

At advising—

LORD JUSTICE-CLERK—This case, which gave us a good deal of trouble as regards the preliminary objections, falls now to be disposed of upon the merits.

The facts as stated in the case are extremely simple. Mr Schulze employed as a gardener a man to whom he paid 21s. a week, and who devoted the hours from eight o'clock in the morning till five in the afternoon, with the exception of an hour or an hour and a half or so for breakfast and dinner, to the service of Mr Schulze; and it is added that he was at liberty to work for others, but did not do so, as he had no need, that he had served Mr Schulze for three years in that manner, and had no other employment during that time.

Now the Justices held that George Waugh was a male servant within the definition of the Act of Parliament, 32 and 33 Vict. cap. 14, section 19, sub-section 3, and they held that he was not within any exception stated in that Act, or in section 5 of the Act 39, Vict. cap. 16.

The question which we have to decide is whether they were wrong in so holding. I have come to the opinion, really without any difficulty, that they cannot be held to have been wrong in coming to that decision. This being a question arising upon the view to be taken in regard to the interpretation of a statute, I think we should do just as is done in another Court where they hold that the Commissioners are right or wrong in the decision which they give, and my opinion upon the case is that the Justices were right.

LORD ADAM—I am of the same opinion. The facts which we have here are as your Lordship has pointed out, that the appellant Mr Schulze employed as a gardener a man named George Waugh, to keep his garden and grounds at Brunswick Hill, at the wage of 21s. per week, payable fortnightly, and we are farther told that he began work at eight o'clock in the morning, finishing at five o'clock, and having intervals for breakfast and dinner amounting in all to about an hour and a half. Now it is clear that if he was employed as a gardener, he is within the definition of servants for employing whom a person is assessable. He falls within the description of male servants for whom a person is assessable, and that being so, I do not see why he should not be held as falling within the Act. But as I understood the argument, the ground on which it was said he did not fall within the description in the Act in that respect, was that no one was a servant or fell within the description in the Act unless his whole time was at the disposal of his employer. Now, I do not agree in that proposition stated in these general terms, because it was said his whole time meant the whole twenty-four hours of the day, and it was said that unless the services of this gardener were at the disposal of his employer the whole twenty-four hours of the day, he did not fall within the description in the Act. I do not think that is so. An ordinary gardener—I mean a gardener about whom there could be no question

—is employed and works regular hours, just as a ploughman does. As soon as the working day is over, his time is his own. He may go where he likes; he may amuse himself as he likes; he may do what he likes with his time. Therefore I do not think it is right to say that this man employed as a gardener to look after Mr Schulze's garden, and working what are apparently the whole working hours of the day, does not fall within the description of a male servant in the Act 32 and 33 Victoria. I think he does, and therefore my opinion is that the Justices were right in coming to the conclusion that this was a male servant who fell within the description in that Act, and that his employer was liable to pay duty.

That being so, the only other question is whether he falls within the exception introduced by the subsequent Act, 39 Vict. cap. 16, section 5. I do not think he does, because the only part of that Act which could be said to have any bearing on the subject was that in which it was said he was only "engaged to serve his employer for a portion of each day." I do not think that he falls within that description. And on the whole I have no hesitation in agreeing with your Lordship that the Justices were right in the conclusion at which they arrived.

LORD RUTHERFURD CLARK concurred.

The Court dismissed the appeal and affirmed the determination of the Justices.

Counsel for the Appellant—Sir Charles Pearson — M'Lennan. Agent — George Andrew, S.S.C.

Counsel for the Inland Revenue—Sol. Gen. Darling, Q. C.—Young. Agent—David Crole, Solicitor of Inland Revenue.

COURT OF SESSION.

Wednesday, May 14.

FIRST DIVISION.

LOGAN, PETITIONER.

Nobile Officium—Appointment of Interim-Keeper of the Signet.

On 23rd April 1890 the Earl of Glasgow, Keeper of Her Majesty's Signet for Scotland, died, and his mandate to Mr Charles B. Logan, W.S., to act as Deputy-Keeper thereupon fell. A petition having been presented by Mr Logan asking to be appointed Interim-Keeper, the Lord Ordinary on the Bills (Wellwood), pronounced an interlocutor in which, the "Crown Agent having expressed his consent" to the appointment, he appointed the petitioner to act as Interim-Keeper until the 3rd sederunt day in May. On 14th May, no permanent appointment of Keeper of the

Signet having been made, the Court, the Lord Advocate having intimated his concurrence by counsel, *continued* the petitioner's appointment as Interim-Keeper till Her Majesty should be pleased to issue a commission appointing a new keeper.

Friday, May 16.

SECOND DIVISION.

[Lord Wellwood, Ordinary.]

MACDOUGALL v. M'FARLANE AND OTHERS (M'FARLANE'S TRUSTEES).

Trust—Vesting—Postponement of Vesting till Actual Payment.

A testator by trust-disposition and settlement conveyed his whole estate to trustees, directing them, upon the death of himself and his wife, and upon his youngest child attaining the age of 40 years, to divide his whole means and estate among those of his children who should then be alive, and the children of any who might have died, and declaring "that the provisions under these presents to my children shall not vest in them till actual payment and conveyance, and if any one or more of my children shall die before receiving payment or conveyance of their share, and without leaving issue, such shares shall be divided among my surviving children and the issue of decessers in the same manner . . . as the shares originally provided to them."

The testator's youngest child J. died about five months after attaining the age of forty, before receiving payment of his share, but leaving a trust-disposition and settlement by which he conveyed to a certain person, whom he also appointed his sole executrix, his whole estate, including his interest in his father's succession.

In an action at the instance of J's executrix against his father's trustees, held (following *Howat's Trustees v. Howat*, December 17, 1869, 8 Macph. 337) that J's share had not vested, the trustees not having unduly delayed to realise and divide the estate.

Alexander M'Farlane died on 22nd October 1837, leaving a trust-disposition and settlement dated 3rd March 1847 by which he conveyed his whole estate to trustees for the following purposes:—(1) For payment of his debts, deathbed and funeral expenses, and the expense of the trust; (2) for payment and implement to his wife, in the event of her surviving him, of the provisions to which she was entitled under her contract of marriage; and (3) the trustees were to hold the whole remainder of his said means and estate for behoof of his children, and the survivors and survivor of them, equally among them share and share alike; and it was declared that till the final division of his estate, his trustees, after

satisfying his wife's claims, should either pay to his children their shares of the remainder of the annual proceeds of his estate, or expend the same for their behoof or the behoof of any of them, with power to the trustees to expend on the education and maintenance of such of his children as might not be able to maintain themselves, a part or the whole of the annual proceeds of the shares of his children who might be able to maintain themselves. Then followed this declaration:—"And upon the death of both me and my said wife, my said trustees and their aforesaid shall, upon my youngest child attaining the age of forty years, divide my whole means and estate among those of my children who shall be then alive, and the children of any who may have died, such children succeeding *per stirpes*, and such division may be carried into effect either by a conveyance of a share of the property, or by a payment of money, or partly by both, as my said trustees may consider proper; and if any of my children shall die before receiving implement of their claims under these presents, leaving lawful issue, such issue shall be entitled to the share to which their parent would have succeeded if in life, and if more than one, in such proportions as such parent may have directed by a writing under his or her hand, and failing such writing, share and share alike: Declaring that the provisions under these presents to my children shall not vest in them till actual payment and conveyance, and if any one or more of my children shall die before receiving payment or conveyance of their share, and without leaving issue, such share shall be divided among my surviving children and the issue of decessers, in the same manner and under the same conditions and restrictions as the shares originally hereby provided to them." The estate left by the testator consisted almost entirely of certain heritable property in Crown Street and Govan Street, Hutchesontown, Glasgow.

The testator was survived by several children, and in 1878 the trustees nominated under the settlement being all dead, these children were appointed trustees by Act and Decree of the Lords of Council and Session.

John M'Farlane, the testator's youngest child, attained the age of 40 years on 4th December 1887, at which date the truster's wife was dead. He died on 25th May 1888, leaving a trust-disposition and settlement, date 22nd September 1887, whereby he conveyed and made over to Eliza Macdougall his whole means and estate, including his whole right and interest present and future in certain heritable subjects in Crown Street and Govan Street, Glasgow, which formed the most important part of the estate left by the deceased Alexander M'Farlane, and he appointed Eliza Macdougall his sole executrix. At the time John M'Farlane attained the age of forty several of the trustees and beneficiaries under his father's settlement were resident abroad.

Eliza Macdougall having been duly confirmed as executrix under the settlement of John M'Farlane, raised this action against