was not suggested that any separate issue was required for this item of damage, of which adequate notice is given on record.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court approved of the issue quoted in the Lord President's opinion.

Counsel for Pursuer—Comrie Thomson—Deas. Agents—Clark & Macdonald, S.S.C.

Counsel for Defenders—Graham Murray, Q.C.—Ure—Clyde. Agents—Hope, Mann, & Kirk, W.S.

---

*Wednesday, March 7.*

## SECOND DIVISION.

## BELFRAGE AND OTHERS (TAIT'S TRUSTEES) *v.* MONTEITH.

*Succession — Settlement — Construction — "Survivors" as equivalent to "Others."*

A testator directed his trustees to hold the residue of his estate for the liferent use of his four sisters equally, and for their children respectively in fee, with the declaration "that in the event of the decease of one or more of my said sisters without children, her or their shares shall be held by my said trustees for the liferent use of the survivors and their children in liferent and fee aforesaid."

*Held* that upon the death of one of the testator's sisters without issue the share liferented by her fell to the sister then surviving and her children in liferent and fee respectively, the issue of a predeceasing sister being excluded—*Ward* v. *Lang*, July 13, 1893, 20 R. 949, *followed*.

Andrew Tait junior, baker in Edinburgh, died upon 6th February 1849.

By his trust-disposition and settlement, dated 30th January 1849, "for the love, favour, and affection which I have and bear to my relatives after mentioned," he gave, granted, and disponed his whole estate, heritable and moveable, to certain trustees named therein, for the following purposes, *inter alia*—(1) Payment of debts. (2) "That my said trustees, or the trustees acting for the time, may have and hold the residue of the means and estate hereby conveyed, or at their discretion convert the same into cash, and in either case take the destination of the means and estate or proceeds thereof to themselves for the liferent use of my sisters, Jane Tait or Belfrage, Christina Tait or Stenhouse, Ann Tait, and Margaret Tait, equally, and for their children respectively in fee: And declaring that in the event of the decease of one or more of my said sisters without children, her or their share shall be held by my said trustees for the liferent use of the survivors and their children in liferent and fee as aforesaid."

He was survived by his four sisters mentioned in the settlement. His estate when realised amounted to about £3200.

The truster's four sisters enjoyed the liferent of the trust-estate equally between them until Ann Tait died upon 24th March 1856 without leaving issue. Upon her death her share was liferented by her surviving sisters. Margaret Tait or Taylor or Monteith died on 18th February 1892 survived by three children, and the fee of the one-third share of the truster's estate liferented by her was divided among them. Mrs Christina Tait or Stenhouse died upon 18th March 1893 without leaving issue, and questions having then arisen as to the disposal of the share liferented by her, a special case was presented. The parties were (1) Andrew Tait junior's testamentary trustees; (2) Mrs Monteith's children; (3) Mrs Jane Tait or Belfrage, the truster's surviving sister; (4) The trustees of the deceased William Christie as assignees of Andrew James Belfrage, a son of Mrs Belfrage; and (5) Jane Belfrage, a daughter of Mrs Belfrage.

The questions for the consideration of the Court were—"1. (*a*) Does the liferent of the share formerly liferented by Mrs Stenhouse accresce and belong to Mrs Belfrage, the third party; or (*b*) does the liferent of one-half only of said share accresce and belong to her 2. If branch (*a*) of question 1 be answered in the affirmative, does one-half of the fee of the said share formerly liferented by Mrs Stenhouse vest in the second parties, the children of Mrs Monteith, and the other half vest in the fourth and fifth parties, as children (as in right of a child) of Mrs Belfrage, equally between them; or does the fee of the whole of the said share vest in the fourth and fifth parties? 3. If branch (*b*) of question 1 be answered in the affirmative, does one-half of the said share formerly liferented by Mrs Stenhouse fall at once to the second parties, and the fee of the other half, subject to a liferent to Mrs Belfrage, to the fourth and fifth parties, equally between them?"

Counsel for the third and fifth parties argued—The words "the liferent use of the survivors and their children," &c., must be taken in their ordinary signification, and that being so the whole share of the estate liferented by Mrs Stenhouse passed to her sister Mrs Belfrage in liferent, and on her death the fee went to her children, excluding Mrs Monteith's children. The case was really ruled by *Ward* v. *Lang*, July 13, 1893, 20 R. 949, which followed on the cases of *Forrest's Trustees* v. *Rae*, December 20, 1884, 12 R. 389; and *Hairsten's Judicial Factor* v. *Duncan*, July 14, 1891, 18 R. 1158.

Counsel for the fourth party concurred in the above argument.

The second parties, Mrs Monteith's children, argued—The truster began his deed by setting forth the love, favour, and affection he bore towards his relatives; that expression showed that he meant all to share equally in his estate. It was therefore absurd to suppose that his intention was that "the position of his descendants

in the second degree was to depend on the accident of whether their parent died first or second"—*Badger* v. *Gregory*, L.R., 8 Eq. 78, *per* Vice-Chancellor James, p. 84, cited in *Paterson's Trustees* v. *Brand*, December 9, 1893, 31 S.L.R. 200. The result was that the term "survivors" used in the deed must be held to mean "others," and therefore the children of the sister who had predeceased Mrs Stenhouse would take a part of her share—*Ramsay's Trustees* v. *Ramsay*, December 21, 1876, 4 R. 243.

At advising—

LORD JUSTICE-CLERK—In this case counsel for the third and fifth parties referred us to a case of *Ward* v. *Lang* which seems to me to be quite undistinguishable from this. I think, therefore, that our decision must be to the same effect.

LORD YOUNG—There may be some difficulty in distinguishing *Paterson's Trustees* from *Ward* v. *Lang*, but I think that it is impossible to distinguish this. I think, therefore, that we must follow *Ward* v. *Lang*, which, as Lord Rutherfurd Clark observed, expresses the settled rule of construction.

LORD RUTHERFURD CLARK—I also think that we must follow *Ward* v. *Lang*, and give the word "survivor" its ordinary meaning.

LORD TRAYNER—I agree. If necessary I do not think it would be impossible to distinguish this case and *Ward* v. *Lang* from *Paterson's Trustees*.

The Court answered the first half of the first question and the second alternative of the second question in the affirmative, and found it unnecessary to answer the other questions.

Counsel for the First, Third, and Fifth Parties—Macfarlane.

Counsel for the Second Parties—Sym. Agents—W. & J. Burness, W.S.

Counsel for the Fourth Party—Burnet. Agent—James F. Mackay, W.S.

---

*Wednesday, March 7.*

## FIRST DIVISION.

## STEVENSON *v.* STEVENSON.

(Sequel to case reported *supra*, p. 350).

*Husband and Wife—Custody of Children—Execution pending Appeal to House of Lords—Warrant to Messengers-at-Arms to Take Children into Custody.*

A wife having presented an appeal to the House of Lords against an interlocutor ordering her to deliver up the children of the marriage whom she had surreptitiously removed from their father's house, the husband presented a petition craving the Court "to allow execution to proceed notwithstanding the appeal," and also "to grant warrant to messengers-at-arms to take into their custody the persons of the said children."

*Held* that execution should be allowed to proceed, but that the latter part of the prayer of the petition was inappropriate, the wife not being in contempt of Court.

Colonel James Stevenson of Braidwood, Lanarkshire, presented a petition to the First Division of the Court of Session on March 3, 1894, in which he stated that his wife had presented a petition of appeal to the House of Lords against the judgment pronounced by their Lordships on January 30, 1894, (*supra*, p. 350), and prayed the Court "to allow execution to proceed upon the said judgment notwithstanding the appeal, to the effect of enabling the petitioner to obtain the custody of his children, the said Samuel Delano Stevenson, Adela Florence Victoria Stevenson, and Laura Janetta Stevenson, in terms thereof; and also to grant warrant to messengers-at-arms and other officers of the law to take into their custody the persons of the said children, wherever they may be found, and deliver them into the custody of the petitioner, or any person or persons he may appoint to have and keep their custody, and authorise and require all judges-ordinary in Scotland and their procurators-fiscal to grant their aid in the execution of this warrant, and recommend to all magistrates in England and elsewhere to give their aid and concurrence in carrying this warrant into effect: Or to do otherwise as to your Lordships shall seem proper."

Argued for petitioner—In the case of *Symington*, June 11, 1874, 1 R. 1006, a prayer "to allow execution to proceed on the foresaid decrees notwithstanding the appeal (to the House of Lords), to the effect of enabling the petitioner to obtain the custody of the children of the marriage" was granted. That case did not support the latter part of the prayer here, which, however, was in terms similar to those used in the cases of the *Earl of Buchan* v. *Lady Cardross*, May 27, 1842, 4 D. 1268; *Leys* v. *Leys*, July 20, 1886, 13 R. 1223; *Hutchison* v. *Hutchison*, December 13, 1890, 18 R. 237.

Argued for respondent—(1) The *status quo* should be maintained pending the appeal—*Gray* v. *Low*, March 12, 1859, 21 D. 723; *Kirkcaldy District Committee of the County Council of Fife* v. *Howard*, July 20, 1893, 20 R. 1123. There was no suggestion that the mother was about to remove the children out of the country, or that there would be undue delay in prosecuting the appeal. (2) The health of the children, according to a letter from a qualified medical man, made it very undesirable that they should leave St Leonards-on-Sea, where they were living, and travel north in winter. (3) The latter part of the prayer was quite inappropriate to the present circumstances and unwarranted. Such a prayer was only granted where the respondent was defying the orders of the Court.