authenticate his signature may sign as a witness after a lapse of time. But this is not a case of signing *ex intervallo;* it was one continuous proceeding.

I also agree—although the question was not argued before me at the trial—that the objection, even if good under the Act 1681, is excluded by the Act of 1874.

The Court refused the bill of exceptions.

Counsel for the Pursuer — Shaw — G. Stewart. Agents — Donaldson & Nisbet, Solicitors.

Counsel for the Defenders — Guthrie—Craigie. Agents—James Russell, S.S.C.

Wednesday, November 16.

SECOND DIVISION.

[Sheriff of Perthshire.

JOHNSTON *v.* HENRY-ANDERSON AND OTHERS (JOHNSTON'S TRUSTEES).

(*Ante*, vol. xxviii. p. 634; 18 R. 823.)

Trust — Tutors and Curators — Appointment—Intestate Succession — Guardianship of Infants Act 1886.

A testatrix directed her trustees to hold one-half of her estate for her nephew in trust until he reached the age of twenty-five, with certain discretionary powers as to payment of interest and earlier payment of part of the capital, "but which discretion will lie wholly with my said trustees, whom I hereby appoint to be tutors and curators to him until he attain the age of twenty-five years complete." The trustees were directed to hold the remaining half of the estate for behoof of the testatrix's brother and his children *nominatim*. By a codicil the testatrix cancelled the provision in favour of her brother and his children. She left her brother a legacy of £100, and directed that the residue should be disposed of among her relatives "according to their legal rights."

In a special case for the opinion of the Court it was decided that the half of the residue mentioned in the codicil fell to be divided equally between the brother and the nephew, and was immediately payable to them. Two of the trustees declined to accept the office of tutor, but one of them accepted, and the nephew's share of the intestate succession was paid over to him as his tutor and guardian.

In an action of accounting and for payment against the trustees by the mother of the nephew, as his natural guardian under the Guardianship of Infants Act 1886 — *held* that as the share now payable to the nephew passed to him as intestate succession, the trustees had no power to receive or administer it, and that the pursuer was entitled thereto.

Opinion per curiam, that the appointment of the trustees as tutors and curators was a joint appointment, and that one of them could not validly accept the office, the others declining to do so.

Mrs Agnes Johnston, Blairgowrie, as mother and guardian under the Guardianship of Infants Act 1886 of her pupil son William Low Johnston (his father having died), sued Isaac Henry-Anderson, S.S.C., Blairgowrie, John Soutar Baxter, and Dr Charles Smith Lunan, trustees and executors of the late Margaret Johnston of Welton, for an account of their intromissions as trustees and executors, and for payment to the pursuer of a sum of £1250 as one-fourth of the residue of Miss Margaret Johnston's estate.

Margaret Johnston died at Edinburgh on 14th July 1890. She left a trust-disposition and settlement dated 27th January 1887, whereby she disponed her whole estate, heritable and moveable, to Isaac Henry-Anderson, S.S.C., Blairgowrie, John Soutar Baxter, and Dr Charles Smith Lunan, as trustees, and directed them to convert her whole estate into money, and dispose of the same as follows—"One-half of the free rest and residue of my estate to my said nephew William Low Johnston, payable on his attaining the full and complete age of twenty-five years, but until he attains that age my trustees shall hold the capital in trust, and apply in such sums and in such way as they deem most expedient, the annual interest, or a part therof, for his maintenance and upbringing, but with power to said trustees, if they think proper, to advance to the said William Low Johnston, prior to his attaining said age, a part of the capital not exceeding one-half in starting him in business or otherwise starting him in life, but which discretion will lie wholly with my said trustees, whom I hereby appoint to be tutors and curators to him until he attains said age of twenty-five years complete; but declaring, in the event of the said William Low Johnston dying without leaving lawful issue of his body before attaining the said age, his said share of my estate shall fall to the parties afternamed, being the children of my brother James Johnston, and the said James Johnston, and shall be divided among them in the same proportions as their own share is to be divided as hereinafter set forth; and the remaining half of said residue shall be held, applied, and disposed of by my said trustees to and for behoof of the children of my said brother James Johnston, and to himself, in the proportions following."

By a codicil of 2nd July 1889 the testatrix cancelled and annulled "the whole provisions therein contained in favour of my brother James Johnston, and also of his children *nominatim*, in the said deed above written, and in lieu thereof I leave to the said James Johnston a sum of £100 sterling in full of all he can claim, and in the event of his challenging this codicil, this bequest of £100 will be held as null and void; and

with regard to the residue of my estate, so far as the said James Johnston and his children were interested under the said trust-disposition and settlement, in the event of my death before executing a new settlement, such residue will be disposed of amongst those of my relatives according to their legal rights." Her heirs *in mobilibus* at the date of her death were James Johnston, her brother, and William Low Johnston, her nephew.

A special case was submitted by the defenders of the first part, the said James Johnston of the second part, and the said William Low Johnston and the pursuer, as his mother and guardian or tutrix foresaid, of the third part, to the First Division of the Court of Session in January 1891. In this special case the parties asked the opinion and judgment of the Court upon, *inter alia*, the questions—"(1) Whether the half of the residue bequeathed to William Low Johnston by the said trust-disposition and settlement vested in him *a morte testatoris?* (2) Whether the other half of the residue fell to be equally divided between the said James Johnston and William Low Johnston?" On 13th May 1891 the Lords of the First Division of the Court of Session answered these two questions in the affirmative, and found and declared accordingly, and found it unnecessary to answer the other questions stated in the case. By this judgment it was decided that the one-half of the residue directed under the fifth purpose of said trust-disposition and settlement to be held in trust for William Low Johnston was now vested in him, although the period of payment was postponed until he attained the age of twenty-five years; and that one-fourth of the residue, viz., one-half of the other half of said residue, belonged in virtue of the codicil absolutely at the present time to William Low Johnston.

At a meeting of the trustees upon 17th November 1891, Mr Baxter and Dr Lunan declined to accept the office of tutors and curators, and upon 20th November the remaining trustee, Mr Anderson, intimated to his co-trustees his acceptance of the offices. He thereafter received payment of the share falling to the pupil under the decision in the special case, viz., £1249, 12s. 4d., and granted a discharge therefor to the trustees. Mrs Johnston then raised this action in the Sheriff Court at Perth to have the sum handed over to her.

The pursuer pleaded—"(1) The defenders are bound to count and reckon with the pursuer for their intromissions with the estate of Margaret Johnston, and the pursuer is entitled to decree for the one-fourth of the residue payable to the said William Low Johnston in virtue of the said codicil, with expenses. (2) The alleged acceptance of the office of tutor and curator by Mr Anderson, and the alleged authority to pay to and discharge by him, are invalid and of no effect—1st. Because the appointment of tutors and curators in the settlement does not apply to the subject-matter of this action. 2nd. Because, even supposing the appointment to apply thereto, the defenders declined the office, at least so far as the subject-matter of this action is concerned; and 3rd. Because the pursuer is the only legal guardian of his son, so far as the subject-matter of this action is concerned, and has been recognised and treated as such by the defenders, and in particular by the defender Mr Anderson, who alone of the defenders now claims the office."

The defenders pleaded—"(2) There being an acting tutor-nominate to the pupil, and the pursuer not being that person, she has no title to sue the present action. (3) The trustees having paid the one-fourth share of residue at present falling to the pupil, in terms of the testatrix's codicil to the tutor-nominate, and having obtained a valid discharge therefor, the present action of count and reckoning and payment is outwith the powers of the pursuer, incompetent, irrelevant, and uncalled for, and the defenders should be assoilzied, with expenses against the pursuer."

Upon 10th March 1892 the Sheriff-Substitute (GRAHAME) issued an interlocutor by which he found "that up to 17th November, when the defender Anderson accepted said office, none of the defenders had declined the office of tutors and curators to the said W. L. Johnston nor had acted in any way so as to bar their acceptance of that office, and that at said date it was still open to them all or any of them to accept said office, and finds that the defender Anderson, having then accepted that office and having thereafter acted therein the pursuer is not, as mother of the said William Low Johnston, and his legal guardian under the Guardianship of Infants Act 1886, entitled to sue the defenders for count, reckoning, and payment to her of her said son's share of the residue of Miss Johnston's estate due to him under his aunt's settlement and relative codicil as concluded for in this action: Therefore assoilzies the defenders from the conclusions of the action."

Upon appeal the Sheriff (JAMESON) adhered.

The pursuer appealed, and argued—Mr Anderson's only claim to the office of tutor and curator was the nomination in the trust-settlement. This was, however, a joint appointment of the whole trustees as tutors and curators, and if that was so, then the law was clear that in order to make a valid acceptance the whole body jointly nominated must accept, and not merely one of their body. The appointment of tutors in this case applied solely to the administration of the estate left by the trust-settlement, as the appointment of testamentary tutors rests solely with the father. The trustees were here appointed tutors and curators with the view of enabling them to carry out the work of administering the estate committed to their discretion with more fulness, and must be read as meaning that the trustees and the tutors and curators were always to be the same persons—Ersk. Inst. i. 7, 2. (2) Even if Anderson had validly accepted the office of tutor, the sum in question did not fall under his management. By the decision in the

special case—*Johnston's Trustees* v. *Johnston*, May 13, 1891, 18 R. 823—it was plain that what passed to the heirs *in mobilibus* was the half share of the testatrix's estate formerly left to James Johnston, but the destination of which was changed by the codicil. The phrase "my relatives, according to their legal rights," was of no value in giving any undisposed-of estate to the heirs in intestacy. The estate would have been divided among the relatives according to their legal rights without these words being in the codicil. Accordingly the nephew took this sum of £1250 as heir *ab intestato*, and therefore the tutor could have no claim to its administration.

The respondent argued—The acceptance by Anderson was good. The nomination of the trustees as tutors and curators was the nomination of the individual trustees, not of the whole body, and if it was not expressly stated to be a joint nomination, then any single member of the whole number of trustees could accept as tutor—*Elleis* v. *Scott*, February 14, 1672, M. 14,695; *Young* v. *Watson & Syme*, November 7, 1740, M. 16,346. It was admitted that the tutor's right to administer extended only to the estate given by the testatrix to him by settlement. But the trustees were appointed over her whole estate, not only what she left by the settlement, but also what she left by the codicil. This £1250 was part of the estate left by the codicil, and therefore fell under the trustees' charge, and as under the decision in the special case it was immediately payable, their only duty was to hand it over to the accepting tutor.

At advising—

LORD YOUNG—The questions which this case presents are of some interest, but the facts are simple.

Miss Johnston made a will in the form of a trust, and conveyed her estate to trustees with certain directions. We are not here concerned with any of these directions except two.

She divided her estate into two equal portions, and directed her trustees to hold the one-half for the benefit of her pupil nephew William Low Johnston, and to administer it for his behoof until he attained the age of twenty-five years, and to hold the other half for the benefit of a brother and his children. The conveyance to the trustees is in the ordinary form—to the trustees, "or the acceptors or acceptor, survivors or survivor of them," and to any persons assumed as trustees. Then with respect to the half of the estate she directs them to hold for behoof of her nephew, she authorises them to make such advances to him during his minority as they in their discretion may think fit, and also to advance a part of the capital, not more than one-half, for the purpose of starting him in life, "but which discretion will lie wholly with my said trustees, whom I hereby appoint to be tutors and curators to him until he attain said age of twenty-five years complete."

Now, I think it is clear enough with respect to this half of her estate that the trustees were appointed to hold it and manage it and administer it during the whole years of the prescribed minority, and that it was really to enable them to perform their duties and do their duty as trustees, that she named them tutors and curators to her infant nephew. I doubt greatly if it was in the power of any of the trustees to accept and undertake to act as trustee, without accepting to act according to the whole discretion of the trustees during the minority of the nephew. I do not see what practical good there was in nominating the trustees as tutors and curators. I think that they could have done, and that it was their duty to do as trustees, everything that they could do and had a duty to do as tutors and curators. But this is not a question of much interest so far as regards this portion of the estate, which must remain in the hands of the trustees until the ward arrives at the age of twenty-five; whoever may happen to be tutor, they cannot be interfered with. It is not necessary to decide the question of the appointment, although my own opinion is that this was not a several appointment, so as to devolve on any one of the trustees who chose to accept the office of tutor, while the other trustees did not accept that office. I think that it was a nomination of the whole body of trustees as tutors and curators in order to aid them as such.

But the interest in this case regards the other half of the estate, which I have not spoken of yet, except to notice the direction in the trust by which it is to be divided between the truster's brother James Johnston and his children. If that direction had stood as originally given, then the trustees must have divided it among the beneficiaries as directed; they had no choice. But the lady executed a codicil, by which she "cancels and annuls the whole provisions therein contained in favour of my brother James Johnston, and also of his children." Now, that is cancelling the whole of it; indeed, it is cancelling the deed so far as regards that part of the estate; and then the deed goes on, "and in lieu thereof I leave to the said James Johnston a sum of £100 sterling in full of all he can claim." So that the whole will is cancelled with respect to half of the estate, and there is substituted for these provisions a legacy of £100 to James Johnston. That half is now, as matters stand, undisposed of and unaffected by the will except as regards that legacy. Then the codicil goes on, "and with regard to the residue of my estate, so far as the said James Johnston and his children were interested under the said trust-disposition and settlement, such residue will be disposed of amongst those of my relatives according to their legal rights."

Now, it was held in the special case which was formerly stated for the opinion of the Court that the whole of the one-half of the estate must go to the next-of-kin under the rules of intestate succession. The brother James Johnston, who got a legacy of £100

in full of all his claims, is one of the two next-of-kin, and gets one-half of the residue. He does not take it as testate succession, but in so far as Miss Johnston died intestate the Court decided that he was entitled to one-half of the one-half of her estate. It so happens that the only other next-of-kin is the pupil nephew William Low Johnston, and so he takes the other half of the residue, but he takes it *ab intestato*, not under the will, because there was no provision in the will on the subject. If he had, then James Johnston would have been excluded, but as there was no will, the two next-of-kin divide the residue.

The question then comes to be, whether the appointment of trustees as tutors and curators in the clause I have referred to applies to this part of the succession. I am clearly of opinion that it does not. I think there was no appointment of anybody by the will as tutor to this pupil so far as regards this succession.

My opinion is that his legal tutor, his mother—his father being dead—is entitled to pursue the action of accounting, and that the trustees are bound to account to her for the estate. In an action of accounting the first question to be answered is this, "Is there liability?" and if there is liability then the accounts must be given in. In my opinion the judgment of the Sheriffs that the mother was not entitled to sue this action is erroneous, and the trustees must be ordered to produce their accounts as a matter of form, although I daresay there will be no difficulty in the matter. She concludes for a sum of £1200 that is immediately payable to the tutor of the nephew. The trustees have paid it to Anderson. I think that is erroneous, and that it should be paid to the mother as tutor to her son, the nephew of the testatrix.

LORD RUTHERFURD CLARK—I am of the same opinion. Of course if we hold that this money goes to the nephew as intestate succession there is no pretence for saying that anyone has been appointed tutor so far as regards it. Even if we thought that it was testate succession, I should be inclined to hold that the testatrix did not make any appointment of tutors and curators to that fund, but that the appointment must be limited to funds disposed of under the will.

LORD TRAYNER—I agree. The question here is, whether the pursuer is entitled to sue the present action of accounting as the guardian or tutor of her pupil son. Her title is disputed on the ground that in so far as concerns the means or estate which her son takes under the will of his aunt Miss Johnston, Mr Anderson is by that will nominated and has accepted the office of tutor and curator to the boy. Now, I agree with Lord Young in thinking—though it is unnecessary to decide the point—that the appointment in the settlement of tutors and curators is a joint appointment, and therefore that Mr Anderson could not hold it if the other tutors did not accept and act under it also.

But however that may be, I am satisfied that the appointment of tutor and curator under Miss Johnston's settlement is confined to the administration of that fund which the ward takes under its provisions. The fund for which the pursuer seeks an accounting is no part of the estate conveyed or destined to the ward by the settlement, but is a fund which he takes as one of the testator's heirs *ab intestato*, and in regard to which no appointment of tutor or curator has been made. There being therefore no tutor-nominate in reference to that particular fund, the pursuer, as her son's legal guardian or tutor, is entitled in that character to insist in the present action.

LORD JUSTICE-CLERK—I concur. I think the clearest ground of judgment is that there was intestacy as to the share of residue referred to in the codicil. The testator cancels the will as to it. But she does not by the codicil dispose of it except as to the £100. She only takes away the previous gift, and limits what James Johnston can take to that £100. And I think the codicil plainly points to intestacy, for the testator says that in the event of her death "before executing a new will or settlement" her relatives are to take according to their legal rights.

I agree also with Lord Rutherfurd Clark in thinking that even if we could hold that there was testate succession under the codicil that would not place the fund which falls under the nomination of tutors and curators which is made by the original settlement. And further, I should, if necessary, have been prepared to decide that the nomination of tutors and curators in the settlement was a joint nomination referring only to the trustees as a body who should act in the trust. But it is not necessary to decide that. The first point is sufficient.

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