# HIGH COURT OF JUSTICIARY.

*Monday, March 4.*

(Before the Lord Justice-General, Lord Kyllachy, and Lord Low.)

## CUNNINGHAM *v.* WILSON.

(See *ante*, p. 165.)

*Justiciary Cases—Deforcement—Officer not Having His Principal Warrant with him—Knowledge of Accused that the Officer was in the Execution of his Duty.*

Certain persons were convicted in the Sheriff Court of the crime of deforcement. In a case stated for appeal the Sheriff-Substitute found it proved in fact that the sheriff officer deforced had not the principal warrant with him at the time, but that the accused knew that he was an officer of the law engaged in the execution of his duty.

*Held* that the facts proved warranted the conviction, and appeal *dismissed*.

This case, in an earlier stage, is reported *ante ut supra*.

John Cunningham, checkweighman, Hamilton, and others were found guilty, in the Sheriff Court at Hamilton, under a summary complaint at the instance of Robert Wilson, procurator-fiscal of Court, of deforcement of a sheriff officer when engaged in serving a summary ejection complaint. They appealed. It was found in fact by the Sheriff-Substitute that the sheriff officer deforced "had not with him at the time the principal complaint and warrant." The question of law for the opinion of the High Court was—Whether the facts found proved warranted the conviction?

On 7th December the High Court of Justiciary remitted the stated case to the Sheriff-Substitute to state whether he found it proved that the accused knew or had good reason to know that the sheriff officer was at the time acting in the execution of his duty.

The Sheriff-Substitute, on the remit, stated that he found it proved in fact that "they (the accused) knew he (the sheriff officer) was an officer of the law engaged in the execution of his duty in serving the summary ejection."

The Court answered the question in the case in the affirmative, and dismissed the appeal.

Counsel for the Appellants—Salvesen, K.C.—A. S. D. Thomson. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent—C. K. Mackenzie, K.C.—Younger. Agent—W. J. Dundas, C.S.

# COURT OF SESSION.

*Friday, July 5.*

## FIRST DIVISION.

## GOLLAN'S TRUSTEES *v.* BOOTH.

*Succession — Destination — Destination to "Heirs of the Body" of a Person in Life — Period when Persons composing Class to be Ascertained—Trust—Accumulation — Direction to Accumulate Implied.*

A truster by his trust-disposition and settlement directed his trustees, after the death of his father and mother and brother, to pay the residue of his estate to the "heirs of the body" of his brother, whom failing to the "heirs of the body" of his sister. The truster's brother predeceased him unmarried, and on the death of the longest liver of his father and mother, who survived him, the children of his sister, who was still in life, and was fifty-one years of age, claimed the residue of his estate.

*Held* that they were not now entitled to immediate payment as claimed, in respect that the "the heirs of the body" of the testator's sister could not be ascertained until her death, and that the trustees were bound to hold and accumulate the residue of the trust-estate until the occurrence of that event.

*Presumption—Age of Child-Bearing.*

*Opinion* by Lord Adam that on the more recent authorities a woman cannot be presumed to be past child-bearing at any particular age.

Robert John Gollan died in 1877, unmarried, leaving a trust-disposition and settlement whereby he conveyed his whole estate, heritable and moveable, to the trustees, and for the trust purposes therein mentioned. By his trust-disposition and settlement the testator provided, *inter alia*, as follows:—"(*Fourth*), On the death of both of the said John Gilbert Gollan and Mrs Jane Plumb or Gollan (the testator's father and mother) I direct my trustees out of the capital of my said estate to make payment to my sister Mrs Elizabeth Margaret Jane Gollan or Booth, wife of Karl Edmund Otto Booth, presently residing at No. 6 Chepstow Villas, Bayswater, London, of the sum of £4000 sterling, exclusive of the *jus mariti* and right of administration, and all other right of coverture or otherwise of the said Karl Edmund Otto Booth or any other husband she may marry, and in the event of the said Elizabeth Margaret Jane Gollan or Booth predeceasing her said father or mother, the said sum of £4000 shall be paid to the heirs of her body in such way and manner as she, the said Elizabeth Margaret Jane Gollan or Booth, may direct and appoint by any deed of appointment or direction executed by her, which failing the same shall be paid to

them equally, share and share alike. . . . (*Fifth*), As regards the balance or residue of the capital of my said means and estate, I do hereby specially direct and appoint that after the death of the said John Gilbert Gollan and Jane Plumb or Gollan, and of the said Brooke Bridges Gollan (the testator's brother) the said balance or residue of the capital of my estate shall be paid and made over by my trustees to the heirs of the body of the said Brooke Bridges Gollan, whom failing to the heirs of the body of the said Elizabeth Margaret Jane Gollan or Booth, whom all failing to my own heirs *in mobilibus*." . . .

The testator's father John Gilbert Gollan died on 22nd August. He was predeceased by his wife Mrs Jane Plumb or Gollan, the testator's mother. Brooke Bridges Gollan, the testator's brother, died unmarried in 1886.

The testator was survived by his sister Mrs Eliza Margaret Jane Gollan or Booth or Humphreys, who was still alive. She was twice married, 1st, to Karl Edmund Otto Booth, by which marriage she had three sons, who were all still alive; and 2nd, in 1894, to her present husband Mr Humphreys. No children had been born of her second marriage. She was born on 14th June 1850, and was consequently now fifty-one years of age.

On the death of the testator's father in 1899 Mrs Humphrey's sons claimed the residue of the testator's estate under the fifth purpose of his settlement. This claim was resisted by the trustees, and for the settlement of this question the present special case was presented for the opinion and judgment of the Court.

In the special case it was stated that Mrs Humphreys was beyond the age of child-bearing.

The parties to the special case were (1) the trustees under a certain trust-disposition and assignation by the testator's father and the testator; (2) the trustees under the testator's trust-disposition and settlement above mentioned; (3) Mrs Humphrey's sons by her first marriage,

The third parties maintained that as Brooke Bridges Gollan had died without issue they were entitled under the fifth purpose of Robert John Gollan's settlement to the residue of his estate.

The second parties maintained that they were bound to retain the residue of Robert John Gollan's estate until the death of Mrs Humphreys.

The question of law was as follows—"Are the third parties now entitled to payment of the whole residue of the trust-estate of the said Robert John Gollan?"

Argued for the second parties — The heirs of the body of Mrs Humphreys could only be ascertained at her death—*Maule*, June 14, 1876, 3 R. 831. There was nothing in the fifth purpose of the settlement to qualify the ordinary meaning of the words "heirs of the body," and the trustees were bound to hold the residue until the death of Mrs Humphreys, who might outlive her three children and leave no heirs, in which case there was a destination-over to the truster's heirs *in mobilibus*. There was no ambiguity in the words "heirs of the body"—*Ferguson* v. *Ferguson*, March 19, 1875, 2 R. 627, *per* the Lord President at p. 635.

Argued for the third parties—The testator clearly intended that on the death of the longest liver of his parents and his brother the class benefited in the fifth purpose of his settlement should immediately be ascertained. The death of the longest liver of these persons was the period of distribution to which the words "whom failing" referred—*Young* v. *Robertson*, February 14, 1862, 4 Macq. 314. The words "heirs of the body" were to be construed in the same way as "lawful children of the body" *Biggar's Trustees* v. *Biggar*, November 17, 1858, 21 D. 4: *Wood* v. *Wood*, January 18, 1861, 23 D. 338; *Ross* v. *Dunlop*, May 31, 1878, 5 R. 833; *Hayward's Executors* v. *Young*, June 21, 1895, 22 R. 757; *Winter* v. *Perrat*, February 28, 1843, 9 Cl. & F. 606; *Darbison* v. *Beaumont*, 1 Peere Williams 229. There could be no other heirs of the body of Mrs Humphreys, because she was past the age of child-bearing. At least the third parties were entitled to prevail on finding caution for the preservation of the fund to provide for the event of another child coming into existence. The trustees had no power to hold the residue; there was no direction as to the disposal of the revenue of the residue after the death of the longest liver of the truster's parents and his brother, and no direction to accumulate could be implied.

LORD ADAM—The question we are asked to decide is—"Are the third parties now entitled to payment of the whole residue of the trust estate of the said Robert John Gollan?" There are, as I understand, the present children in life, being the heirs of the body now in existence of Eliza Margaret Jane Gollan or Booth, Eliza Margaret Jane Gollan or Booth being still in existence herself. Mrs Eliza Margaret Jane Gollan or Booth is a sister of the testator. The question is, whether these children are now entitled to payment of the whole residue of the trust estate. Now, practically the only clause of the will of Robert John Gollan which we have to consider is the fifth. I cannot say that, so far as I have listened to the debate, much light is to be got from a consideration of the other clauses as to what really is the meaning of the fifth clause. By his will, which is in the form of a trust-disposition and settlement, Robert John Gollan conveys his whole estates, heritable and moveable, to certain trustees to carry out certain trust purposes; and the fourth purpose was referred to as throwing some light on this question. By it, on the death of John Gilbert Gollan the father and Jane Plumb or Gollan the mother of the testator, he directed the trustees out of the capital of his estate to make payment to his sister—that is, Mrs Booth—of the sum of £4000, exclusive of the *jus mariti*, and so on; and in the event of the said Mrs Booth predeceasing her father and mother, the sum of

£4000 was directed to be paid to the heirs of her body. Now, there is no difficulty about the meaning of the words "heirs of her body" in that clause, and there cannot be, because you have there a direction on the death of certain people that the £4000 was to be paid to his sister Mrs Booth, and failing her to the heirs of her body. Therefore the heirs of her body were ascertained in that case, because she being dead before the conditional institution could take effect the heirs of her body were a class perfectly well known. The trustees were on the death of the father and mother, in the event of Mrs Booth predeceasing them, to pay a sum to the heirs of her body—that is, the heirs of her body in the usual acceptation of the Scotch law language. So far there is no ambiguity. But the fifth clause is different, because it says with regard to the balance of the residue of the capital of his means and estate—"I do hereby specially direct and appoint that after the death of the said John Gilbert Gollan and Jane Plumb or Gollan"—that is, his father and mother —"and of the said Brooke Bridges Gollan" —that is, his brother—"the said balance or residue of the capital of my estate shall be paid and made over by my trustees to the heirs of the body of the said Brooke Bridges Gollan, whom failing to the heirs of the body of the said Elizabeth Margaret Jane Gollan or Booth, whom all failing, to my own heirs *in mobilibus*." That is the direction, and it is said that it is clear from that that there was to be immediate payment upon the event happening of the death of John Gilbert Gollan and his wife, and of Brooke Bridges Gollan. It is said that the period of distribution would arrive then, and no doubt if there had been no obstacle in the way that might very well have happened, but, if one takes the construction for which Mr Craigie contends, the heirs of the body could not be determined at the date which is alleged to be the date of distribution, because nobody could tell until the death of Mrs Booth who her heirs would be. And therefore the argument is, that as you cannot ascertain who her heirs are to be until the death of Mrs Booth, the period for distribution has not arrived. Now, it is said that that construction would necessitate a continuation of the trust, and that there was no power given to continue it. I do not think there is anything in that argument, because the trust estate is vested in trustees for certain purposes, and the trust must be continued, and is authorised to be continued, until the purposes indicated by the truster are wholly carried out. Now, if Mr Craigie's construction of the words is right there is no difficulty as far as the power of continuation of the trust is concerned, because the direction is different from that of the fourth purpose, which was to make a payment "on the death" of the testator's father and mother. "On the death" is, as soon as that event arrives. Here that is not so, but it is to be at some time "after the death." That, I think, indicates no period of time. It is to be "after" a particular death, not "on" it. I do not think anybody can doubt that the words "heirs of my body" have a perfectly well-known meaning, and I may say, are words of art in the language of the law of Scotland, the meaning being the heirs of a particular person. But it is perfectly clear and well recognised that you cannot tell who the heirs of a person are to be until that person dies. It is perfectly obvious that until a person dies nobody can tell whether they are to be survived by heirs of the body or not. Those who are now said to be the heirs may be all dead. Who can tell whether these third parties will survive their mother or not? And how can you tell who are the heirs of a person's body in the ordinary sense as it is used in the law language of Scotland until that person is dead? There is nothing to be found within the four corners of this settlement to show that the testator did not mean to use the words in their ordinary sense, or that he did not mean that the trustees should wait until Mrs Booth was dead. Therefore, upon the whole matter I am of opinion that the question must be answered in the negative.

There was another question raised, whether Mrs Booth or Humphreys, who is said to be fifty-one, is past child-bearing, so that there can be no more heirs of her body than these third parties; and it is said that that is quite enough to entitle the Court to order the money to be paid over now in the same manner as if she were naturally dead, for she is naturally dead in the sense that she cannot have more children. But I think the more recent authorities hold that a woman cannot be presumed to be past child-bearing at any particular age. Therefore I think that we cannot give effect to that contention. I am of opinion that we should answer this question in the negative.

LORD KINNEAR—I have come to the same conclusion, although, I confess, not without some hesitation. I think there is a great deal of force in Mr Kennedy's argument that this will does not, from all that we can see of its terms, appear to contemplate that the estate shall be held for an indefinite time in the hands of the trustees, with no trust purpose to be effected by their keeping it in their hands. The direction is to pay over to certain persons after the death of certain other persons, and then when that time arrives there are no trust purposes to be fulfilled by the trustees retaining the money in their hands; and there is no express direction to accumulate; and again, the intention to accumulate is hardly to be presumed unless it be expressed. I think all that suggests very forcible grounds for the conclusion which Mr Kennedy maintained. But then I do not think that the absence of a direction to make an intermediate application of the money, or of any express power to the trustees to continue to hold, creates any legal difficulty in the operation of the will. The only inference which I think can be legitimately drawn from it is an inference as to the intention of the truster, because if it be clear that the truster's intention is

that the estate is to be conveyed to certain persons who cannot be ascertained until after the lapse of a certain time, then there is a very clearly implied power and direction to the trustees to retain until that time. And if they can do nothing else with the money, it follows of necessity that they must accumulate the income for the benefit of the persons who may ultimately be entitled to it when they are ascertained. The only point therefore is, that the absence of any direction to accumulate or to make any use of the money indicates an intention that, in the event which has happened, the children shall take although their mother is still in life, and therefore, that we must assume that by "heirs of the body" the testator meant nothing more than "children." But after giving full force to the considerations which I have mentioned, I confess I do not think that they are sufficient to displace the plain meaning of the words "heirs of the body." I entirely agree with Lord Adam as to the signification in which these words must be accepted. They are, as his Lordship has said, technical words, having only one meaning, and the persons described by them cannot possibly be ascertained during the lifetime of the ancestor whose heirs are to be benefited. That being so, it does not appear to me that it is material to decide the question whether we are to proceed upon any admission of the parties as to the probability of Mrs Humphrey's having any more children than she has already. That would not enable us to know a bit better than we do now whether her existing children will be her heirs or not, because the contingency which would displace them from that position is not merely the birth of other children, but the possibility of their failing to survive their mother. We cannot hold, and I suppose that even the learned counsel who asks us to proceed upon an admission, as of fact, that there will be no more children, would hardly ask us to accept an admission that as matter of fact the existing children will not die before their mother. But if they do, they will not be their mother's heirs. Apart altogether, therefore, from that point, I agree with Lord Adam that the question should be answered in the negative.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court answered the question in the negative.

Counsel for the First and Second Parties—W. Campbell, K.C.—Craigie. Agents—Forbes, Dallas, & Co. W.S.

Counsel for the Third Parties—Jameson, K.C.—Kennedy. Agent—Lockhart Thomson, S.S.C.

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*Tuesday, July 9.*

## SECOND DIVISION.

## GLASGOW CENTRAL STORES *v.* GOODSON.

*Process—Appeal—Competency—Interlocutor Limiting Proof to Writ—Court of Session Act* 1825 (*Judicature Act*) 6 *Geo. IV. c.* 120, *sec.* 40.

A sheriff pronounced an interlocutor allowing a proof by writ, and containing no finding as to expenses. The defender appealed under section 40 of the Judicature Act. *Held* that the interlocutor was not appealable, and appeal *dismissed* as incompetent.

The Glasgow Central Stores, Limited, having their registered office at 8 Hill Street, Edinburgh, proprietors of certain heritable subjects in Glasgow, brought a petition in the Sheriff Court of Lanarkshire at Glasgow praying the Court to ordain Alfred Goodson, mantle manufacturer, Glasgow, to flit and remove himself, servants and gear furth the premises under pain of ejection.

The pursuers averred that certain agreements for lease entered into between the pursuer's author Hugh Hutchison Gardiner and the defender, and proponed by the defender as his title to occupy the premises, constituted no title in the defender to remain in the subjects in defiance of the rights or contrary to the desire of the pursuers, in respect that these agreements for lease contained no definite ish, or any ish capable of definite ascertainment, and therefore were not binding on the pursuers as singular successors of the granter.

The defenders averred that the ish in the agreement of lease had been fixed by a separate agreement between the pursuers' authors and the defender, to the effect that the lease should be for three years, and that this had been followed by possession and *rei interventus*. The defenders also averred that the agreement of lease appeared *ex facie* of the defenders' disposition, and that the defenders were personally barred by their knowledge of the existence of the agreement of lease at the date of their acquisition of the property from questioning the pursuers' title or insisting in the action of removing.

The Sheriff-Substitute (GUTHRIE) on May 10th 1901 repelled certain of the defenders' pleas-in-law, *quoad ultra* allowed the defender a proof by writ of the lease for three years averred in the defences, and fixed a diet for the proof. There was no finding as to expenses in the interlocutor.

On appeal the Sheriff (BERRY) on May 24th 1901 adhered to the judgment of the Sheriff-Substitute, and remitted to him for further procedure.

The defender appealed to the Court of Session. The pursuers objected to the competency of the appeal.

Argued for the pursuers — The appeal was incompetent. The interlocutor was