

Friday, February 7.

FIRST DIVISION.  
STEWART'S TRUSTEES,  
PETITIONERS.

*Trust—Trustees—Resignation—Appointment of Canadian Company as Trustees—Transfer of Trust Funds.*

Trustees acting under (1) an antenuptial marriage contract between A, who at the time of his marriage was a domiciled Scotsman, and B, an English lady, and (2) a deed of settlement in English form, executed in contemplation of the marriage, presented a petition to the First Division craving the Court to appoint as trustees in room of the petitioners an incorporated trust company in Canada, to empower them to assign the trust funds to the said company, and to authorise them (the petitioners) to resign office. The petition, which was presented at the request of the spouses, stated that they (the spouses) had permanently settled in Canada, and they found it inconvenient to have the trust funds administered by trustees resident in England. There was also produced an undertaking by the company binding themselves, in the event of the petition being granted, to submit to the jurisdiction of the Court of Session in all matters affecting the trust, and assigning the chambers of certain gentlemen in Glasgow as their domicile of citation.

The Court *refused* the prayer of the petition.

*Simpson's Trustees*, 1907 S.C. 87, 44 S.L.R. 62, *distinguished* and *questioned*.

On July 19, 1912, R. B. Pearson, 6 Austin Friars, London, and others, the trustees acting under (1) an antenuptial contract of marriage in Scotch form between William Burton Stewart, advocate, Edinburgh, afterwards managing director of Norton Griffiths & Company, engineers, Montreal, Canada, and Rachel Westmacott or Stewart (therein designed Rachel Westmacott, daughter of Percy G. B. Westmacott of Rosemount, Sunninghill, Berkshire), dated 10th April and registered in the Books of Council and Session 4th May 1899, and (2) deed of settlement in English form entered into between the said P. G. B. Westmacott, W. B. Stewart, Rachel Westmacott, and the said trustees, dated 10th April 1899, presented a petition to the First Division in which they craved the Court to appoint as new trustees, under the said marriage contract and deed of settlement, a corporate company in Canada, to empower the petitioners to assign the trust funds to the said company, and to permit them (the petitioners) to resign office.

The *circumstances* are fully stated in the report by Mr Keith Maitland, W.S., Edinburgh, to whom, on 17th August 1912,

the petition was remitted by the Lord Ordinary officiating on the Bills (KINNEAR).

The *reporter* stated—"The application is made by the trustees acting under the deeds granted in contemplation of the then intended and afterwards solemnised marriage between William Burton Stewart and Rachel Westmacott or Stewart, both presently residing in Canada. . . .

"The trustees appointed under both these deeds are the same, viz., the petitioners, who are Robert Barclay Pearson, sometime advocate, Edinburgh, now of No. 6 Austin Friars, London, John Westmacott of Woodlands, Mitcham, in the county of Surrey, stockbroker, and the said William Burton Stewart and Rachel Westmacott or Stewart. . . .

"The said antenuptial contract of marriage deals with the property placed in trust by the said William Burton Stewart in contemplation of the said marriage. Its provisions may be chiefly stated as follows:— . . . (b) Provision for the said Rachel Westmacott or Stewart should she survive the said William Burton Stewart of a free yearly alimentary annuity of £750 sterling, restrictable as therein mentioned, and including an annuity payable to her from the Advocates' Widows' Fund. (c) Obligation on the said William Burton Stewart to assign and convey to the trustees securities and investments amounting to at least £25,000. (d) Direction to the trustees to hold said securities and investments in trust for the *lifereferent* alimentary use of the said William Burton Stewart, and after his death to apply the interest or so much thereof as might be required to pay the foresaid annuity to the said Rachel Westmacott or Stewart during her life. (e) Direction to the trustees on the death of the survivor of the spouses to hold the trust estate for behoof of the child or children of the marriage, and the survivor or survivors of them, and the issue of such of them as might predecease the term of payment, in fee, payable in such shares and proportions, and at such times and under such conditions, as the said William Burton Stewart should direct in writing, and failing such writing, equally among the children of the marriage and their issue *per stirpes*; the said provisions to vest only on the said children attaining the age of twenty-five, with power to the trustees pending the arrival of the period of vesting to hold the respective shares and apply the interest thereof for the maintenance and education of the children and issue, with power also to the trustees after the death of the said William Burton Stewart, subject to the payment of the said annuity or restricted annuity, to advance and pay, prior to the term of payment, to and for behoof of said children or their issue, such part not exceeding one-half of the provisions conceived in their favour as they might see proper and deem for the advantage of the said children and their issue. . . . (j) The said antenuptial contract of marriage contains the following clause regarding the invest-

ments of the trust:—‘To lend out the trust funds or any part thereof on the security of land or house property, or other heritable security, or in railway debentures, or in loan on deposit-receipt to foreign and colonial banks or banking companies, or to invest the same in the purchase of heritable property, lands, feu-duties or ground-annuals, or in the public funds of Great Britain or the colonies or dependencies of Great Britain, or in guaranteed or preference stocks, debentures, or mortgages of railways either in Great Britain, abroad, or in ordinary stocks of railways either in Great Britain or Ireland, or in or upon the bonds, debentures, debenture stocks, or other securities of any municipal corporation or public body in the United Kingdom, or in any British colony or dependency, and also in the stocks or shares (whether ordinary or preference) of any company in the United Kingdom incorporated by any special Act of Parliament or charter, and to call up, realise, and change the said investments from time to time. . . .’ (k) The said antenuptial contract of marriage further contains a declaration that it and the trusts thereby constituted shall be construed and administered according to the law and practice of Scotland, and that the rights of parties shall be regulated thereby.

“The said deed of settlement, which as before mentioned is in the English form, deals with the property placed in trust by the said Rachel Westmacott or Stewart in contemplation of the marriage. Its provisions may be shortly stated as follows:— (a) Covenant by the said Percy Graham Buchanan Westmacott to pay to the trustees thereby appointed (being the same trustees as those appointed by the said antenuptial contract of marriage) the sum of £8500, or to transfer to them securities of equivalent value. (b) Direction to the trustees to hold the trust fund thus constituted for payment of the income to the said Rachel Westmacott or Stewart for her separate use during her life, and after her death for payment of one half thereof to her said husband until his death, and the other half thereof, under the reservation stated in the said deed of settlement, until his death or until he should marry again, whichever event should first happen, and further in trust for all or any of the children or remoter issue of the marriage in such shares as the said Rachel Westmacott or Stewart might appoint, and failing appointment in trust for the children equally, who being male should attain the age of twenty-one years, or being female should attain that age or marry. (c) Provision that in the event of there being no children of the marriage the trust estate should be held in trust for such person or persons and purposes as the said Rachel Westmacott or Stewart might appoint by will, and failing and subject to any such appointment if she should survive the said William Burton Stewart in trust for her absolutely, but if the said William Burton Stewart should survive her, then in trust for such person or persons as would have become

entitled to the trust fund under the statutes for the distribution of the personal estates of intestates at the death of the said Rachel Westmacott or Stewart had she died possessed thereof intestate, unmarried, and domiciled in England, such persons to take as tenants in common in the shares in which they would have taken under the same statutes. [*The deed contained an investment clause in much the same terms as that in the marriage contract quoted supra.*] . . .

“The sum of £25,000 referred to in the said antenuptial contract of marriage was duly conveyed by the said William Burton Stewart to the petitioners by way of certain investments, which are now represented by the stocks, &c., specified in head I. of the inventory annexed to the petition, valued as at 19th June 1912 at £23,581.

“The funds in the hands of the trustees under the said deed of settlement are now represented by the stocks and others specified in head II. of the said inventory, valued as at 19th June 1912 at £11,912, 16s. 1d. . . .

“The petition narrates that the said spouses, who were at the date of their marriage domiciled, the said William Burton Stewart in Scotland, and the said Rachel Westmacott or Stewart in England, now reside in Canada, and have residences in Vancouver and Montreal, the said William Burton Stewart being managing director to Norton Griffiths & Company, Limited, engineers and public works contractors in these cities. There is produced in process a holograph letter by the spouses to the petitioners, dated 29th June 1912, in which they express their intention of residing permanently in Canada, and state that at present they are definitely resident there, and that in all probability they will remain there permanently. They further explain that it is inconvenient that their marriage trust should be administered by trustees (of whom they themselves form two) resident in England, that they desire their marriage trust investments and affairs as well as their own to be attended to in Canada where they reside, and that the marriage trustees should reside in Canada, as being more satisfactory to them and for the benefit of themselves and their children. They further state their desire that the trust funds should be transferred and invested in Canada, where trust securities yielding a higher rate of interest are obtainable, and they ask the petitioners to make the present application, and to crave the Court to ‘(1) Appoint as our new trustees under the said antenuptial contract of marriage and deed of settlement the Prudential Trust Company, Limited (of Canada), a strong trust company, incorporated by Special Act of the Parliament of the Dominion of Canada, whose head office is in Montreal, and who are licensed in the provinces of Quebec and British Columbia and others to execute the business that can be done by a trust company, and also authorised to undertake, *inter alia*, the office of trustee,

and who are in our opinion fit and proper persons to be appointed trustee; and (2) authorise' the present trustees 'to assign, transfer, and make over the existing trust securities and investments, or to realise the same and pay over the proceeds thereof to the said company, and thereafter to resign the office of trustee.' . . .

"Since the presentation of the petition there has been lodged in process a formal obligation, dated 29th July 1912, executed by the said Prudential Trust Company, Limited, under which the said company consent to act as trustee under the said antenuptial deeds, and in the event of being appointed 'bind and oblige themselves to submit to the jurisdiction of the said Court (Court of Session) in all matters relating to the trust created by the said antenuptial contract of marriage and deed of settlement, and to obey all orders of the said Court made upon us thereanent, and for that purpose we assign the chambers of Messrs Watt, Son, & Co., writers, 183 St Vincent Street, Glasgow, as our domicile of citation.' There have also been produced (1) a notarially certified extract from the minute-books of the said company of a meeting of the board of directors, held on 13th December 1912, under which Farquhar Robertson and B. Hal Brown, two of the directors, and James Elmsly, the secretary of the company, are authorised, *inter alia*, to sign all deeds and instruments which the company in its capacity as trustee may require to sign, and to submit to the jurisdiction of the Court of Session in all matters relating to the trust; and (2) a print of the Act of Incorporation of the company, which contains, *inter alia*, the following clauses:—'9. The company shall invest trust moneys as follows, and may manage, sell, or dispose of such investments as the terms of the trust requires— (a) upon first mortgages of or hypothecs upon improved freehold property of ample value in Canada, the British Empire, or in the United States, and may accept personal property or covenants by way of collateral security thereto; provided, however, that investments in any country other than Canada shall be limited to moneys received from such country. (b) In the stock, funds of Government securities of Canada, or of any province of Canada, or of the United States, or guaranteed thereby respectively, or in bonds or debentures of any municipal corporation in any such province other than municipal corporations having a population of less than two thousand, or an annual rate of assessment exceeding two cents. on the dollar, exclusive of school tax, or in the bonds and debentures of any school district in any such province, or in the public stock, funds, or Government securities of the United Kingdom, or of any of the colonies or dependencies thereof. (c) In such securities as are authorised by the terms of the trust. 2. Nothing in this section shall prevent the company from holding securities of any other kind which form or are part of any trust estate which comes into its hands; and it may hold such secur-

ities subject to the trusts and legal obligations attached thereto; but in the case of the realisation of any portion thereof the proceeds shall be invested as herein directed, unless the will, deed, order, or instrument creating the trust provides otherwise. 10. The moneys and securities of any such trust shall always be kept distinct from those of the company, and in separate accounts, and so marked for each particular trust as always to be distinguished from any other in the registers and other books of account to be kept by the company, so that at no time shall trust moneys form part of or be mixed with the general assets of the company, and the company shall, in the receipt of rent, and in the overseeing and management of trusts and other property, keep distinct records and accounts of all operations connected therewith: . . . 11. Moneys, properties, and securities received or held by the company upon trust or as agent shall not be liable for the debts or obligations of the company. . . . 16. The company shall prepare, and annually transmit to the Minister of Finance, a statement in duplicate, verified by the oath of the president or vice-president, and of the manager or secretary, setting forth the capital stock of the company, the proportion thereof paid-up, the assets and liabilities of the company, the trust property held by it, and such other details as the minister requires, and such statements shall be made up to the 31st day of December in each year.

"It is necessary for the petitioners to obtain the authority of the Court to enable them to carry out the course proposed, and there is precedent for an application of the kind so far as relating to a Scotch marriage-contract trust. In the case of *Simpson's Trustees* (reported in 1907 Session Cases on page 88) authority was granted to the trustees under a Scotch antenuptial contract of marriage to resign, and the Court appointed certain individuals resident in Canada to be trustees subject to their granting an obligation to submit to the jurisdiction of the Court of Session very much in the same terms as the obligation which has been produced in the present process, and also authorised the trust funds to be transferred to Canada. In the present case it may be noted that under the investment clauses in both deeds the present trustees have full powers of investment in Colonial securities.

"The reporter has, however, considerable difficulty in the present case upon two points.

"The first is with regard to the trust created by the deed of settlement. This deed, as before stated, is in English form, and it appears to the reporter that the law of England might require to be invoked in order to regulate the carrying out of the trust. The trustees under the two deeds are the same, but the trust funds are distinct, and the provisions in the two deeds regarding the disposal of the respective trust funds are different. They constitute in effect separate trusts,

and the funds have been kept separate. The ultimate beneficiaries under the deed of settlement will in certain events require to be ascertained according to English law. The reporter is in these circumstances doubtful as to the power of the Scotch Courts to alter the administration of the trust created by the deed of settlement, and he thinks it proper to bring the point before your Lordships.

"The second point arises in connection with the appointment, suggested by the petitioners, of the Prudential Trust Company, Limited, as trustee. So far as the information before the reporter goes, the company would appear to be financially sound, but on the information at his disposal he does not feel himself in a position to state any definite opinion on this subject. As regards its powers, the reporter has examined the Act of Incorporation, of which a print has been lodged in process, and he refers to the clauses therein, which are quoted above, which show that under its Act it is authorised to act as a trustee on estates either under deeds or under appointment by any court. So far as the reporter is aware, however, there is no precedent in Scotland for the appointment by the Court of an incorporated company as a trustee under a private trust. There is no recognition of such a principle under the Trusts Acts, and it seems to the reporter that in a Scotch trust to be administered in Scotland such an appointment may be incompetent, although the principle of an incorporated company acting as trustee is recognised in England and also in Canada. The point is one which the reporter also thinks it necessary to bring before your Lordships."

Argued for petitioners—*Esto* that the deed of settlement was an English deed, and that questions of English law might arise in administering the trust, that did not constitute the trust an English trust. The domicile of the husband at the time of the marriage was Scotch. Moreover, the intention of the spouses was that the trust should be executed as one trust. The trustees were the same, and the trust purposes were to be carried out together. Further, no different method of investment was to be followed *quoad* the settled funds. *Esto* that the company was domiciled in Canada, certain of its directors were resident in London, and it had undertaken to submit itself to the jurisdiction of the Court of Session in all matters affecting the trust. It was also under statutory obligation to keep the trust funds separate from its own funds, and to render annually accounts to the Canadian Government. The present case was *a fortiori* of *Simpson's Trustees*, 1907 S.C. 87, 44 S.L.R. 62, for the security of a sound trust company was much greater than that of two individuals, to whom in that case the Court authorised the conveyance of the trust funds. As to what constituted the domicile of a trust, reference was made to *Brockie, Petitioner*, July 10, 1875, 2 R. 923, 12 S.L.R. 604, and to *Allan's Trustees*, December 11, 1896, 24

R. 238, *per* the Lord President at p. 241, 34 S.L.R. 166, and to the sequel of that case at 24 R. 718, 34 S.L.R. 532.

At advising—

LORD PRESIDENT—This is a petition by the marriage-contract trustees of Mr and Mrs Burton Stewart, in which they ask your Lordships to appoint as new trustees a corporate company in Canada, to empower the petitioners to assign the trust funds to the said company, and to permit them, the petitioners, to resign office.

Mr Burton Stewart at the time of his marriage was a domiciled Scotsman. Mrs Burton Stewart was an English lady, and when they married two deeds were executed. One was an antenuptial marriage contract in ordinary Scotch form, under which the husband settled certain funds, the other was a deed of settlement in English form, by which the lady's father put in trust certain funds, but the trustees under the two deeds were the same, and the trust has been executed as one trust, although in one sense it really consists of two. The spouses have now gone to Canada, Mr Burton Stewart having secured a position in that country, and the reason for the petition is brought out by letter addressed by the spouses to the trustees, in which, after stating that they intend to remain in Canada, they say this—"My wife and I find it inconvenient to have our marriage trust administered by trustees (of whom you will remember we are two) resident in England, and we would like our marriage trust investments and affairs, as well as our own, to be attended to in Canada, where we reside." They then ask the trustees to crave the Court to appoint as new trustees "the Prudential Trust Company Limited (of Canada), a strong trust company incorporated by Special Act of Parliament of the Dominion of Canada, whose head office is in Montreal," and to authorise the transfer of the trust funds to them. The trust company has lodged in process a document by which they consent, in the event of your Lordships granting the prayer of the petition, to bind themselves "to submit to the jurisdiction of the Court of Session in all matters relating to the trust created by the said antenuptial contract of marriage and deed of settlement," and they have assigned the chambers of certain gentlemen, who are writers in Glasgow, as their domicile of citation.

Your Lordships remitted the petition to Mr Keith Maitland, Writer to the Signet, and we have his report before us. He brings to your Lordships' notice the difficulties which he feels in the case, and the two difficulties are, first, the appointment of the Prudential Trust Company Limited, as trustees, and secondly, the fact that there are, as I have already said, really two trusts, one of which is truly English. The learned reporter cites the case of *Simpson's Trustees* (1907 S.C. 87), in which the Judges of the Second Division authorised trustees in a Scotch antenuptial con-

tract of marriage to resign, and appointed certain individuals resident in Canada to be trustees, subject to their granting an obligation to submit to the jurisdiction of the Court of Session, as is here proposed. He also points out that, so far as he knows, the Court has never yet appointed an incorporated company as trustee, although he believes that that is done in England and also in Canada.

Now in the case of *Simpson's Trustees* no opinions are given, and, speaking for myself, I wish to say that I should like to reserve my opinion as to whether what was there done was within the proper power of the Court. But assuming that it was, I think the present case goes a good deal further. After all, the whole idea of this Court having jurisdiction over a trust is to enable it to vindicate the interests of the beneficiaries if the necessity should arise. There are minor beneficiaries in existence here, because the spouses have children, and although one would be very anxious to do what the spouses wish, I have come clearly to be of opinion that the prayer of the petition cannot be granted. Even assuming *Simpson's Trustees* to be a decision which one would repeat, I think the present application if granted would go a step further, because in that case the Court appointed individual gentlemen, who not only gave an undertaking as is proposed in this case, but who, of course, if they ever were in Scotland, could at least be made subject to the power of the Court. It seems to me that an incorporated company in Canada is absolutely beyond the power of the Court, and equally obviously it will never come to Scotland. So that although I do not doubt the good faith of the company in executing and lodging in process the document referred to, that document is after all only worth the paper that it is written upon, and if the governing body of the company changed—as it will change in time to come—and if the successors of the present directors thought it convenient to disregard the obligation, there would be no possibility of this Court enforcing it. To my mind that would be enough, but I think there is also an insuperable difficulty connected with this double trust. There is no question that the Court in England would have jurisdiction to inquire into the proper administration of the English settlement, and I think that the Court in England would be surprised if, upon proceeding to inquire into the conduct of the trustees, it was told that the Court in Scotland had transferred the whole trust administration to Canada. I do not think that we should be entitled to do such a thing, and thereby hamper the Court in the other part of the United Kingdom.

Upon the whole matter, although I regret not being able to comply with the view of the trustees and of the spouses, which I have no doubt is founded upon considerations of convenience and not upon any idea of escaping from the jurisdiction of the Court, I have come to the conclusion that the petition cannot be granted.

LORD JOHNSTON—I agree. Even if the case of *Simpson's Trustees* (1907 S.C. 87) were given the fullest effect as an authority, I should consider that this application is one that for reasons peculiar to itself could not possibly be granted. But I desire to associate myself with what your Lordship has said, and to reserve my opinion as to the course taken in *Simpson's* case. Taking the case as it stands in the reports, I do not think that the question as now before us was fully before their Lordships of the other Division, and I think that the matter ought to be reconsidered if such a case again comes before the Court.

LORD PRESIDENT—LORD DUNDAS concurs.

LORD MACKENZIE did not hear the case.

LORD KINNEAR was absent.

The Court refused the prayer of the petition.

Counsel for Petitioners—Hon. W. Watson. Agents—Dundas & Wilson, C.S.

Friday, February 7.

## SECOND DIVISION.

[Sheriff Court at Wigtown.]

KERR v. RITCHIES.

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1(1)—“Accident Arising out of and in the Course of the Employment”—Heart Failure Causing Death—Strain.*

In arbitration proceedings to recover compensation under the Workmen's Compensation Act 1906 the arbitrator found that a workman, who apparently was in the enjoyment of good health, died suddenly whilst engaged in his occupation of lifting baskets from the ground on to the top of a bruising machine; that “nothing unusual or unexpected occurred in the course of his work that afternoon until the sudden attack of illness”; that the cause of death was heart failure; and that “the strain arising from the exertion made by the deceased in repeatedly” lifting the baskets was a contributing cause of the heart failure.

*Held*, on the facts stated, that the arbitrator was not entitled to find that the workman had died from an accident arising out of and in the course of his employment within the meaning of the Act, because there was no particular occurrence to which death could be attributed.

*Clover, Clayton, & Company v. Hughes*, [1910] A.C. 242, 47 S.L.R. 885, distinguished.

This was an appeal by way of Stated Case from a decision of the Sheriff-Substitute (WATSON) at Wigtown in an arbitration