

directors must call a meeting of the company and get their approval, as a provisional matter, to the agreement which they, the directors, have proposed, and authority to proceed with this application. I agree also that this petition may be continued in order to allow these necessary steps, which should have been preliminary to it, to be taken.

LORD SALVESEN—I also agree. The machinery of this section may be set in motion in an appropriate case by any creditor or member of the company, as well as by the company itself. I think it is plain that before a creditor or member of the company can bring an application under section 120 there must have been some arrangement or compromise proposed by the creditor or member of the company to the company, and that it would never do to allow a member or a creditor who had made a provisional agreement with a third party involving the interests of the company, but without consulting the company at all, to obtain an order from the Court calling certain meetings to see whether the necessary majority in favour of this scheme could be obtained. If that is plain as regards a member or a creditor of the company, it appears to me equally to apply to the case with which we are here dealing—that of a proposed arrangement between the company and its members. In short, there must be two parties to a proposed arrangement, and before the Court can be asked to intervene there must be some evidence before the Court that a proposed arrangement of the kind embodied in the scheme has been submitted to both parties—proposed by one for the consideration of the other. So far as I can judge from this petition, nothing of the kind has been done. The scheme which has been brought forward by the directors on their own initiative alone—I shall assume at this moment entirely in the interests of the company—has never been submitted to the members of the company as such.

Strictly speaking, therefore, the petition ought to be dismissed as not brought in terms of section 120, but I agree with your Lordship in the chair that it is not desirable that we should throw it out, but should give the petitioners an opportunity of showing that there really is an arrangement proposed between the company and its members within the meaning of section 120 by submitting it to a general meeting of the company and obtaining their approval. On the other matters I also agree with your Lordship in the chair that it is desirable that we should refrain from expressing any opinion.

The LORD PRESIDENT was absent.

The Court sisted the petition *in hoc statu*, reserving all questions of expenses.

Counsel for the Petitioners (in Single Bills)—The Dean of Faculty (Dickson, K.C.)—Macmillan—(on the competency) Constable, K.C.—Hon. W. Watson. Agents—Davidson & Syme, W.S.

Counsel for the Respondent (Thomas Mackenzie)—Clyde, K.C.—Moncrieff. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for the Respondents (Wood & Others)—Clyde, K.C.—Gentles. Agents—J. & R. A. Robertson, W.S.

Wednesday, June 22.

## SECOND DIVISION.

### STEWART AND OTHERS (WATSON'S TRUSTEES) v. WATSONS.

*Succession—Election—Duty of Immediate Election—Prejudice by Delay—Provision to Widow of Annuity of £500 or such Other Sum as Trustees should Consider Reasonable, with Power to them to Vary Amount.*

A testator directed his trustees to pay to his widow until her death or re-marriage £500 per annum, or such other sum as they in their discretion should think reasonable. He added in a codicil a power to his trustees to reduce or increase or vary the amount of this provision. *Held* that as no third party could show any prejudice from the postponement of the widow's election between this provision and her legal rights she was not bound immediately to elect.

Andrew Stewart, solicitor, Glasgow, and others, the trustees and executors of the late John Watson, warehouseman, Glasgow, acting under his trust-disposition and settlement dated 28th December 1891, and relative codicils, *first parties*; Mrs Jane Bruce Nicoll or Watson, widow of the said John Watson, *second party*; Joseph Watson, eldest son of the said John Watson, *third party*; and John Alexander Watson and Jeanie Watson, the whole remaining children of the said John Watson, both being in minority, *fourth parties*, brought a special case for the determination of, *inter alia*, the second party's rights under the deceased's testamentary writings.

By his trust-disposition and settlement the testator provided, *inter alia*—“(Fourth) I direct my trustees to hold the whole residue of my means and estate, and from the income thereof to pay to my said wife, or to others, for her behoof, the sum of Five hundred pounds sterling per annum, or such other sum as my trustees in their discretion shall consider reasonable, so long as she remains my widow, for the maintenance of herself and the maintenance, education, and upbringing of such of my children as may reside in family with her, payable such annual sum half-yearly, quarterly, or in such other manner and in such sums as to my trustees shall appear most convenient and most beneficial to all concerned . . . : (Fifth) I direct my trustees during my said wife's lifetime and viduity, and after each year satisfying or providing for the allowance directed to be paid under

article fourth hereof, to pay or apply the remaining income of my trust means and estate to or for behoof of my whole children equally, and the survivors and survivor of them . . . ; (*Sixth*) In the event of the death of my said wife or of her entering into another marriage, I provide that payment of the provision under article fourth hereof shall *ipso facto* and thereafter cease, and I direct my trustees thereupon to include such provision as income to be dealt with under article fifth hereof, and to deal with the same accordingly; (*Seventh*) I direct my trustees after the death of my said wife, or on her re-marrriage should she marry again, . . . to hold the whole residue and remainder of my means and estate for behoof of my whole children, . . . and to pay the share falling to each beneficiary under this provision on his or her attaining the age of 25 years complete: And I provide and declare (*first*) that the foresaid annual provision to my said wife shall be purely alimentary, and shall not be arrestable or assignable or capable of anticipation or affectable by her debts or deeds or the diligence of her creditors . . . ; (*third*) that the provisions herein conceived in favour of my wife and children are provided and shall be accepted by them respectively in full satisfaction of all claims of *terce*, *jus relictae*, legitim, and all other claims competent to them or any of them by or through my death. . . .

By a codicil dated 16th February 1897 the testator further provided as follows:—“ . . . And I hereby specially provide and declare (*first*) that my trustees shall have power in their absolute discretion to reduce or to increase or to vary the amount of the provision contained in the fourth purpose or article of my said trust-disposition and settlement for behoof of my said wife; and (*second*) that in the event of my said wife or children, or any of them, claiming or having claimed for them their legal rights in respect of my death, the person or persons so claiming or having claim made for them shall respectively for themselves and their issue, children, and heirs, executors, and representatives whomsoever, *ipso facto* and absolutely amit and forfeit all right, title, and interest whatsoever under or in respect of my said trust-disposition and settlement and this codicil to the same extent and effect as if such persons claiming or having claim made as aforesaid had predeceased me without issue. . . . ”

The estate left by the testator consisted of

1. Heritable properties valued at . . . . .	£ 4,650 0 0
2. Bonds and dispositions in security over various heritable properties in Glasgow . . . . .	22,000 0 0
3. Moveable property . . . . .	3,967 11 6
Making gross estate amounting to . . . . .	£30,617 11 6
The debts due by the testator amounted to . . . . .	528 0 2
Leaving net estate of . . . . .	£30,189 11 4

subject to Government duties. The annual

income of the estate amounted to £900 or thereby.

The case stated—“ At the request of the second party the first parties submitted to her for consideration a statement of the whole estate showing approximately her legal rights, but she declined either to claim her legal rights or to accept the testamentary provision in her favour. The first parties were willing and offered to pay the second party an allowance at the rate of £500 per annum, but the second party, after consultation with her own law agent, requested that the allowance should be at the rate of £490 per annum, lest by acceptance of the full £500 she should be committed to acceptance of the testamentary provisions made for her.”

The *first question* submitted to the Court was—“ Is the second party bound now to declare her election either to accept the testamentary provision in her favour under the said trust-disposition and settlement and codicils, or to claim her legal rights?”

Argued for the first parties—The widow was bound to make her election at once. It was not necessary for the trustees to aver special reasons for an immediate election. The material for her choice had been offered to her, and the election must be made even though contingencies attached to some of the provisions in her favour—Fraser, Husband and Wife, vol. ii, pp. 1000 and 1032; *Keith's Trustees*, July 17, 1857, 19 D. 1040.

Argued for the second party—Present election was not only unnecessary, it was impossible. The widow could not ascertain the value of her provisional rights, which were entirely at the mercy of the trustees—*Turnbull v. Cowan*, March 17, 1848, 6 Bell's App. 222, per L.C. Cottenham, at pp. 237 and 238. That distinguished this case from *Keith's Trustees*, *supra*, where the contingency had an ascertainable value (per Lord Ivory, at p. 1061). Here no one else could show any prejudice from the postponement of election—*Keith's Trustees*, *supra*, per Lord President M'Neill, at p. 1057. Further, no division of the estate was contemplated by the testator until his eldest child reached the age of twenty-five, and only then if that event took place after the death or re-marriage of his widow.

LORD JUSTICE-CLERK—In this case the first question which arises is—Are there any facts disclosed which render it necessary to force the widow to make an immediate election? So far as I can see there is not. There are no interests which would be prejudiced if the matters were left in their present position. This is a kind of question which always involves an appeal to the discretion of the Court, as was said by Lord Cottenham in the case of *Turnbull v. Cowan* (6 Bell's App. 222). In this case the Court would be very slow to force the widow to make an immediate election, because under this will she is in the position of not knowing the respective values of the rights between which an election is to be made.

Mr Murray suggested that the trustees were empowered to decide finally the amount of the annuity which should be paid to the widow under the will in all future time. Even if that could be maintained on the terms of the will, which I doubt very much, it can hardly be maintained in view of the power given to the trustees by the codicil to reduce or to increase or to vary the amount of the widow's provision in their absolute discretion. That is a power which must be exercised from time to time according to the circumstances in which the trustees find the estate and the parties interested from time to time. In these circumstances it would be very unfair to call upon the widow to make an election at once, and therefore I am of opinion that the first question should be answered in the negative.

LORD KINNEAR—I agree. I think it is quite obvious that to compel the widow to make a final election now would be to put her in an extremely unfavourable position, in which, so far as I can see, there is no rule of law or equity compelling us to place her. There is no definite offer made to her by her husband's will as to which she is now in a position to form an opinion whether it is for her interest to accept it, or to reject it and claim her legal rights against the will, which she can accept or reject once for all, because he leaves her an annuity, which he fixes to begin with at £500, but which he empowers his trustees at their discretion to increase or to lower as they think expedient, and he entrusts them with a further discretion to pay the annuity that they do allow her at such times as they may think fit. And therefore when the widow is called upon by the will to take or reject the benefits given to her by her husband she has no idea at all of what the future interests may be which she is called upon finally to accept or reject. I can quite understand that inconvenience and disadvantage to her may be no answer to a demand that she should either approve or reprobate the will if there were any present conflicting interests in any of the other beneficiaries under the will requiring the election to be determined now. But there is nobody interested in forcing a decision upon the widow. If she goes on taking the allowances which the trustees give her in the meantime she prejudices nobody by declining to say whether she will or will not fall back upon her legal rights in the event of the trustees finding it impossible to continue to give her the annuity she is now receiving. It is evident that she cannot approve and reprobate, and if she takes under the will in such circumstances as to prejudice other persons, or to such an extent that what she has taken cannot be restored, she will create a bar against any future claim for her legal rights. But it is not said that she has in fact determined her election by any claim that she has already made. The position of the trustees therefore is that she is not entitled to take any payment on

account of the annuity bequeathed to her under reservation of her right to elect hereafter between that and her legal rights. I do not think she is bound to surrender that right unless and until she makes a claim which involves some prejudice to other persons if it is not treated as a final act of election. In the meantime it is not alleged that she has done anything which is in itself conclusive, and I see no conflicting interests requiring us to force upon her an election which in her own interests it would be so disadvantageous for her to make at present.

The first question being answered in the negative, I agree with your Lordship that the other questions are not raised in a shape which makes it proper for us to decide them. We have very frequently held that we are not to decide in the form of a special case questions which could not have been competently brought before the Court by any other form of action, as, for example, by a declarator, and therefore that in this particular kind of process, as in others, our business is to decide litigated questions. We are not to give general advice to trustees how they are to conduct the administration of a trust during a period of future years in events which neither they nor we can foresee, and still less are we to try to remodel a testator's will in order to make its directions more clear in certain hypothetical contingencies. There seems to be no specific question really raised for decision between any of the parties except the question stated as to the widow's right of election.

LORD DUNDAS concurred.

LORD LOW and LORD ARDWALL were not present.

The Court answered the first question in the negative.

Counsel for the First Parties—Wilson, K.C.—Wark. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Second Party—Murray, K.C.—W. J. Robertson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Third and Fourth Parties—Blackburn, K.C.—W. T. Watson. Agents—Dove, Lockhart, & Smart, S.S.C.