

was originally equally divided, and was ultimately decided by the casting vote of Lord Pitmilley. The ground of that judgment was that a decree of approbation was produced, which finally fixed that the amount of teind belonging to the heritor was less than what he was called upon to pay under the interim locality. The true amount of the teind was so conclusively proved as, in the opinion of the majority of the Court, to overcome the presumption arising from the interim locality. Even there two judges of great eminence were of a contrary opinion.

The other case, that of *Oswald*, was very peculiar. The minister was admitted to be hopelessly insolvent. There was no ground of relief against the other heritors, so that if Sir John Oswald had been compelled to pay more than what should be ascertained to be the true amount of his teind, he could not possibly have got any relief.

I cannot hold either of these cases to infringe upon the general rule, that the minister is entitled to immediate payment under the interim scheme of locality, until the final scheme is adjusted. The circumstances of this case are by no means strong. The heritor is perfectly safe if the other heritors have sufficient teinds to pay the augmentation. He has not alleged, far less proved, that there is not a surplus in the hands of the other heritors sufficient to meet any claims on his part for overpayments. An element, therefore, which might weigh with the Court, is entirely wanting.

The other Judges concurred.

The Court adhered, with additional expenses.

Agents for Suspenders—T. & R. B. Ranken, W.S.

Agents for Charger—M'Neill & Sime, W.S.

Thursday, May 30.

JAMIESON (ALLARDICE'S JUDICIAL FACTOR), PETITIONER.

*Judicial Factor—Special Powers.*

Circumstances in which the Court granted authority to a judicial factor to sell heritable estate.

*Succession—Vesting.*

Terms of a bequest held, by the majority of the Court, to import vesting *a morte testatoris*.

This was a petition by Mr G. A. Jamieson, C.A., judicial factor on the trust-estate of the late Robert Barclay Allardice, of Ury and Allardice, for special powers. The most important object of the application was to obtain authority from the Court to expose to sale by public roup the estate of Allardice at an upset price of £41,500 and also certain subjects in Stonehaven at £1300.

The late Robert Barclay Allardice, of Ury, died in 1854, survived by a daughter, Mrs Margaret Barclay Allardice or Ritchie, and by three grandsons, sons of Mr Ritchie. He also left two natural sons, Robert and David. Mr Barclay Allardice left a trust-disposition and settlement, dated February 1851, by which he conveyed his whole estate, heritable and moveable, to trustees. The first purpose of the trust is for payment of debts; the second for payment of £3000 to his son David; the third for payment of an annuity of £100 to Ann Angus, the mother of his natural

sons, and of an annuity of £200 to his daughter, Mrs Ritchie; the fourth for payment of £1000 to each of his three grandsons. In the fifth place, the truster directs his trustees to make over the residue of his estate, heritable and moveable, to his eldest natural son Robert, adding, "And I leave and bequeath the same to him accordingly, with full power to my said trustees to apply the annual rents, or interests of the foregoing bequests, to my said two sons in alimending and educating them during their minority, and, if found advisable, to apply the principal sums, in whole or in part, in purchasing commissions for them in the army or navy, or otherwise settling them in life; and declaring that, subject to the exercise of these powers, the bequest in favour of my said son Robert shall not take effect until he shall attain the age of thirty years complete, unless my said trustees shall be of opinion that it should take effect sooner." Power was given by the trust-deed to the trustees to sell the heritable estate, though the truster stated it to be his earnest wish and desire that they "shall, if possible, and if considered by them to be expedient in the circumstances of the trust, make over my landed property, in whole or in part, after making provision for the payment of my debts, bequests, and others before-mentioned, to my eldest son Robert, by the said Ann Angus, on his arriving at the age of thirty years, or earlier if deemed expedient."

In 1871 Mr Jamieson was appointed judicial factor on the trust-estate, and in February 1872 he presented the present petition, with concurrence of Lieutenant Robert Allardice, the beneficiary under the trust.

The following is taken from the report by Mr Alexander Hamilton, W.S., to whom the Lord Ordinary (MACKENZIE) remitted to inquire into the circumstances set forth in the petition:—

"The petitioner sets forth that, at the death of the said deceased Robert Barclay Allardice, his estates were heavily burdened with debt, and his affairs were in great confusion and embarrassment. His trustees sold the estate of Ury by public roup; but they retained the estate of Allardice, conceiving that it would increase in value, and that the rental would be sufficient to meet the interest of debts and annuities, as well as maintain the truster's son, Lieutenant Allardice, for whose benefit the trustees were desirous of preserving the estate, in conformity with the earnest wish and desire of his father.

"The anticipations of the trustees have not been realised, for the interest of the debts, the annuities to Mrs Ritchie, now Mrs Barclay Allardice, and Mrs Ann Angus or Macdonald, the public burdens, and expenses of management, more than swallow up the rental, so that, instead of there being any surplus for the maintenance of the truster's son, there is a deficiency.

"There is embodied in the petition a state of the rental and expenditure, bringing out a deficiency of . . . £8 1 8 exclusive of the interest of £1500, borrowed by Lieutenant Allardice on his reversionary interest, at 5 per cent, . . . 75 0 0

which makes an annual deficiency of £83 1 8

"The petitioner has had the estate valued by Mr James F. Beattie, land-surveyor, Aberdeen, and he recommends that if the property is exposed for sale the upset price should be £41,500. The

subjects in Stonehaven, which are also proposed to be sold, have been valued by Mr George Murray, licensed valuator, Stonehaven, at £1313. The trust-deed grants power to sell or dispose of all or any part of the trust-estate and effects.

"The petitioner asks authority to expose the estate of Allardice at the upset price of £41,500 and the Stonehaven subjects at . . . 1,800

£42,800

which sums the petitioner has been advised he may expect to realise.

"The debts affecting the said estate and the Stonehaven subjects amount to £25,700

which would leave a balance of . . . £17,100

"But from this would have to be deducted the sum borrowed by Lieutenant Allardice, and secured upon his reversionary interest in the estate, . . . 1,500

leaving a residue of . . . £15,600

"If that residue of £15,600 were invested at 4 per cent. it would yield . . . £624 out of which the following annuities would require to be paid:—

1. To Mrs Barclay Allardice, . . . £200
2. To Mrs Ann Angus or Macdonald, 100

300

leaving a surplus income of . . . £324

in place of a deficiency of £83, 1s. 8d., as at present existing.

"Sale of Stonehaven Subjects.—The remarks on the above branch apply also to this part of the petition, and if your Lordship grants authority to sell the estate of Allardice, it seems expedient that these subjects ought also to be sold.

"The expediency of the sale of the estate of Allardice and the Stonehaven subjects, being now the whole remaining portions of the trust-estate under the petitioner's management as judicial factor, has been established. Lieutenant Allardice, the sole beneficiary, and in whom the residue of the estate is vested, not only concurs in the petition, but "is desirous that the estate should be sold without delay." On 22d May 1873 he will attain the age of thirty, when, by the terms of the trust-deed, the estate would fall to be made over to him. No other person has any interest to object. The annuities are not a burden upon the estate, and the judicial factor, before parting with the price, will require to provide for the payment of the annuities. The petition has been served upon the annuitants, and they have not appeared, though it is right to mention that Mrs Ann Angus or Macdonald, being in America, will not probably be aware of the proceedings.

"On the whole, it appears to the reporter, after examining the application, and whole proceedings and productions, and made such inquiries as he considered necessary, that the facts and circumstances stated in the petition are correctly set forth, and that it is proper and expedient that the special powers prayed for should be granted."

The Lord Ordinary, by interlocutor dated 20th March 1872, refused *in hoc statu* to grant authority to sell.

His Lordship considered that the small deficiency of income to meet the expenditure was not *per se* a sufficient ground to warrant the application;

that it was by no means certain that an interest in the residue had vested in Lieutenant Robert Allardice; and that there was the less reason for granting the power, as the latter would attain the age of thirty on 22d May 1873, when, if he survived, the residue would certainly vest in him.

The judicial factor reclaimed.

SOLICITOR-GENERAL and WATSON for him.

Mrs Barclay Allardice or Ritchie, on whom the petition had been served, but who had not appeared in the Outer House, put in a minute, craving to be heard by counsel in support of the Lord Ordinary's interlocutor.

BALFOUR, for her, maintained that the petition should be refused; because (1) the truster had expressed an earnest wish that the estate should not be sold; (2) no case of necessity had been made out; (3) it was by no means clear that the residue had vested in Robert Allardice before he attained the age of thirty; and that Mrs Ritchie had therefore an interest in opposing the sale as heir-at-law of the truster.

Reference was made to the case of *Allardice's Trustees v. Ritchie and Others*, 16th March 1866, 1 Scot. Law Rep., 224, which involved the construction of the fourth purpose of the trust-deed of 1851, and in which the Judges of the Second Division incidentally expressed their opinion that the residue had vested in Robert *a morte testatoris*.

At advising—

LORD PRESIDENT—If Robert Barclay Allardice has a vested interest in the residue of the trust-estate, it is obviously expedient in the highest degree that the estate should be realised, which would give him an income of some £300 or £400 a-year, instead of nothing at all. If, on the other hand, he has not a vested interest, it is a very good reason for not granting power to sell, particularly as the period is so near at hand when the estate will certainly be vested in him, if he survives. The question raised by the reclaiming note depends therefore on whether the interest of Robert Barclay Allardice is vested. I may perhaps have a preconceived opinion on the subject, but I do not feel much diffidence in saying that I regard the point as very clear indeed, and that in no circumstances can there be any right in Mrs Barclay Allardice, as the heir-at-law of the testator. The trustees are directed "to pay and make over the residue to my eldest son Robert." Words of direct bequest follow, "and I leave and bequeath to him the same accordingly," which must operate at the death of the testator, unless qualified by the words which follow. The first clause which follows is a power to apply the interests of the foregoing bequests in alimenter the sons during their minority, and, if necessary, to apply the principal in settling them in life. The trustees have as ample powers in the application of the residue in the case of the elder son, as in the application of the £3000 in the case of the younger son. A power of disposing of the whole residue in settling Robert in life before he attains the age of thirty is very inconsistent with the notion that the truster had any purpose of suspending vesting. A suspension of vesting is a thing very difficult to assume as contemplated by a testator, unless for some definite purpose. Almost the only conceivable purpose is to secure some ulterior interest. Then the truster goes on to declare, "that subject to the exercise of these powers, the bequest in favour of my said son Robert shall not take effect until he shall attain

the age of thirty years complete, unless my said trustees shall be of opinion that it should take effect sooner." It is contended that the declaration that the bequest shall not "take effect" is equivalent to a declaration that it shall not vest. The words "take effect" have no fixed legal meaning, and must therefore receive a meaning from the general scope of the deed. Fortunately for the construction of the deed, they are twice repeated. If they are to be read as equivalent to "vest" in the first clause, they must also be read as equivalent to "vest" in the passage which allows the trustees to cause the bequest to "take effect" sooner. Now a power to trustees to vary the time of vesting fixed by the testator is so novel as to lead one to speculate in what form it is to be carried out. I do not say that the testator might not declare in express terms that his trustees shall have power to alter the time of vesting. But I am not prepared to hold that any such power can be inferred from ambiguous words.

The only remaining point in the deed is the power of sale given to the trustees, in which the testator expresses his earnest wish that if possible they should make over his landed property in whole or in part to his son Robert. There is no notion whatever here of any interest beyond Robert.

Taking all these passages together, it seems a very clear case of vesting. And this being so, it would be an unnecessary hardship to Lieutenant Allardice that he should be deprived of an income which might be derived from realizing this estate, especially as the only wish of the testator which is frustrated is one which must necessarily be frustrated in any case. I am therefore disposed to grant authority to sell.

**LORD DEAS**—I do not think it necessary to enter upon the question of vesting. I am very clearly of opinion that the power of sale ought to be granted, whether the residue is vested in Robert Allardice or not. There is no difficulty in the terms of the deed. It is not required to make out a case of necessity. The trustees have power given them by the trust deed to sell, and there is nothing to hinder them, except the wish expressed by the testator that they shall, if possible, make over the landed property to his son Robert. Another consideration is that if the sale is allowed, the estate will remain in a better form for whoever may get it.

**LORD ARDMILLAN** concurred with the Lord President, and pointed out that the passage of the trust deed expressing the truster's desire that the trustees should if possible *make over* the landed property to his son Robert on his arriving at the age of thirty years, or earlier if deemed expedient, was the exact counterpart of the passage which provided that the bequest shall not *take effect* until he should attain the age of thirty years, unless the trustees should be of opinion that it should *take effect* sooner; and that the expression "take effect" in the latter passage thus clearly was shown to refer to the term of payment, and not to that of vesting.

**LORD KINLOCH**—I agree that the power of sale should be given. As far as Robert Allardice is concerned, that is obviously the proper course to take. The only reason against selling would be if it could be shown that there was some one who was entitled to say that it should not be sold. I agree that such reason has not been made good. I

agree with your Lordship as to the question of vesting, but, at the same time, I am disposed to concur with Lord Deas that it is not indispensable to decide that question. Suppose that the lady may come at some time or other to the right of this estate, it is plain that she could not retain it. A sale must take place. It resolves itself into a question of expediency. The trustees could have sold without applying to the Court at all, and it is only because Mr Jamieson is a judicial factor that he has thought it necessary to apply to the Court. I do not think that in regard to the interest of the lady it would benefit her not to sell the lands. In short, there is no reason for denying Mr Robert Allardice the great benefit he has in selling.

The Court remitted to the Lord Ordinary to grant authority to sell, as craved.

Agents for Petitioner—Mitchell & Baxter, W.S.

Friday, May 31.

SPECIAL CASE—WALKINSHAW'S TRUSTEES  
AND OTHERS.

*Provision—Marriage-Contract—Vesting—Policy of Insurance—Jus relictæ.*

By antenuptial contract a husband bound himself "to provide and secure to the child or children who might be procreated of the marriage, if only one such child, the sum of £2000, and if more than one such child, the sum of £3000," payable after the decease of the longest liver of the spouses; and further, towards securing the said provisions, to effect and keep up a policy of insurance for £1500, at the sight of the marriage-contract trustees. There were two children of the marriage, both daughters, both of whom predeceased their father. The younger died unmarried, having conveyed her whole means to trustees. The elder was married, and had issue. By antenuptial contract she conveyed her whole means, presently belonging to her, or which should be acquired by her during the subsistence of the marriage, to trustees. The father, who survived his first wife, contracted a second marriage, and in anticipation thereof executed a holograph writing, by which he conveyed his furniture to his intended wife. There were no children of the second marriage; his second wife survived him. On his death, the proceeds of the policy of insurance for £1500, amounting, with bonus additions, to £2480, which he had effected in implement of his marriage-contract with his first wife, and assigned to the trustees under that contract, were paid by the insurance company to the said trustees. His moveable estate and furniture (the latter being valued at £600) were only sufficient to pay his debts and leave a balance of £300.

*Held* (diss. Lord Kinloch)—(1) That the full provision of £3000 vested in the two children of the first marriage at their birth, and was conveyed by their respective deeds in equal shares to the testamentary trustees of the one, and the marriage-contract trustees of the other.

(2) That the widow was not entitled to *jus relictæ* out of any part of the proceeds of the policy of insurance.