

At advising—

LORD JUSTICE-CLERK—This reclaiming-note may be technically competent, but I do not think this is a mode of procedure which should be encouraged. I think that it would need very strong grounds indeed to lead us to interfere with an interlocutor such as this pronounced by a Lord Ordinary.

This reclaiming-note is pronounced against an interlocutor of the Lord Ordinary ordering an adjustment of issues, and naming a day for that purpose. But that interlocutor does not in the least preclude the Lord Ordinary in the exercise of his discretion when the issues are before him from ordering the evidence in the case to be given in a jury trial or in a proof before himself. That question remains entirely open.

The only result, so far as I can see, if we allowed this method of procedure, would be that we might have two reclaiming-notes in every case; one upon the interlocutor ordering the adjustment of issues, and another afterwards when the issues had been brought forward and either adjusted or refused. I think there has been no ground stated here for holding that the Lord Ordinary should be debarred from exercising his discretion in the matter of how the proof should be taken.

LORD YOUNG—That is my opinion also, and I think that this reclaiming-note should be dismissed.

I abstain from giving any opinion as to the competency of this note, but without any reference to the competency I think that a reclaiming-note against such an interlocutor as this ought at once, and as of course, to be dismissed, for if it is competent, it is only accidentally so, and I think that it should not be allowed.

The provisions of the Act of Parliament were not exactly followed in this case, but substantially they were so. When the record was closed the Lord Ordinary ought to have asked the parties if they renounced probation. They would certainly have said they did not, but supposing that that part of the procedure was unnecessary, then the statute provides by section 27—“The Lord Ordinary shall appoint the cause to be debated summarily at the end of the motion roll on a day to be fixed, before which day the parties shall respectively lodge the issue or issues, if any, which they propose for the trial of the cause, and the Lord Ordinary, after hearing parties, shall on the said day determine whether further probation should be allowed.” It was not necessary therefore to appoint a day on which parties should adjust the issues; it would have been more proper to appoint a day on which the case would be summarily argued, and the parties could have lodged their issues if they wished to do so. In this case “this day week” was the day appointed to hear parties, and before which issues were to be lodged. Then the statute proceeds—“If the Lord Ordinary shall consider that it is necessary, he shall determine whether it is to be limited to proof by writ or oath, and if not, whether it is to be taken before a jury, or in whatever manner of way.”

Now, supposing that on the day week after closing the record the parties come before the Lord Ordinary with the issues they think proper for the trial of the cause, and he is of opinion that the case ought to be tried by jury trial, and approves

of issues to carry out that purpose, what then? The statute provides in the next section to the one I read—“Any interlocutor pronounced by the Lord Ordinary as provided for in the preceding section, except under sub-division (1)”—which does not concern us here—“shall be final, unless within six days from its date the parties, or either of them, shall present a reclaiming-note against it to one of the Divisions of the Court, by whom the cause shall be heard summarily.” Well then, on that day—in the present case “this day week”—the Lord Ordinary hears parties, and adjusts an issue for the trial of the cause, and there is a reclaiming-note competent to either party, what then is the meaning of this reclaiming-note?

I think it is an extravagant reclaiming-note, and I think we would be doing an injustice to litigants if we gave any countenance to such a course of procedure. The case must go back to the Lord Ordinary. Of course I do not say anything as to what course he may think proper to adopt when the parties are before him with their issue to be adjusted. When he has heard them he may judge whether the case is to be tried by a jury or a proof before himself, and then a reclaiming-note will be competent to either party whatever he should decide. But this reclaiming-note must be dismissed with expenses.

LORD RUTHERFURD CLARK and **LORD LEE** concurred.

The Court adhered.

Counsel for the Appellants—Salvesen. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Respondent—A. S. D. Thomson. Agent—Wm. Officer, S.S.C.

Tuesday, July 16.

SECOND DIVISION.

BOWIE AND OTHERS v. PATERSON.

Succession—Power of Appointment.

In an antenuptial contract of marriage the power was reserved to the husband to apportion a sum, which it was stipulated he should provide, as he thought proper among the children of the marriage, and failing his doing so, a similar power was given to the wife should she survive him. Should neither exercise the power of apportionment the sum was to be divided equally among the children. The husband died first, without having exercised the said power. After his death the wife became party to a bond and assignation in security by a son in favour of an assurance company, whereby she apportioned to the said son, his heirs and assignees, a sum of not less than one-fifth part or share of the sum stipulated for in the marriage-contract. She died possessed of considerable moveable property, leaving a trust-disposition and settlement in which she directed the trustees to pay the residue of her whole estate to the children who should survive her, with the exception of one daughter, to whom only a sum of £100 was left, in such shares as she

should appoint by any writing under her hand, failing which in equal shares; declaring that these provisions should be in full satisfaction of any claim competent to them on her death, "whether legally or under my said marriage-contract."

Held that the bond and assignation in security contained a valid appointment to the son therein mentioned to the extent of one-fifth of the estate held in trust under the marriage-contract, and that the remaining four-fifths of that estate fell to be divided equally among the other children of the marriage, or those in their right, the power of apportionment not having been exercised with regard thereto.

Mr William Bowie and Annetta Antonia Louisa Thurburn were married in 1840. By an antenuptial contract of marriage Mr Bowie, *inter alia*, bound himself to provide by insurance on his own life, or otherwise the sum of £4000, and to take the rights and securities thereof to himself and his promised spouse and the survivor, in conjunct fee and liferent for her the said Annetta A. L. Thurburn's liferent use only, and to the children of the marriage and the issue of these children in fee. It was declared that it should be in the power of William Bowie to divide and apportion as he should think proper among the said children or their issue the above provision in their favour, and in case of his death without making any such division, his wife, if she survived him, was to have the same power. In case such power was not exercised by either, the sum was to be equally divided among the children of the marriage. It was also declared that the said provision in favour of the children should be in full satisfaction to them of all bairns' part of gear or legitim.

By mutual disposition and settlement, dated 9th May 1849 and registered 13th March 1857, Mr and Mrs Bowie, on the narrative of the fore-said antenuptial contract of marriage and obligation above mentioned, and that the said William Bowie had effected two policies of insurance on his life, amounting together to £3000, assigned the same to his said wife in liferent in the event of her surviving him, and to the child or children of the marriage who might be alive at the time, in such proportions as he might direct by any writing under his hand; or failing his leaving such writing, then his said wife should have the power of making such apportionment, and failing either of them leaving such writing, then the said sums should be divided among his said children share and share alike. Certain trustees were nominated and appointed to carry out the purposes of the settlement.

Mr Bowie died on 5th January 1856 without having exercised the power of apportionment reserved to him in the marriage-contract. He was survived by his wife, and also by six children, viz., (1) Marizza Bowie or Paterson, (2) John Mure Bowie, (3) Elizabeth Thurburn Bowie or Hopcroft, (4) Annetta Antonia Louisa Bowie or Edwards, (5) Robert Thurburn Bowie, and (6) Henrietta Isabella Bowie.

Mrs Bowie died on 23rd January 1888, survived by the same children, leaving a trust-disposition and settlement dated 12th May 1877, by which she conveyed her whole estate to trustees for certain purposes. *Inter alia*, she

directed her trustees to pay her daughter Mrs Marizza Bowie or Paterson the sum of £100, and to pay the residue of her whole estate to her whole children who survived her, other than Mrs Paterson, in such shares as she should appoint by any writing under her hand, failing which in equal shares, and she declared that these provisions in favour of all her children should be "in full satisfaction to them of legitim and executy, and of all claims competent to them on my decease, whether legally or under my said marriage-contract."

Mrs Bowie died possessed of moveable estate to the amount of £9584, 10s. 11d. She left no other testamentary writing, or other writing under her hand dealing with her estate. She had, however, become party to a bond and assignation in security dated 2nd November 1883, granted by her son John Mure Bowie in favour of the Scottish Life Assurance Company for £500, whereby he assigned to the company in security of a loan his whole right and interest to the sums held in trust under the mutual disposition and settlement, and the disposition by Mr Thurburn already referred to, in so far as they might then belong or thereafter become payable to him. The bond and assignation then proceeded—"And I, the said Annetta Antonia Louisa Thurburn or Bowie, having regard to my right of apportionment or disposal of the funds and others held in trust as aforesaid, and considering that I have, for the further security of the said company, agreed to exercise now in favour of my said son the said John Mure Bowie the rights and powers conferred upon me by the said mutual settlement and disposition of the said Robert Thurburn: Therefore I have apportioned and do hereby apportion to the said John Mure Bowie and to his heirs and assignees a sum of not less than one-fifth part or share of the fore-said sum of £4000, and a further sum of not less than one-fifth part or share of the price or value that may be obtained for the said house No. 28 Regent Terrace, when the said house comes to be sold."

On William Bowie's death in 1856 the trustees under the marriage-contract and mutual trust-disposition and settlement entered into possession of the trust-estate. They received payment from the Assurance Companies of the sum of £3790, 7s. 10d., and invested the same along with a sum of £209, 12s. 2d. which was granted by Mr Thurburn, the father of Mrs Bowie, in order to make up the sum of £4000 contained in William Bowie's obligation in the marriage-contract. Mr Thurburn had by a previous disposition conveyed the house 28 Regent Terrace, Edinburgh, to the same trustees, directing that it should be held for Mr and Mrs Bowie's liferent, and that the price of the same, when sold as therein directed, should be applied in the same manner as the sums payable under the policies of assurance. When Mrs Bowie died the sums held in trust under the antenuptial contract and the mutual disposition and settlement were a bond and disposition in security for £4000 over heritable subjects in Aberdeen, and the house in Regent Terrace, Edinburgh.

These funds having become divisible on the death of Mrs Bowie, Mrs Paterson claimed that they should be divided equally among the children of the marriage. The view of the trustees was

that by her trust-disposition and settlement and the bond and assignation in security mentioned above. Mrs Bowie had validly exercised the power of appointment reserved to her in the marriage-contract, and that the trust funds should be divided into five shares, one-fifth whereof should be paid to John Mure Bowie, and the remaining shares distributed equally among the other four children of Mrs Bowie, excluding Mrs Paterson. They therefore refused to accede to Mrs Paterson's claim.

In these circumstances this case was presented to obtain the judgment of the Court on the questions which had arisen. The first parties to the case were the trustees under the marriage-contract and mutual disposition and settlement of Mr and Mrs Bowie. Mrs Paterson was the second party, and the third parties were the other four children of Mr and Mrs Bowie or those in their right.

The questions submitted for the opinion of the Court were the following:—“(1) Whether the first parties, the said trustees, are bound to divide the trust-estate mentioned in article 6 of the foregoing case equally among the whole children of the marriage of Mr and Mrs Bowie? or (2) Whether the deeds referred to contain a valid appointment of one-fifth of the said trust-estate in favour of John Mure Bowie, the balance being unappointed? or (3) Whether the said deeds contain a valid appointment of the whole trust-estate to the effect of excluding the party of the second part from any right to a share of the same, and dividing it among the parties of the third part as follows, viz., one-fifth to John Mure Bowie, and four-fifths equally among the other four children of Mr and Mrs Bowie, or those in their right?”

The first and third parties argued—Mrs Bowie alone had the power of appointment here as her husband had died without exercising his power of appointment. She had validly executed that power when she joined in the bond and assignation in security granted by John Mure Bowie, as was expressed in the deed itself. That left four-fifths of the trust money undisposed of. But she had provided a scheme of distribution of that sum by her trust-disposition and settlement. If a testatrix possessing power to make a scheme of distribution of a certain part of her estate made a settlement disposing of her whole estate in a particular manner, by leaving it to an executor, &c., the part over which she had the power of apportionment was divided in the manner provided in the settlement, as it was not necessary to narrate particularly that she was exercising her power of appointment—*Smith v. Milne*, June 6, 1826, 6 S. 670 (N. Ed. 685); *Hyslop v. Maxwell's Trustees*, February 11, 1834, 12 S. 413; *Grierson v. Miller*, July 3, 1852, 14 D. 93; *Mackenzie*, 19th June 1874, 1 R. 1050. If the testatrix clearly expressed her intention of leaving the property over which she had power in a certain manner the Court would give effect to her intention—*Mackie v. Mackie's Trustees*, July 4, 1885, 12 R. 1230. It was plain that she had so expressed her intention here. The appointment to John Mure Bowie of one-fifth of the trust-estate was quite plain and valid. Then she left £100 to Mrs Paterson, which was to come out of the general estate, and she directed that the residue of her estate, including the trust

funds, should be divided equally among her other children, plainly showing that Mrs Paterson was not intended to participate at all in the scheme of division. If she had meant otherwise she would have granted John Mure Bowie one-sixth only, and not one-fifth of her estate. The recent case of *Whyte v. Murray*, November 16, 1888, 16 R. 95, which appeared to be against the contention of these parties, could be distinguished from the present, as the sum there to which the son was found to have no title had originally been the property of the wife, and at the date of the case she was alive and in the enjoyment of the securities. These elements were absent from this case.

The second party argued—No appointment had been made. It was admitted that Mr Bowie had not exercised his power of appointment. Neither had Mrs Bowie. The bond and assignation in security was merely an arrangement with John M. Bowie to enable him to borrow more easily from the insurance company. When it was executed Mrs Bowie was not thinking at all of the shares of the trust funds which were to go to the children. It was admitted that Mrs Paterson's £100 was to come out of Mrs Bowie's own estate, and Mrs Paterson claimed no more from that fund, but she was entitled to get a fair share of the marriage trust funds so far as these had not been disposed of by any deed of apportionment executed by the spouses.

At advising—

LORD YOUNG—I do not think that this is a case of any particular difficulty. The question lies in a nutshell. The funds contained in the marriage-contract of Mr and Mrs Bowie are the only funds with which we are concerned, and by that contract there is given to the wife a lifeferent of the funds, and the fee to the children of the marriage. She was the survivor, and had no estate in it except a lifeferent, and the fee was in the children unless the parents directed otherwise. The father died, not having exercised his power of apportionment; the power was then in her, and the only question is, whether she exercised that power? Failing any exercise of that power by her the fund would fall to be equally divided among her children.

Now, the first question is, whether this document which she granted in favour of John Bowie, and which bears to be an exercise of her power of apportionment, is effectual? No doubt it was executed by her at the time it was executed for a particular purpose, but I think it was a good exercise of her power of apportionment of one-fifth of the estate over which that power existed.

Now, is there any further exercise of that power by her? There is no other suggested except her settlement, but her settlement contains nothing of the kind. She gives £100 to one of her daughters, but it was admitted; and even pressed upon us, that that was to be paid out of her own estate, and not out of the marriage-contract funds. Then there is a direction to divide the rest of her own estate among the rest of her children equally. That is not an exercise of her power of apportionment at all. I am therefore of opinion that we should find there has been a valid appointment of the fund to the extent of one-fifth to John Mure Bowie, and the trustees must satisfy his claim, but that there has

been no exercise of the power of apportionment as regards the other four-fifths of the fund, and that it falls to be divided equally among the other children.

LOED RUTHERFURD CLARK, LORD LEE, and the LOED JUSTICE-CLERK concurred.

The Court pronounced this interlocutor:—

“The Lords having considered the special case, and heard counsel for the parties thereon, are of opinion that the deeds therein referred to contain a valid appointment to John Mure Bowie of one-fifth of the estate held by the trustees under the antenuptial marriage-contract, and that the remaining four-fifths of said estate fall to be divided in five equal shares among the parties of the second and the parties of the third part, other than the said John Mure Bowie—that is to say, one-fifth to Mrs Marizza Bowie or Paterson; one-fifth to the trustees and assignees under the indenture and settlement on the marriage of Mrs Annetta Antonia Louisa Bowie or Edwards, wife of William Henry Edwards; one-fifth to the trustees under the marriage-contract of Mrs Elizabeth Thurburn Bowie or Hopcroft; one-fifth to Robert Thurburn Bowie; and one-fifth to Henrietta Isabella Bowie: Find the parties to the special case entitled to payment out of the funds of the said estate of the expenses incurred by them in relation to the case,” &c.

Counsel for the First and Third Parties—Jameson—C. N. Johnstone. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Second Party—Sym. Agent—William Fraser, S.S.C.

Tuesday, July 16.

FIRST DIVISION.

HAMILTONS v. HAMILTON'S TRUSTEES.

Proof—Secondary Evidence—Skilled Witnesses—Value of Colliery.

In an action of reduction of a *mortis causa* trust settlement and codicil, on the ground of facility and circumvention, the Court granted a warrant ordaining the defenders to allow an inspection of the plant, machinery, and working plans of certain collieries—a large share in which belonged to the trust-estate—the object being to obtain evidence of their value for the purposes of the pursuer's case.

James Hamilton, a large coalmaster in Glasgow, died on 27th August 1888, when he was seventy-five years of age, leaving a trust-disposition and settlement dated 7th April 1874, with two codicils appended dated 7th May 1877 and 18th December 1882. Under these deeds the trustor provided for an equal division of the annual proceeds of the undivided residue among his whole children (three sons and three daughters), the issue of a predeceasing child to take their parents' place, and upon the dissolution of the firm of M'Colloch

& Company, who owned several collieries, and of which firm the trustor was the leading partner, he provided for an equal division of his realised share among his whole children.

By a codicil of 14th June 1888, and a trust-disposition and settlement of 6th July 1888, the trustor reduced his daughters' provisions to a mere liferent of a sum of £5000.

The daughters, or their representatives, brought an action of reduction of the last two deeds against the sons, alleging that their father had been induced to sign them by the fraud and circumvention of one of the defenders.

The pursuers stated the value of the trustor's estate at the time of his death at £120,000. The defenders stated it at £50,000.

An issue was adjusted, and the cause was set down for trial at the sittings at the close of the summer session.

The pursuers moved the Court for a warrant ordaining the defenders to allow an inspection of the plant, machinery, and working plans of the collieries by two mining engineers, “in order to estimate the value of the said plant, machinery, and collieries.”

The defenders opposed the motion, urging that the pursuers would get all the information to which they were entitled from the balance-sheets of the business (some of which the defenders themselves intended to impugn), the inventory of the deceased's personal estate, and the business books of the firm. All that could be reasonably asked or was required at this stage was a general view of the value of the collieries, so as to compare the estimate made of it by the trustor and his sons respectively. An inquiry of the kind asked might be competent if the deeds were reduced, but not at the present stage. In any case the working plans ought not to be put into the hands of other parties.

The Court granted the motion.

Counsel for the Pursuers—Murray. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, July 16.

SECOND DIVISION.

CREEVY v. HANNAY'S PATENTS COMPANY (LIMITED).

Reparation—Lead Poisoning—Factory and Workshop Act 1883 (46 and 47 Vict. cap. 53), sec. 3—White Lead.

Held (Lord Lee diss.) that the provisions of the Factory and Workshop Act 1883 (46 and 47 Vict. c. 53) with regard to the manufacture of white lead applied to carbonate of lead, and did not apply to a salt of lead called white lead used as a substitute for that article, but which was in reality a sulphate of lead.

A workman employed in a factory for the manufacture of Hannay's white lead became ill with lead poisoning, and brought an action of damages against his employers.