the same did not constitute any liferent or other proprietary right in favour of the pursuer, but only a right of personal occupation during his life; therefore assolizies

the defenders from the conclusions of the action, and decerns," &c.

The pursuer reclaimed—At the hearing the following cases were referred to—*Rodgers' Trustees v. Rodger*, January 9, 1875, 2 R. 294, 12 S.L.R. 204; *Bayne's Trustees v. Bayne*, November 3, 1894, 22 R. 26, 32 S.L.R. 31; *Cathcart's Trustees v. Allardice*, December 21, 1899, 2 F. 326, 37 S.L.R. 252.

LORD JUSTICE-CLERK—The Lord Ordinary has decided that the pursuer has no right to deal with the subjects in question as his own. In my opinion that judgment should be affirmed. It seems to me to be clear that what is granted in the letter relied on is the use of a particular house, and that implies nothing more than this, that the grantee is to have the use of the house for himself in respect of his infirmity.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Munro—W. T. Watson. Agents—Macdonald & Stewart, S.S.C.

Counsel for the Defenders and Respondents—Wilson, K.C.—W. Thomson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Saturday, May 28.

## FIRST DIVISION.

[Lord Pearson, Ordinary.]

### ECUADORIAN ASSOCIATION, LIMITED (IN LIQUIDATION) v. LORD STANMORE AND OTHERS.

*Company — Winding-up — Voluntary Liquidation subject to Supervision of Court—Appointment of Liquidators.*

A petition having been brought by creditors for the winding-up of a company by the Court on the allegation that the company was unable to pay its debts, the company subsequently, at an extraordinary general meeting, resolved by a majority (1) that the company should be wound up voluntarily under the supervision of the Court; and (2) that two persons, A and B, who were partners, should be appointed liquidators. The minority of the company, while not disputing the ability and fitness of A and B, moved the Court to appoint an independent liquidator to act along with A and B, averring (1) a number of circumstances in the history of the company which, they alleged, were suspicious and needed thorough and impartial investigation; and (2) that there was a conflict of interest between them and the majority of the shareholders.

The Court refused the motion.

The Guayaquil and Quito Railway Company, a corporation organised under the laws of the State of New Jersey, United States of America, on 7th March 1904, presented a petition for the winding-up by the Court of the Ecuadorian Association, Limited, incorporated under the Companies Acts 1862 and 1898, and having its registered office situated at 15 Hill Street, Edinburgh.

The petitioners suggested Francis More, C.A., Edinburgh, and Herbert William Haldane, C.A., Edinburgh, both partners in the firm of Lindsay, Jamieson, & Haldane, as fit persons to be appointed official liquidators of the association. In ordering intimation of the petition, the Court, in respect that the petitioners stated that they were apprehensive that in the meantime preferences might be obtained over the assets of the association, appointed Mr More and Mr Haldane to be provisional liquidators.

The petitioners averred, *inter alia*, as follows:—The Ecuadorian Association, Limited, was incorporated on 4th April 1899. The primary purpose for which the association was incorporated was the acquisition of certain shares in the Ecuador Development Company, a company incorporated under the laws of the State of New Jersey, United States of America, and certain first mortgage gold bonds of the petitioner's company. At the date of the incorporation of the Association the Ecuador Development Company was engaged in the construction and equipment of a railway from Duran to Quito, in the Republic of Ecuador, under a contract from the petitioners. In 1900 it was arranged that the association should acquire all the rights and interests of the Ecuador Development Company in the railway construction contract, and should itself construct the railway from Duran to Quito so far as this had not been done at the date of the transfer. After April 1900 the said Association was engaged in the construction of the said railway from Duran to Quito, but owing to difficulties encountered by it, the cost of construction was found greatly to exceed the estimate upon which the contract had been entered into, and in January 1903 the railway remained still incomplete, while the funds at the disposal of the said association had become exhausted. The association had meantime obtained from the petitioners advances in bonds to the amount of \$1,606,000, which are still resting-owing, and besides incurring other indebtednesses it had borrowed in London and New York, sums understood to exceed £150,000, to secure which it had pledged practically all its assets available at the time. In order that the railway should be completed, the association entered into negotiations with the Ecuador Company of New Jersey—a company incorporated for the purpose of carrying on the enterprise. The Association assigned to the Ecuador Company all its rights and interests in, *inter alia*, the railway construction contract, on condition that the Ecuador Company should imple-