

for apprehending that preferences had been obtained between the date of the first deliverance in the Sheriff Court and the deliverance in the Bill Chamber, that might have been a sufficient reason for the recal. But it was admitted that the petitioner is not in a position to say that such ground exists. The proper course seems to be that taken in *Tennent v. Martin*, March 6, 1879, 6 R. 786."

The petitioner reclaimed, and argued that this case was ruled by the cases of *Jarvie v. Robertson*, November 25, 1865, 4 Macph. 79; and *Kellock v. Anderson, &c.*, December 14, 1875, 3 R. 239, and not by those of *Tennent v. Martin & Dunlop*, March 6, 1879, 6 R. 786; and *Simpson v. Myles*, November 8, 1881, 9 R. 104.

At advising—

LORD PRESIDENT—I do not consider that in this class of cases it is matter of legal right who shall be the party who obtains sequestration. These two applications have been presented and come before the Court by way of competition, and the real question is, What in the interest of the whole body of creditors is the most convenient and least expensive way of disposing of the estate? Now, here there can be no doubt that proceedings have been taken in the Bill Chamber which if completed will secure the immediate winding up of the sequestration, for there is a deed of arrangement which substantially settles matters, and if it is gone on with there will be no need for further proceedings.

In these circumstances I think it would be inconvenient if this sequestration were recalled. I quite agree with the remark of the Lord Ordinary that if there were the slightest reason for supposing that any preference had been obtained, that would be a most excellent reason for recalling the sequestration, but there is nothing of that kind here. I think therefore that the decision in the case of *Tennent v. Martin & Dunlop* is applicable here.

LORDS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Petitioner—Brand—Macfarlane.
Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Respondents—Trayner—Keir.
Agent—Alexander Morison, S.S.C.

Monday, April 16.

B I L L C H A M B E R.

[Lord Shand, Lord Ordinary
on the Bills.

STAVELEYS, PETITIONERS.

Process—Vacation—Trust—Petition—Power of
Lord Ordinary on the Bills—Trusts (Scotland)
Act 1867 (30 and 31 Vict. c. 97), sec. 16.

Held by Lord Shand (Lord Ordinary on the Bills) that a petition under section 16 of the Trusts (Scotland) Act 1867 can be presented to and proceed before the Lord Ordinary officiating on the Bills during vacation.

The Trusts (Scotland) Act 1867 provides by section 16—"Applications to the Court under the authority of this Act shall be by petition addressed to the Court, and shall be brought in the first instance before one of the Lords Ordinary officiating in the Outer House, who may direct such intimation and service thereof, and such investigation or inquiry, as he may think fit, and the power of the Lord Ordinary before whom the petition is enrolled may be exercised by the Lord Ordinary on the Bills during vacation; and all such petitions shall, as respects procedure, disposal, and review, be subject to the same rules and regulations as are enacted with respect to petitions coming before the Junior Lord Ordinary in virtue of the Act 20 and 21 Vict. c. 56." . . .

On 12th April 1883 W. G. A. Pepper Staveley and Miss Pepper Staveley, his daughter, presented a petition under the Trusts (Scotland) Act 1867 for the appointment of new trustees on a lapsed trust in which they were the beneficiaries, and for warrant to complete title in name of the trustees to be appointed. The attention of the Lord Ordinary was directed to a decision of Lord Gifford in 1870 to the effect that such petitions could not proceed in vacation unless they had been first brought before a Lord Ordinary during session and intimation and service ordered by him.

The Lord Ordinary (LORD SHAND) officiating on the Bills ordered intimation and service of the petition.

"Note.—I think it is too narrow a view of the terms of section 16 of the Trusts (Scotland) Act 1867 (30 and 31 Vict. c. 97) to hold that the Lord Ordinary on the Bills can only deal with applications which have been presented during session, and so cannot even order intimation and service of a petition presented in virtue of that section.

"Such a reading of the Act greatly restricts its usefulness, and for no object that I can discover, and it ought not to be adopted unless the language used compels this. And *prima facie* it would seem to be a remarkable state of matters that the Lord Ordinary on the Bills should have the power to appoint trustees and to authorise them to complete titles or to exercise the other powers which under the statute the Court may confer, and yet should be powerless to give the mere formal order of appointing intimation and service.

"The petition is in all cases addressed to the Court—that is, to the Lords of Council and Session—but although so addressed it is dealt with and disposed of by the Lord Ordinary in session, and by the Lord Ordinary on the Bills in vacation. The 16th section of the statute provides that the petition, though addressed to the Lords of Council and Session, 'shall be brought in the first instance before one of the Lords Ordinary officiating in the Outer House, and . . . the power of the Lord Ordinary before whom the petition is enrolled may be exercised by the Lord Ordinary on the Bills during vacation.' The words 'shall be brought in the first instance before one of the Lords Ordinary officiating in the Outer House' are used to make it clear that the petition is not an Inner House proceeding; and the whole enactment is in terms which show that the power of the Lord Ordinary and of the Lord Ordinary on the Bills is not derived from the Inner House as if on a remit, but is an original jurisdiction directly conferred by the statute.

"It is said the words 'is enrolled' imply that

an enrolment before a Lord Ordinary in session is a condition precedent of the exercise of any power under the Act by the Lord Ordinary on the Bills. I do not think so. It is something against that view that no good reason for such a provision can be suggested, and that this reading seriously limits the usefulness of the enactment. In my opinion the true meaning of the words 'the power of the Lord Ordinary before whom the petition is enrolled' is, 'the power of the Lord Ordinary before whom the petition is or might be enrolled (though addressed to the Court) may be exercised by the Lord Ordinary on the Bills during vacation.' Under these powers I hold that the mere ordering of intimation and service is included, and I have invariably acted on this view during the last ten years. Under the larger power of disposing of the merits of applications under section 16 of the statute, I think the minor power of ordering intimation and service is included, and I do not think the language of the section compels or warrants an opposite view.

"What I have said applies also to the case of appointment of judicial factors, and giving them power to make up titles, though not to the applications of such factors for other special powers. See 30 and 31 Vict. c. 97, secs. 15 and 16; 31 and 32 Vict. c. 101, sec. 24; and 32 and 33 Vict. c. 116, sec. 3."

Counsel for Petitioners—Kermack. Agents—Mackenzie & Kermack, W.S.

HOUSE OF LORDS.

Tuesday, May 8.

(Before the Lord Chancellor, Lords Watson and Fitzgerald.)

STUDD v. COOK.

(*Ante*, vol. xviii. p. 177, and 8 R. 249.)

Succession—Foreign Destination—Devise of Scotch Heritage by an English Will—Titles to Lands Act 1868 (31 and 32 Vict. c. 101), secs. 19 and 20—Conveyancing Act 1874 (37 and 38 Vict. c. 94), sec. 46.

An Englishman by a will in English form devised his landed estates situated in England and in Inverness-shire "to the use of my elder son and his assigns for his life without impeachment of waste," and after the death of the elder son "to the first and every other son successively" of the elder son "according to their respective seniorities in tail male, with remainder," &c. This was admittedly a valid settlement in tail male of the English estates by English law. The elder son was also residuary devisee and legatee. He raised against his pupil children an action to have it declared that he was entitled to the estate in Inverness-shire in fee-simple either (1) as conveyed to him absolutely by the will, on the ground that the devise was habile to convey the estate, but that the destination was not such as by the law of Scotland could restrict or limit his right, or (2) as falling to him under the residuary clause, or (3)—on the assumption that it had not been validly conveyed by the will—as heir-at-law.

Held that the intention of the testator that the pursuer should have a life-rent interest only in the estate, though conceived in technical terms involving restrictions and limitations not capable of being precisely expressed or carried out by Scotch law, must receive effect in so far as that law would allow, that effect being to give the pursuer a life-rent alienably, and the heir-male of his body at the time of his death a fee, the pursuer's life-rent including all powers given by the will and capable of receiving effect by Scotch law.

Process—Appeal—Expenses—Parent and Child—Obligation of Parent who had Raised Action against his Pupil Children to Provide Funds to Enable their Curator ad litem to Defend Judgment of Court of Session.

A father having in an action raised by him against his pupil children for declarator that he was fee-simple proprietor of certain heritage appealed to the House of Lords against an interlocutor by which the defenders were assoltized, the House, on the petition of the curator *ad litem* for the children, ordered that all proceedings in the appeal should be stayed until reasonable means should be provided by the appellant for enabling the curator *ad litem* to defend the interests of the pupil children in the appeal.

In Court of Session 10th December 1880, *ante*, vol. xviii. p. 177, and 8 R. 249.

The pursuer appealed to the House of Lords. After the petition of appeal had been served upon the respondent, the curator *ad litem* to the appellant's pupil children, a note was on 8th March 1882 presented by him to the Second Division setting forth that his taxed account of expenses amounted to £52, 6s. 8d.; that he had moved for expenses on the case being decided in his wards' favour on 10th December 1880, but that the Court had indicated an opinion that it was unnecessary to insert a decerniture for expenses in the interlocutor, since the main question having been decided, the expenses would be paid him as matter of course; that he had frequently written to the appellant's agents asking payment, but without effect; that an appeal had now been taken to the House of Lords, and that the interlocutor had not been extracted. The curator prayed the Court either (1) to find him not obliged to enter appearance in the appeal, and discharge him from his office, reserving right to recover the amount of his account, or (2) to ordain the appellant to pay the said account, and to supply a further sum of £250 to enable him to defend the case in the House of Lords.

The appellant objected to the competency of the application, on the ground that an interlocutor had been pronounced which was final in the Court of Session—6 Geo. IV. c. 120, sec. 21—and that the process was now with the unextracted processes, and that no further interlocutor could therefore be pronounced. Moreover, he submitted that the judgment of the Court being under appeal to the House of Lords, the Court had no power to pronounce any further interlocutor in the cause except under remit from that House.

He also stated that he repudiated liability as father and administrator-in-law of his children for their curator's expenses in the cause.

The Court superseded consideration of the