

ing the Company had a perfect right to apply to the Sheriff, the interdict would stand in the way. I give no opinion what the rights of the Company are. I give no opinion on the question whether the expeding a notarial instrument entitles them to go into possession. I can see very important questions that may be raised as to the construction of the statute, and the apparent distinction in the statute between the vesting of the right in the Company and the recording of the instrument. It is only in the latter case that it is to have the effect of a conveyance. I say nothing as to that question, whether recording is necessary before they take possession, only observing that it does not follow that expeding a notarial instrument retained in the possession of the party, and which he may at any time destroy, is the same as recording it, whereby the real rights of the owner will be made apparent on the face of the public register. And I give no opinion on the regularity of the tender and consignment.

LORD ARDMILLAN—I have no difficulty in recalling this interdict *simpliciter*, but what may be the effect of that I shall not say. I have some views on the matter, but I do not at present give any opinion as to how far the Company may found on the provision of the statute, as giving them an immediate right of possession on expeding a notarial instrument, or whether they must wait until recording it. That question, arising on the construction of the statute, is not now before us. The objections stated to the notarial instrument now produced by the Company are so feeble as to be hardly stateable in argument. I think the justice of the case is to remove the obstacle which is at present in the way of the Company. But for the want of the notarial instrument the Company would have got immediate possession formerly. They have now got it, and I am for removing the obstacle.

The Court accordingly recalled the interdict, and found neither party entitled to expenses since 16th January, the date of the last interlocutor.

Agent for Advocators—A. J. Dickson, S.S.C.

Agents for Respondent—H. & A. Inglis, W.S.

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Wednesday, February 5.
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WILSON'S EXECUTORS v. SOCIETY FOR CONVERSION OF THE JEWS, AND OTHERS.

Proof—Propinquity—Title to sue—Expenses. Claims as next of kin in a multiplepounding repelled, in respect of failure in the proof of propinquity. In the circumstances expenses given to the respondent in a reclaiming note, although his title to appear and claim was objected to, and had not yet been made matter of proof, and the claimer objected that he might thus be paying to a party who ought never to have appeared in the action.

Isabella Wilson died in 1868. By her settlement she directed her executors, after deducting all her lawful debts and legacies, "when my whole subjects and effects are recovered, and the preferable claims paid, to divide the same (with the exceptions after mentioned) equally among the four following charitable societies, viz., one-fourth to the London Missionary Society; one-fourth to the British and Foreign Bible Society; one-fourth to the Home Missionary Society, and the remaining

one-fourth to the Society for the Conversion of the Jews." This action of multiplepounding was now raised, in the name of Isabella Wilson's executors, by Mrs Wilson or Walker or Ogg and her husband, the parties called being "the Society for the Conversion of the Jews, if any such there be," and Mrs Ogg, "the next of kin or one of the next of kin of the deceased," and her husband, and others. The fund *in medio* was the one-fourth destined to the Society for the Conversion of the Jews.

A claim was lodged for Mrs Ogg and other parties, claiming as next of kin. They alleged that the bequest to the "Society for the Conversion of the Jews" was void in respect of uncertainty, there being no society in existence bearing that designation, and it being impossible to determine what society the testatrix intended to benefit.

James Wilson compared and lodged a claim as next of kin, making the same allegation in regard to the "Society for the Conversion of the Jews," as was made by Mrs Ogg.

The "Scottish Society for the Conversion of Israel" claimed the fund *in medio*. The Society, they alleged, had existed for upwards of twenty years. The congregation at Huntly, in which the testatrix had been a member, was visited by the Society's agent, and made collections on its behalf. The testatrix was a subscriber to the Society, and to a periodical issued by it, and the testatrix intended by her bequest to leave, and had validly left, one-fourth of the residue of her estate to the Society.

The Lord Ordinary (ORMIDALE), on 28th Nov. 1866, pronounced an interlocutor finding "that the claimants, Mrs Ogg and others, and the claimant James Wilson, ought, before the case is farther proceeded with, to have an opportunity of establishing their title as next of kin to the deceased Isabella Wilson, as averred by them respectively." "Note—The competition here is betwixt the claimants, the Society for the Conversion of Israel, on one hand, and the claimants referred to in the interlocutor, who respectively allege that they are the next of kin of the deceased Mrs Wilson, whose succession is in dispute on the other hand. It appears to the Lord Ordinary to be proper, if not indispensable, that it should be determined, in the first instance, which of the two parties referred to in the interlocutor is truly the next of kin of the deceased, as it is clear that only one of them can be so."

A proof was thereafter taken partly before the Lord Ordinary and partly by commission, and on 12th February 1867, the Lord Ordinary pronounced an interlocutor finding that the claimants had failed to establish their propinquity to the testatrix, and rejecting their claims; finding no expenses due to or by either of these claimants *inter se*, but finding said claimants respectively liable in expenses to the claimants, the Society for the Conversion of Israel, since the date of the interlocutor allowing the proof; and before farther procedure as to the claim for the Society for the Conversion of Israel, ordaining intimation to the Officers of State in order that they might, if so advised, make appearance for the interests of the Crown.

Wilson acquiesced, but Ogg and others reclaimed.

MACLEAN for reclaimers.

DEAN OF FACULTY (MONCREIFF) and W. A. O. PATERSON for the Society.

LORD PRESIDENT—I think it is very much to be regretted that there has been so much expense in

this process, as I understand the fund to be very small, and no less than two sets of parties are here to prove whether they are next of kin of the testatrix; but, as the case stands, there is no course open to us but either to adhere or alter the interlocutor on the merits and proof for the claimant Ogg, the claimant Wilson, who sought to establish his propinquity, having acquiesced. The Lord Ordinary has found that these claimants have failed to establish their propinquity as alleged by them respectively to the testatrix, the late Isabella Wilson, and I entirely agree in that conclusion. I never saw such a shadow of proof as this, for it is merely proof that this Mrs Ogg herself says she once heard her grandmother say that she was first cousin of a certain George Wilson, who was grandfather of the testatrix. No doubt hearsay evidence is admissible in cases such as this, where the party whose statements are given is dead. But I never heard that the hearsay of one party, reported by another, is enough to make out a case. But that is all we have here. The proof is weak, not only in what it presents, but in what it does not present. There is no family in Scotland that for three or four generations has not some scrap of written evidence to offer in the way of proving the descent of some member of the family. I never saw such a meagre case of evidence as this.

LORD CURRIEHILL—I concur.

LORD DEAS—I agree that this case is not in a shape in which we can put an end to it as it might have been. This lady left the residue of her estate to the Society for the Conversion of the Jews. This Society says it is the society designated. The only answer to that is, that this Society had been merged into another. That is denied. If there had been a proof of the averments about that, and it had appeared that this was the Society, and that it was not extinct, even though it had joined another Society, the result would have been that the Society would have got its money, and none of the next of kin would have had anything to do with it. In place of that, the parties claiming as next of kin are put to prove their propinquity in order that they may have a title to try the question with the Society. The result is that neither party is next of kin, and now their money must go to the Crown or the Society. The question whether this is the Society is only beginning. If the Society had been allowed a proof at the same time as the other parties, we should have had proof whether this was the Society or not. If it was, it would have been in a position to be preferred to the fund, and there would have been an end of the matter. While it is unfortunate that this is the shape of the case, I agree that, in the position of matters, we cannot do anything but adhere.

LORD ARDMILLAN concurred

PATERSON moved for expenses.

MACLEAN opposed, on the ground that the title of the Society had not been established, and the claimer if found liable in expenses to the Society, might in the end be found to have paid to a party who had no title to appear at all.

The Court gave expenses.

Agent for Reclaimer—Wm. Miller, S.S.C.

Agents for Respondent—J. & A. Peddie, W.S.

Thursday, February 6.

MARTIN'S TRUSTEES V. MARTIN AND OTHERS,
YOUNGS V. MARTIN AND OTHERS.

Succession—Heritable and Moveable—Heir and Executor—Legacy—Residuary Legatee. A died, appointing B residuary legatee; B died intestate, without having obtained a conveyance from A's trustees, her *jus crediti* against A's estate being partly for heritable and partly for moveable subjects. Plea by B's executor that he was entitled to be relieved by B's heir of a rateable proportion of the debts and legacies due by A's estate, *repelled*.

Janet Martin died in 1847 leaving a trust-disposition and settlement whereby she disposed and conveyed to her trustees and executors her whole means and estate, empowering them to sell and dispose of the heritable subjects disposed to them, and of her whole other estate. The purposes of the trust were for payment of the truster's debts, and of certain legacies and annuities; and (6), for payment to John Martin of an additional or deferred legacy of £3000, and to Thomas Young an additional or deferred legacy of £5000, these legacies not to be payable till the death of the truster's niece Anne Gordon Martin, who was to liferent the capital of the legacies. (8) After payment of certain of the legacies and bequests, and upon setting apart a fund to meet the deferred legacies in article 6, the trustees were, on obtaining the consent of one of the annuitants, to "have it in their power to convey and make over and pay over to the said Anne Gordon Martin, whom I hereby appoint my residuary legatee, the whole residue and remainder of my means and estate, heritable and moveable, hereby conveyed," under burden of the annuities, and of all claims against the trust-funds, and thus to bring the trust to a close. Janet Martin left a considerable amount of property, consisting partly of heritable subjects, partly of heritable bonds, and partly of moveable property. The trustees entered on the administration of the trust, and paid the truster's debts and legacies. Anne Gordon Martin did not obtain a conveyance from Janet Martin's trustees. She died in 1862 intestate and unmarried. Two actions were raised—an action of multiplepointing at the instance of Janet Martin's trustees, and an action of declarator at the instance of Thomas and James Young, executors *qua* nearest of kin of Anne Gordon Martin. It had already been held by the Court, in the conjoined actions, in a question between Thomas and James Young, claiming as Anne Martin's executors, and John Martin claiming as her heir-at-law, that the residuary estate of Janet Martin, to which Anne Martin had a *jus crediti* at the time of her death, had not been constructively converted, so as to become personal estate, descending to her executors, but that Anne Martin's right in the succession of her aunt, so far as heritable, went to her heir, and so far as moveable, to her executor.

The present question related to a plea maintained by Anne Martin's executors, to the effect that Janet Martin having charged her whole estate, heritable as well as moveable, with the payment of debts, legacies, and trust expenses, such debts, legacies, and trust expenses were chargeable upon the whole heritable and moveable estates rateably, according to their respective values.

The Lord Ordinary (JERVISWOOD) repelled this