

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 deceasers 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 1857, 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 deceasers, 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

Alexander M'Farlane's testamentary trustees to have it declared that John M'Farlane had at the time of his death a vested interest in his father's estate, and for payment of his share of that estate.

The pursuer averred—"There was nothing to prevent the trustees from dividing the trust-estate, and paying and conveying the same in terms of the said trust-disposition in the said month of January 1888, or at any time thereafter, and they ought to have done so. The delay which took place was quite unjustifiable and unreasonable."

The pursuer pleaded—"(1) The pursuer, being in right of the said deceased John M'Farlane's share and interest in the trust-estate of the said deceased Alexander M'Farlane, in respect the same vested in him before his death and was carried to the pursuer by his disposition and settlement, is entitled to decree of declarator as concluded for.

Upon 15th November 1889 the Lord Ordinary pronounced this interlocutor:—"Finds that at the date of his death on 25th May 1888 the deceased John M'Farlane had no vested right and interest in the trust-estate of his father Alexander M'Farlane: Therefore sustains the third and fourth pleas-in-law for the defenders: Assoilzies the defenders from the conclusions of the summons, and decerns."

"*Opinion.*—The truster's direction as to the ultimate division of his estate was that it should take place upon the death of himself and his wife, and upon his youngest child attaining the age of forty years. It was declared, however, that the provisions in favour of the truster's children should not vest in them till 'actual payment and conveyance.' It is further provided that if any of the children should die 'before receiving implement of their claims,' leaving lawful issue, such issue should be entitled to the share to which the parent would have succeeded if in life, and that if any of the children should die 'before receiving payment or conveyance of their shares,' and without leaving issue, such shares should be divided among the truster's surviving children and the issue of the predeceasers.

"John M'Farlane, the truster's youngest child, attained the age of forty years on 4th December 1887. He died on 25th May 1888 without receiving payment or conveyance of his share.

"The first question is, what is the meaning of the words used in the vesting clause? Do they mean what they say, viz.—that the shares shall not vest until actual payment and conveyance, or do they mean simply that the shares shall not vest until the time when they are directed to be paid or conveyed? On this point I do not think that there can be the slightest doubt that the words must be given their natural interpretation. If the truster had intended that vesting should take place at the period fixed for division of his estate it would have been easy for him to have said so, but it is clear from the wording of the clause, and also from the language used in the other passages to which I have referred, that what he had in view was the actual receipt

or conveyance of the shares, and not the time fixed for division of the estate. Reference may be made to the cases of *Howat's Trustees v. Howat*, December 17, 1869, 8 Macph. 337, and *Johnston v. Crook*, June 1879, L.R., 12 Ch. Div. 639, and the opinion of the Master of the Rolls, Sir George Jessel.

"The only other question is whether there is room for the application of the equitable maxim, *quod fieri debet infectum valet*. I think there is not. John M'Farlane died only five months after the time fixed for division, and I do not think that it can be said that there was any unreasonable delay. Even if there was, John M'Farlane, who was a trustee, was as much to blame for it as anyone. It is said that the trustees should have been ready to divide whenever the period of division arrived. I do not think so. Until John M'Farlane attained the age of forty years it could not be certain who or how many would be the parties who would ultimately be entitled to payment or conveyance, and therefore it would have been useless to decide by anticipation whether the subjects should be sold or divided among the beneficiaries. The case is a somewhat hard one, but I feel that I have no alternative but to decide it as I have done."

The pursuer reclaimed, and argued—This case was not ruled by that of *Howat's Trustees*. In that case a much greater latitude was given to the trustees as to the time when they might realise the estate. Here the date of payment must be taken to mean the period when the youngest child reached forty, and must not be held to be dependent upon the activity or inactivity of the trustees—*Leighton v. Leighton*, March 8, 1867, 5 Macph. 561; *Howat's Trustees v. Howat*, December 17, 1869, 8 Macph. 337.

The defenders argued—This case was ruled by *Howat's Trustees*, where the words of the settlement under construction were almost precisely the same as here. No doubt if the term of payment was only postponed in order that a third party might enjoy the benefit of a liferent, vesting might take place, and the want of zeal or activity of the trustees could not affect the payment of a share that had vested—*Popham's Trustees v. Parker's Executors*, May 24, 1883, 10 R. 888. The present was not, however, a case of that kind. Further there had been no undue delay in realising the estate.

At advising—

LORD JUSTICE-CLERK—This is a question of some difficulty, but I am unable to come to any other result than that it has been decided already in the case of *Howat*. That case is as exactly in point as an authority can be when the words which are the subject of construction are not precisely the same. It decided on a construction of words which are substantially identical with those which have to be construed in this case, that vesting did not take place. I think we must follow that decision and adhere to the judgment of the Lord Ordinary.

LORD YOUNG—I do not differ from the course which your Lordship proposes to take. This is evidently a case in which it is not desirable that there should be protracted litigation, and the only way in which we can prevent that protracted litigation is to follow the precedent cited to us and which I agree with your Lordship is in point.

But I do not wish to say anything that would add to the authority of that case. I think it is a case which is well worthy of reconsideration on a suitable occasion. The question is whether in a case where we have a legacy left to a particular person, and the bequest followed by such unfortunate words as we have here, and the legatee dies before payment, the money which is undoubtedly his should not be available for payment to his creditors. The money is really his because it was given to him, and to say that the vesting of the legacy, which means merely the clothing the legatee with the gift, is to depend upon the zeal and activity of the trustees or upon some accident, and that inquiry may be made as to whether the estate might not have been realised and the payment made a little sooner than actually took place, is to my mind a very dangerous doctrine.

I should be willing to establish some such rule as this—If a truster creates a right in any person, which right has to be established by trustees, that right is not to be frustrated by the want of zeal or inactivity of the trustees. It would be impossible, I think, to say that if a person in these circumstances should die before the payment was actually made—even if he had been constantly urging the trustees to realise the estate and pay it over to the beneficiaries—it would be impossible to say that that legacy should not go to his heirs.

I think that some of these considerations may not have had their full weight in the decision of cases of that class. But I desire to say that I think the principle of such cases is well worth reconsideration, and that my inclination is to take the view taken by Lord Deas in *Howat's* case, who dissented from the majority of the Court. But I think in this somewhat petty case that we should follow the case of *Howat's Trustees*.

LORD RUTHERFURD CLARK—I think that the case of *Howat's Trustees* is in point, and that therefore we should follow that decision.

LORD LEE concurred.

The Court adhered.

Counsel for the Pursuer—A. S. D. Thomson. Agents—Emslie & Guthrie, S.S.C.

Counsel for the Defenders—Pearson. Agents—H. B. & F. J. Dewar, W.S.

Friday, May 16.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

CARRUTHERS v. CAIRNS AND OTHERS.

*Trust—Liability of Trustee—Neglect to Use Diligence for Recovery of Debt Due to Trust-Estate—“Wilful Default.”*

A farmer died leaving a trust-disposition and settlement by which he conveyed his whole estate to trustees for behoof of his wife and children, declaring that his trustees should not be liable “for the responsibility of the debtors, purchasers, or others” with whom they might transact, but “for wilful default, and no further.”

The trust-estate consisted almost entirely of the crop and stocking of the farm of which the truster was tenant. A renunciation of the lease by the trustees was accepted by the proprietrix, who let the farm to another tenant with entry at Whitsunday 1882. The incoming tenant bought the fallow, dung, crop, &c., for £815, 10s. 9d., the value fixed by arbiters, the last instalment of which sum was payable in August 1883. He also made purchases amounting to £774, 7s. 3d. at a sale by public auction of the stock on the farm, the articles of roup containing the usual provision for cash or four months' bills. In October 1882 he paid £500, and in March 1884 £200, to account of his debt. The balance remained unpaid, and the trustees, though making demands for payment, took no serious steps to recover it. In November 1886 the debtor, who had become insolvent, granted a trust-deed for behoof of his creditors, which was followed by the sequestration of his estate in May 1887.

In an action by the widow of the truster, held that the loss sustained by the trust-estate had been caused by the gross neglect of the trustees (excepting one lately assumed as trustee) in having failed to use due diligence for the recovery of said debt, and that they were liable to restore the amount so lost to the trust-estate.

*Process—Summons—Amendment—Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 29.*

Circumstances in which the pursuer of an action was allowed to amend the summons after the Lord Ordinary had heard proof and pronounced an interlocutor containing findings, in respect that the amendment was, in terms of the above section, “necessary for the purpose of determining in the existing action . . . the real question in controversy between the parties.”

John Carruthers died on 16th June 1881, survived by a widow and two pupil children. He left a trust-disposition and settlement, by which he disposed to the trustees therein