

Wednesday, May 26.

SECOND DIVISION.

SCOTT'S TRUSTEES v. SCOTT AND OTHERS.

Succession—Legacy to a Class—Period of Distribution—Date when Members of Class Ascertained—Nati et Nascituri.

A testator in his settlement directed his trustees to "retain and invest in their own names the sum of £10,000 for the younger children of my nephew" B . . . "and apply the income thereof for their behoof and maintenance, and convey and make over the capital of said sum of £10,000 to said younger children equally, share and share alike, on said children, if males, attaining the age of twenty-one years complete, and if females, on their attaining said age or being married, whichever event shall first happen." By a codicil the testator made a provision of £8000 in favour of "the lawful issue of the body of my nephew" B under conditions as to the payment thereof as the bequest above set forth.

Held that the period of distribution of the said funds respectively was when the oldest child of the respective classes attained majority, and that children born thereafter were not entitled to share.

The late Major-General James Corse Scott died on 6th March 1890, domiciled in Scotland, leaving a trust-disposition and settlement, dated 20th March 1889, and relative codicils. By the said trust-disposition and settlement the truster directed, *inter alia*, "(Seventh) That my trustees shall retain and invest in their own names the sum of £10,000 sterling for the younger children of my nephew the said John Scott of Sinton—that is, the whole lawful children of the said John Scott other than the child or heir who shall succeed or be entitled to succeed to the said estate of Sinton—and apply the income thereof for their behoof and maintenance, and convey and make over the capital of said sum of £10,000 to said younger children equally, share and share alike, on said children, if males, attaining the age of twenty-one years complete, and, if females, on their attaining said age or being married, whichever event shall first happen." It was further provided that "the fee of none of the capital sums or shares of residue hereinbefore destined shall be payable by my trustees, nor shall the same, or any part thereof, or any interest therein, vest, or be held to have vested in the recipients thereof, or in any of the lawful issue of such recipients, unless and until such recipients or their lawful issue, if males, shall have attained the age of twenty-one years complete or, if females, shall have attained such age or been married, whichever event shall first happen, but nevertheless my trustees shall have power to advance and pay to or for behoof of all or any of such recipients or their

lawful issue, the whole or any part of the free annual income accruing upon the presumptive share or shares of any such capital sums or shares of residue to which they or any of them or their issue are respectively entitled to under these presents, or any part of such capital sums or shares of residue, not exceeding one-third thereof, for the advancement in life of them or any of them."

By codicil dated 21st February 1890 the truster further directed the trustees to invest in their own names the sum of £8000 sterling in trust for the liferent alimentary use allenarly of Mrs Eugenia Margaret Cameron Money or Scott during her widowhood, and on her death or forfeiture of liferent by re-marriage (which happened on 15th October 1890) he directed and appointed his trustees "to hold, invest, pay, convey and make over the said sum of £8000 to and for the lawful issue of the body of my nephew the said John Scott of Sinton, equally among them, share and share alike, payable said shares on said children, in the case of males, attaining the age of twenty-one years complete, and, in the case of females, on their attaining said age or being married, whichever event shall first happen, and to apply the income of said shares for behoof of such issue during their minorities, or, in the case of females, until marriage." The liferentrix, the said Mrs Eugenia Margaret Cameron Money or Scott, having married on 15th October 1890, forfeited her interest under the said provision.

Mr John Corse Scott of Sinton had the following children:—John Michael Corse Scott, born 25th February 1882; Marianne Katherine, born 22nd April 1883; Violet, born 15th April 1884; Esther, born 25th October 1885; James Douglas, born 20th November 1886; Leila Jane, born 10th March 1889; and Alexander, born 25th November 1894. Of these children, Alexander, the youngest, was thus born after the death of the truster, the whole of the other children having been born before that event. None of the children were married, and the five eldest had now attained majority.

Question having arisen as to the rights of parties a Special Case was presented to the Court.

The parties to the Special Case were (1) the trustees; (2) the younger children of the said Mr Scott of Sinton, *i.e.*, his whole children except the eldest son the said John Michael Corse Scott (who was entitled to succeed to the said estate of Sinton under the entail thereof), and except his youngest child, the said Alexander Corse Scott, who was born after the truster's death; (3) the said John Michael Corse Scott; (4) the said Alexander Corse Scott, with consent and concurrence of his father.

The following statement of the parties' contentions is taken from the Special case:—

"The first parties maintain that under the seventh purpose of the settlement the parties intended to be benefited are the whole children of Mr Scott of Sinton born,

or to be born, other than the child or heir who may succeed, or shall be entitled to succeed, to the estate of Sinton, and that therefore the said provision cannot be paid over until it is seen whether Mr Scott of Sinton shall, either by his present or any subsequent marriage, have other children. The first parties similarly maintain, in regard to the provision in the codicil of 21st February 1890, that the provision in favour of 'the lawful issue of the body of my nephew the said John Scott of Sinton,' is a provision in favour not only of the existing issue but includes any issue of Mr Scott who may hereafter come into existence. The trustees therefore maintain that it is their duty to hold the funds disposed of by these two provisions until it is ascertained that there is no possibility of the class being further increased.

"The second parties maintain that by the seventh purpose of the settlement the trustor intended to benefit only such of the children of Mr Scott of Sinton (other than the heir entitled to succeed to the estate) as were in existence at the date of his death; and that the youngest child of Mr Scott, Alexander, is therefore excluded from the benefit of the said provision. Alternatively, they maintain that the persons intended to be benefited under the said provision are the whole children of Mr Scott (other than his eldest son) alive at 22nd April 1904, being the date when Marianne Katherine Corse Scott (the eldest of their number) attained twenty-one and so became entitled to payment of her share in the said provision, and that each of the other members of the class in like manner is entitled to payment of his or her share on attaining twenty-one, or, in the case of females, marrying before that age.

"The second and third parties maintain, similarly, that the provision in the codicil of 21st February 1890 was intended by the trustor to operate in favour of only such issue of Mr Scott of Sinton as might be alive at the date of the trustor's death, excluding therefor Alexander, Mr Scott's youngest child, who was born subsequent to that period. Alternatively, they similarly maintain that the words 'lawful issue of the body of my nephew' mean the whole children of Mr Scott alive at 25th February 1903, being the date when John Michael Corse Scott (the eldest of their number) attained twenty-one, and that each member of the class then ascertained becomes entitled to payment of his share of the legacy in question as he or she attained or attains twenty-one, or, in the case of females, marries before that period.

"The fourth party maintains that the words 'whole lawful children' in the seventh purpose of the settlement, and 'lawful issue of the body' in the codicil of 21st February 1890, are not limited to the children or issue alive at the death of General Scott, and he therefore adopts and concurs in the alternative contentions of the second and third parties."

The opinion and judgment of the Court was requested upon the following questions—"(1) Are the 'younger children' of Mr

Scott of Sinton, in whose favour the provision of £10,000 in the seventh purpose of General Scott's settlement is conceived, (a) only those alive at the death of the trustor, or (b) only those alive at the period when the eldest of the class attained majority, or (c) all children born or who may hereafter be born to Mr Scott, except the heir entitled to succeed to Sinton estate? (2) Are the beneficiaries under the provision of £10,000 in the seventh purpose of General Scott's settlement entitled to payment of their respective shares of the said provision as they respectively attain twenty-one, or, in the case of females, marry before attaining that age? (3) Are the 'lawful issue of the body' of Mr Scott of Sinton, in whose favour the provision of £8000 in the codicil of 21st February 1890 is conceived, (a) only those alive at the death of the trustor, or (b) only those alive at the period when the eldest of the class attained majority, or (c) all children born or who may hereafter be born to Mr Scott? (4) Are the beneficiaries under the provision of £8000 in the codicil of 21st February 1890 entitled to payment of their respective shares of the said provision as they respectively attain the age of twenty-one, or, in the case of females, marry before attaining that age?"

Argued for the first parties—The trustees must hold till there was no possibility of the class being further increased. The gifts in favour of the children of John Scott were gifts to all his children whenever born. The English rule, limiting the gift to children born before the date when the oldest child attained majority, was merely arbitrary, and had not been adopted in the law of Scotland—*Hope Johnstone v. Sinclair's Trustees*, November 1, 1904, 7 F. 25, 42 S.L.R. 30; *Ross v. Dunlop*, May 31, 1878, 5 R. 833, 15 S.L.R. 580; *Hayward's Executors v. Young*, June 21, 1895, 22 R. 757, 32 S.L.R. 559.

Argued for the second and third parties—(1) The youngest child was excluded. The testator intended the classes to be fixed at the date of his death; (2) at all events, children born after the date when the oldest child attained majority were excluded. The classes must be ascertained at the respective periods of distribution—*Wood v. Wood*, January 18, 1861, 23 D. 338; *Buchanan's Trustees v. Buchanan*, May 26, 1877, 4 R. 754, 14 S.L.R. 503. These decisions absolutely ruled the present case. Here the date of distribution was, respectively, the date when the oldest child of the respective classes attained majority, for at that time he or she became entitled to payment. The date of first payment fixed the total number of legatees. If *post nati* were to be entitled to share, that would involve repetition, which was finally negated in *Ross v. Dunlop (sup. cit.)*. *Hope Johnstone (sup. cit.)* was altogether different. In that case there was no provision for division or payment in any of the events that had already happened. Trustees were directed "to hold" a fund in trust until the death of a life-renter. Before that date the class could not be definitely ascertained.

Argued for the fourth party—The fourth party was born before the eldest child of either class attained majority. Having therefore been in life before the respective periods of distribution arrived, he was entitled to share in both funds.

LORD JUSTICE-CLERK—I think that this case must be decided in accordance with the views maintained by the second parties. The question might have been one of some difficulty if it had not been clearly and distinctly decided by authority. There may be some hardship in holding that *post nati* in the same position as children who are already born should not share. It is difficult to believe that that could have been the intention of the testator. But the only way in which the matter can be worked out is by holding that the class of beneficiaries is to be determined at the time when the first payment comes to be made. The *post natus* here must come in, because he was born before that period was reached. We must hold in answer to the first question that the children entitled to share are those alive at the period when the eldest of the class attained majority, and in answer to the second question that the beneficiaries are entitled to payment of their shares as they respectively attain twenty-one, or in the case of females, marry before attaining that age.

LORD LOW—If this case had not been covered by authority I should have had some difficulty, but it is a typical case for the application of the rule of construction which was laid down in the case of *Wood v. Wood* (23 D. 338), and which has been repeatedly recognised since that decision. I accordingly agree that the questions should be answered in the way proposed by your Lordship.

LORD ARDWALL—I also concur, and in particular I agree that the question in this case has been decided by authority. The three cases of *Wood* (23 D. 338), *Buchanan's Trustees* (4 R. 754), and *Ross v. Dunlop* (5 R. 833) seem to me to settle conclusively that the children entitled to share are those in existence at the date when the eldest child attains majority.

The Court answered heads (b) in the first and third questions, and the second and fourth questions, in the affirmative.

Counsel for the First Parties—Pitman. Agents—McNeill & Sime, S.S.C.

Counsel for the Second and Third Parties—Graham Stewart, K.C.—Lyon Mackenzie. Agents—Rusk & Miller, W.S.

Counsel for the Fourth Party—Chree—Spens. Agents—R. C. Bell, W.S.

Thursday, May 13.

FIRST DIVISION.

[Sheriff Court at Perth.

CALEDONIAN RAILWAY COMPANY
 v. M'GREGOR.

Complaint—Instance—Railway Prosecution—Concurrence of Procurator-Fiscal—Trespassing upon Railway—Caledonian Railway Act 1898 (61 and 62 Vict. cap. clxxxviii), sec. 36.

Where a prosecution is not for a crime at common law, but merely for a statutory offence, no question arises as to the concurrence or non-concurrence of the public prosecutor; the only question is as to who has the title to prosecute, and that depends on the statute which creates the offence; such title may be conferred by the statute upon a private party expressly or by inference.

The Caledonian Railway Company has a title to prosecute for the offence of trespassing upon the railway created by section 36 of the Caledonian Railway Act 1898.

Railway—Trespass—Complaint—Relevancy—Locus—Provision in Statute as to Notices—Caledonian Railway Act 1898 (61 and 62 Vict. cap. clxxxviii), sec. 36.

A complaint charged a contravention of section 36 of the Caledonian Railway Act 1898 in so far as the accused did on a date named "trespass upon the railway belonging to the complainers in the parish of Tibbermore and county of Perth at a point one mile or thereby to the north of Perth General Station . . ." It was objected that the complaint was irrelevant in respect (1) that the *locus* was not sufficiently specified, and (2) that it was not stated that notices warning persons not to trespass had been erected—the section providing that no penalty should be recoverable unless "the company shall prove to the satisfaction of the Sheriff . . . that they have painted or fixed up" such notices.

Held that the complaint was relevant, inasmuch as (1) the specification of the *locus* could leave no doubt or confusion in the accused's mind, and (2) the proviso in the statute dealt merely with procedure at the trial.

The Caledonian Railway Act 1898 (61 and 62 Vict. cap. clxxxviii), section 36, enacts—". . . Any person who shall trespass upon any of the railways, stations, works, lands, and property belonging to or worked by the company shall, without having received any personal or other warning than as hereinafter mentioned, forfeit and pay by way of penalty any sum not exceeding forty shillings for every such offence: Provided that no person shall be subject to any penalty under this enactment unless the company shall prove to the satisfaction of the Sheriff or Justices before whom