

fourteen days after the process has been received by the Clerk of Court, print and box the note of appeal, record, interlocutors, and proof, if any; . . . and if the appellant shall fail, within the said period of fourteen days, to print and box or lodge and furnish the papers required as aforesaid, he shall be held to have abandoned his appeal, and shall not be entitled to insist except upon being reponed as hereinafter provided."

Section 3 (3) of the Act of Sederunt enacts:—"It shall be lawful for the appellant, within eight days after the appeal has been held to be abandoned as aforesaid, to move the Court during session . . . to repone him to the effect of entitling him to insist in the appeal; which motion shall not be granted by the Court . . . except upon cause shown and upon such conditions as to printing and payment of expenses to the respondent or otherwise as to the Court . . . shall seem just."

This was an appeal against an interlocutor of the Sheriff of Aberdeen (CRAWFORD) dismissing an appeal against an interlocutor of the Sheriff-Substitute there (D. ROBERTSON), whereby an interim interdict granted against the appellant was declared to be perpetual. The process was received by the Clerk on 29th February 1904, but the papers were not printed and boxed until the 2nd March.

The appellant moved in the Single Bills to be reponed, and explained that the agent's clerk in charge of the cause had counted off the fourteen days allowed for having the papers printed and boxed upon a diary which omitted Sundays, and he had consequently exceeded the period by two days. He argued that the matter was entirely in the discretion of the Court, and as no hurt was being done to the respondent, and there was no gross carelessness to be punished, it would be inequitable to make him suffer the penalty entailed by the omission—*Walker v. Reid*, May 12, 1877, 4 R. 714, 14 S.L.R. 502; *Boyd, Gilmour, & Company v. Glasgow and South-Western Railway Company*, November 16, 1888, 16 R. 104, 26 S.L.R. 84.

Argued for the respondent—There was no discretion in the Court to waive the requirements of the Act of Sederunt, and reponing was only competent upon cause shown. Such an excuse as was here offered was quite insufficient—*Taylor v. Macilwain*, October 18, 1900, 3 F. 1, 38 S.L.R. 1; *Bennie v. Cross & Company*, March 8, 1904, 41 S.L.R. 381.

LORD PRESIDENT—I am of opinion that, subject to paying the expenses of this appearance, the appellant should be reponed. It is to be observed that there was no gross carelessness. Unfortunately the agent's clerk used a diary of a peculiar nature which the agent himself did not examine, and by which the clerk was misled. It is not as if the matter had been wholly overlooked, and I think that to refuse the reponing would be too severe a penalty for the inadvertence of the clerk.

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

The Court reponed the appellant upon payment of two guineas of expenses, and sent the case to the roll.

Counsel for the Appellant—W. T. Watson. Agents—Macdonald & Stewart, S.S.C.

Counsel for the Respondent—Munro. Agent—Andrew Urquhart, S.S.C.

Thursday, March 17.

FIRST DIVISION.

CRIGHTON AND OTHERS (FORREST'S TRUSTEES) v. MACDONALD AND OTHERS (MITCHELL'S TRUSTEES) AND OTHERS.

Succession—Vesting—Conditional Institution of Issue.

A mutual trust-disposition and settlement by spouses provided for payment, on the death of the survivor of them, of the interest of a sum of money to each of three of the wife's sisters, and on the death of each of the sisters, or the death of the surviving spouse, if any, of the sisters predeceased, for payment of the three several principal sums among the children of the said three sisters and a deceased sister, subject to apportionment, and failing apportionment then equally among them, "the issue of such of the said children as shall predecease the foresaid respective terms of payment being entitled to the share which would have fallen to their predeceasing parent."

Held (following dicta in Bowman v. Bowman, 1 F. (H.L.) 69, 36 S.L.R. 959) that vesting was postponed until the term of payment.

By antenuptial contract of marriage between William Forrest, younger of Easter Ogil, and Miss Agnes Marnie, daughter of James Marnie, Esquire, of Deuchar, dated 24th June 1850, the said Miss Agnes Marnie conveyed to trustees the whole means and estate then belonging to her, or to which she might succeed during the marriage, for the purpose, *inter alia*, of payment of the income of the estate to the spouses during their joint lives, and to the survivor during his or her life. It was provided that in the event of there being no issue of the marriage it should be competent for Mrs Forrest, subject to her husband's liferent, by any deed or last will to assign or bequeath all or any part of the trust funds to such person or persons as she should think fit. There was no issue of the marriage.

By mutual trust-disposition and settlement dated 7th February 1872, and recorded 16th December, 1873, Mr and Mrs Forrest disposed and assigned to trustees the whole means and estate which should belong to

them respectively or to which they might have right at their respective deaths, in trust for the purposes therein specified, *inter alia*—“*Third*. On the death of the survivor of us the said Mrs Agnes Marnie or Forrest and William Forrest, for payment to each of my (the said Mrs Agnes Marnie or Forrest) three surviving sisters, Isabella Marnie, Charlotte Marnie, and Mrs Jemima Marnie or Gardner, wife of the Reverend Alexander Gardner, minister of the parish of Brechin, during all the days of their respective lives, of the interest or annual produce of the sum of one thousand pounds sterling, payable in equal portions at the terms of Whitsunday and Martinmas, commencing the first payment at the first term after the death of the survivor of us, for the period preceding. *Fourth*. At the first term of Witsunday or Martinmas after the death of each of my said three sisters, or at the first term of Whitsunday or Martinmas after the death of the survivor of us, if my said sisters or any of them predecease us, for payment of the fee of the said three several principal sums of one thousand pounds among the children of my said three sisters and my deceased sister Mrs Mary Marnie or Sandeman, in such proportions, at such times, and under such conditions as I may appoint by a writing under my own hand, without the concurrence of my said husband, though he may be then in life, and failing such appointment, then among the said children equally, the issue of such of the said children as shall predecease the foresaid respective terms of payment being entitled to the share which would have fallen to their predeceasing parent. *Sixth*. The whole means and estate hereby conveyed, excepting always the three foresaid sums of £1000 mentioned in the third and fourth purposes hereof, and the paraphernalia of my said wife, shall, subject always to the liferent right hereby conferred on her, belong to and be subject to the disposition of me the said William Forrest.”

Mrs Forrest died on 4th November 1873, survived by her husband and her three sisters. James Wilkie Crighton, sometime farmer at Mains of Finhaven, Forfarshire, and afterwards residing at Guildford, Surrey, and others, the trustees under the mutual trust-disposition and settlement, accounted to Mr Forrest for the rest of the estate and retained the sum of £3000, the income from which they continued to pay him. She was also survived by the following nephews and nieces, viz.—(1) James Marnie Sandeman, (2) Mrs Mary Sandeman or Mitchell, (3) Mrs Jane Morrison Sandeman or Thomson, the three children of her deceased sister Mrs Mary Marnie or Sandeman, and (4) James Alexander Gardner, the only child of her sister Mrs Jemima Marnie or Gardner.

Miss Charlotte Marnie died unmarried on 21st April 1886 and Miss Isabella Marnie also died unmarried on 7th June 1886. Mrs Gardner died on 17th December 1890.

James Marnie Sandeman died without issue on 2nd May 1883, leaving a will in favour of his sisters Mrs Mitchell and Mrs

Thomson, dated 11th October 1862. Mrs Mitchell died without issue on 25th November 1900 leaving a trust-disposition and settlement under which William Kid Macdonald and others were the trustees. Mrs Thomson was still living at the date of this case.

James Alexander Gardner died unmarried and intestate on 25th September 1887, and was succeeded by his father the Reverend Alexander Gardner who died on 12th April 1893 leaving a trust-disposition and settlement.

On the death of Mr Forrest on 16th November 1902 differences arose as to the rights of parties in the £3000 held by the trustees under the mutual trust-disposition and settlement, turning upon the question when vesting took place. A special case was therefore prepared and presented to the Court, in which the trustees under the mutual trust-disposition and settlement were the first parties, Mrs Mitchell's trustees and Mr Gardner's trustees were the second parties, and Mrs Jane Morrison Sandeman or Thomson the sole surviving niece was the third party.

The question of law submitted for the opinion of the Court was—“Did the three sums of £1000 each vest on Mrs Forrest's death in her four nephews and nieces then alive? or Was vesting postponed until the death of the liferenter Mr Forrest, so that the whole sum vested in the third party?”

The second parties maintained that vesting took place on Mrs Forrest's death, and argued—There was a general presumption in favour of immediate vesting, and though the term of payment was here postponed it was recognised that the time for actual payment was not of importance in the question—*Thompson's Trustees v. Jamieson*, January 26, 1900, 2 F. 470, at p. 493, 37 S.L.R. 346; *Ross's Trustees*, December 18, 1884, 12 R. 378, 22 S.L.R. 232. That was especially the case where as here it was a class, viz., nephews and nieces, who were to be favoured. The postponement of payment was therefore not to be pressed. There was recent authority far these parties' contention—*Matheson's Trustees*, February 2, 1900, 2 F. 556, 37 S.L.R. 409; *Ogle's Trustees v. Ogle*, February 4, 1904, *ante*, p. 284; *Waugh's Trustees*, March 3, 1904; and the case of *Bowman v. Bowman*, July 25, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959, was decided the same way though on a specialty, and though some *dicta* in it might be considered against. These *dicta*, however, were not to be pressed too far, for they were not intended to establish a universal rule overriding previous cases, but merely to guard against the evil that the cases were getting too stereotyped and not sufficient weight was being given to the testator's intention. The presumption against intestacy was favourable, for if the opposite contention were upheld there might have been intestacy under it.

The third party maintained that vesting only took place on the death of Mr Forrest, and argued—The wording of the settlement was in favour of vesting being postponed, for there was no other term mentioned

save the term of payment. The question was also foreclosed by decision—*Bowman cit. dicta*; *Parlane's Trustees v. Parlane*, May 17, 1902, 4 F. 805, 39 S.L.R. 632; *Gavin's Trustees v. Johnston's Trustees*, July 20, 1903, 40 S.L.R. 879.

At advising—

LORD M'LAREN—The case sets forth that under the antenuptial contract of marriage of Mr and Mrs Forrest the wife's estate was conveyed to trustees primarily for securing payment of the income of the trust estate to the spouses during their joint lives and to the survivor for life, and in the event of there being no issue of the marriage, that the fee should be subject to Mrs Forrest's disposal by deed or will as she should think fit. The case, however, only relates to a sum of £3000, part of the wife's estate, which she disposed of by a mutual trust-deed executed by Mrs Forrest and her husband, because as to all the residue of her estate except this sum and the paraphernalia it was provided that it should belong to and be subject to the disposition of Mr Forrest.

The destination of the £3000 in question is very clearly expressed. To each of Mrs Forrest's surviving sisters she bequeathed the interest or annual produce of one thousand pounds, payable at the usual terms, and as to the capital she provided that at the first term after the death of each of her said three sisters, or at the first term after the death of the survivor of the spouses in the case of any of the sisters predeceasing the spouses, payment of the said three principal sums of one thousand pounds should be made to the children of her said three sisters and her deceased sister Mrs Sandeman, subject to apportionment, and failing apportionment then "among the said children equally, the issue of such of the said children as shall predecease the foresaid respective terms of payment being entitled to the share which would have fallen to their predeceasing parents."

There is no provision of survivorship and no destination-over except to the issue of the testator's nephews and nieces in the terms which I have quoted. Mrs Forrest was survived by two nephews and two nieces, children of her sisters, but three of these died in the lifetime of Mrs Forrest, and therefore predeceased the term of payment. The sole survivor is Mrs Jane Sandeman or Thomson, the third party to the case. The representatives of a deceased nephew and a deceased niece are the second parties to the case, and their claim is founded on the assumption that the fee of the fund of £3000 vested in such of Mrs Forrest's nephews and nieces designed in the will as survived the testator Mrs Forrest.

If the question were open to consideration it seems to me that there is a good deal of equity in the view that a share vested in each nephew or niece who survived Mrs Forrest, at least to the extent that these persons might dispose of their shares in case of their death without issue. But the

effect of a substitution of children to parents was considered by the House of Lords in the recent case of *Bowman*, and although the decision of the House in the particular case was in favour of vesting, because the context showed that such was the testator's meaning and intention, their Lordships expressed clear opinions to the effect that a destination in favour of issue of the immediate legatees ought to be construed like any other destination, and that *prima facie* a substitution of issue to parents was suspensive of vesting. Now in the present case I have been unable to find in the testamentary deed of Mr and Mrs Forrest any clauses or expressions which tend to displace the ordinary construction. This is not even left to implication, because the substitution is in express words to the issue of such of the "said children as shall predecease the foresaid respective terms of payment." The term of payment as to the entire fund (in the events which happened) is the death of Mr Forrest, 16th November 1902, and it follows from the principle of interpretation which has been settled by the highest authority that in the absence of any controlling words of a contrary tendency no one could acquire any right to the fee of the £3000 who did not survive Mr Forrest.

I am therefore of opinion that we ought to answer the question in terms of the second alternative—that is, in favour of the third party to the case.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court answered the first alternative question in the negative, and the second in the affirmative.

Counsel for the First Party—Carnegie. Agents—Lindsay, Howe, & Company, W.S.

Counsel for the Second Parties—Inglis. Agents—J. C. & A. Steuart, W.S.

Counsel for the Third Party—Macphail. Agents—Lindsay, Howe, & Company, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, March 15.

(Before the Lord Justice-General, Lord Adam, and Lord M'Laren.)

WHYTE v. PATERSON.

Justiciary Cases—Complaint—Relevancy—Specification of Statute Constituting Offence—Public-House

A complaint set forth that a grocer holding a certificate for the sale of exciseable liquors "did on 24th September 1903 . . . give out from his said licensed premises . . . one gill of whisky after ten o'clock at night . . . contrary to his said licence certificate and to the Public-Houses Acts Amend-