

Trustees as the proper contradictors, have chosen to come forward and identify themselves with the trustees defending the action in their interest. Now, when Messrs Laird & Sons come forward in that capacity, Mr Laird, the partner, cannot dissociate himself from the action of the firm and claim to act as arbiter in the controversy in which his firm represent the trustees. I think it impossible, his firm having elected to take up this position, that Mr Laird can continue qualified to act as arbiter. He would be deciding in a question between his own firm and the pursuer. That appears to me to be a most difficult and improper position for anyone to be placed in. But the ground of my judgment is, that the position is one which the law does not allow, and that the firm of Messrs Laird & Sons, having identified itself with the City Improvement Trustees in defending this action, Mr Laird is no longer qualified to act as arbiter under the reference clause.

LORD ADAM—By the interlocutor now under review the Sheriff finds that “the claims made by the pursuer in this action are embraced by the clause of arbitration to James Laird” in the conditions of sale. The pursuer pleads that James Laird has disqualified himself from acting as arbiter. Now, there is no doubt that James Laird is a partner of the firm of James Laird & Sons, and the proposition is that we are to refer a case in which James Laird & Sons are the defenders to the arbitration of a member of the defenders’ own firm. This appears to me to be a perfectly hopeless proposition. It was not necessary for the defenders to have taken up the position which they have, for they were merely the holders of the fund. If they had said, “You must make the City Improvement Trustees, who are the true contradictors of your claim, parties to the case,” then there would have been nothing to disqualify Mr Laird from acting as arbiter under the seventh article of the conditions of sale. But they did not do so. It is evident that the firm may become liable in the expenses of the proceedings, which of itself shows that they have a material interest in the result. We cannot therefore allow one of the firm to act as arbiter.

LORD M'LAREN—I assent unreservedly to the grounds of judgment indicated by your Lordship in the chair. It is a very usual stipulation in executory contracts of all kinds that the engineer or architect, or other skilled person who is the responsible adviser of the undertaker of the work, should act as arbitrator between the undertaker and his contractors in regard to practical questions which may arise in the course of the execution of the contract. Experience shows that such references can be carried out in a manner satisfactory to both parties, and that an architect (who is not to be considered as a person in the service of the employer but is an independent adviser) may be trusted to act fairly as an arbiter. I am not prepared to

say that the same principle does not cover the case of an auctioneer and agent for sale. An auctioneer is not very closely identified with his employer, who is probably only one of a class of persons whose goods he undertakes to sell, and I see no reason why in the ordinary case he should not be able to act impartially as an arbiter in matters arising out of the sale. But it is an essential condition of the duty and action of an arbiter that he must keep himself neutral. He must not identify himself with either of the parties by taking an active interest in the prosecution of his claim, and any interference of this kind is sufficient to disqualify him. Now, it is as plain as any fact can be, that, when an arbiter takes upon him the active conduct of a litigation on behalf of one of the parties to the reference, especially where that litigation relates to the subject-matter on which he is called upon to give a decision, he ceases to be qualified to act impartially and without a prepossession in favour of the party whom he represents in the litigation. It follows that the pursuer is not bound to submit his claim to the defender.

LORD KINNEAR concurred.

The Court recalled the judgments of the Sheriff-Substitute and Sheriff, and remitted the case to the Sheriff Court for further procedure.

Counsel for the Pursuer—Sol.-Gen. Shaw, Q.C.—T. B. Morison. Agent—P. Morison, S.S.C.

Counsel for the Defenders—A. Jameson—Guy. Agents—Macpherson & Mackay, W.S.

Friday, November 16.

SECOND DIVISION.

WILSON'S TRUSTEES v. WILSON.

Succession—Shares of Residue—Accretion—Intestacy.

A testator directed his trustees “to hold the residue of my estate for behoof of my whole children equally in liferent for their liferent alimentary use allenerly, and for behoof of their respective issue in fee, declaring that the issue of any of my children who may die shall succeed always to the share the liferent of which is hereby provided to their parent.” The testator was survived by five children.

One of these children having died without issue—held that the share of residue liferented by him fell into intestacy, and belonged to the heirs *ab intestato* of the testator as at the date of the testator's death.

Paxton's Trustees v. Cowie, July 16, 1886, 13 R. 1191, followed.

Lyon Wilson, builder, Glasgow, died on 20th July 1888, leaving a trust-disposition and settlement dated 15th March 1880,

by which he assigned and disposed his whole means and estate, heritable and moveable, to trustees for the purposes therein specified. The sixth purpose of the trust-deed was as follows—"I direct my trustees to hold the residue of my estate for behoof of my whole children equally in liferent for their liferent alimentary use allenerly, and for behoof of their respective issue in fee; declaring that the issue of any of my children who may die shall succeed always to the share the liferent of which is hereby provided to their parent, and that in such proportions as may have been appointed by their parent, and failing such appointment equally among them *per stirpes*."

The testator was survived by five children, viz., Lyon Wilson, junior, Mrs Mary Barclay Wilson or Neill, and Misses Margaret Craig Wilson, Jane Wilson, and Christina Mackie Wilson.

Mrs Neill died on 12th December 1893, survived by a daughter, and leaving a general trust-disposition and settlement whereby she conveyed her whole estate to trustees.

Lyon Wilson, junior, died on 30th December 1893, survived by a widow, but without having had any issue. He left a trust-disposition and settlement, dated 23rd October 1891, by which he assigned and disposed to trustees his whole means and estate, heritable and moveable, "including therein the whole means and estate belonging to me under and in virtue of the trust-disposition and settlement of my father, the late Lyon Wilson, . . . and also the fee of the estate stated to be liferented by me therein, and which belongs to me in fee, inasmuch as the fee is not specially disposed of, and same falls to me as heir-at-law of my father, or otherwise in respect that the conveyance in my favour therein contained by the terms thereof implies a fee in my favour."

In these circumstances questions having arisen with reference to the share of the trust-estate liferented by Lyon Wilson, junior, a special case was presented for the judgment of the Court by (1) Lyon Wilson's testamentary trustees; (2) Lyon Wilson, junior's, testamentary trustees; (3) Misses Margaret Craig Wilson, Jane Wilson, and Christina Mackie Wilson; (4) Mrs Neill's testamentary trustees; and (5) Mrs Neill's daughter.

The questions of law were—"(1) Has the share of the testator's estate bequeathed in liferent to Lyon Wilson, junior, fallen into intestacy? (2) If the foregoing query be answered in the affirmative, does the said share belong to the heirs *ab intestato* of the testator as at the date of his death? or (3) Does it belong to his heirs as at the death of the said Lyon Wilson, junior? (4) If the first query be answered in the negative, does the bequest in favour of the late Lyon Wilson, junior, imply a fee in his favour, and does the share bequeathed to him now fall to be conveyed to the second parties; or (5) Has the liferent of the said share accreted to the liferent of the shares

already liferented by the third parties, the fee of the said share falling to their children, if any? or (6) Is one-fourth of the said share now payable to the fifth party, and has the liferent of the remaining three-fourths of the said share accreted to the liferent of the shares already liferented by the third parties, the fee of the said three-fourths of the said share falling to their children, if any?"

Argued for third parties—(1) The liferent of the share of residue liferented by Lyon Wilson, junior, had accreted to them, and they were now entitled to payment thereof, equally among them, the fee falling to their children, if any, in the same way as that of the shares expressly provided to them by the settlement. *Paxton v. Cowie*, July 16, 1866, 13 R. 1191, did not rule the present case, because there was here a class of persons of unascertained number; they were neither named or sufficiently described for identification—*Muir's Trustees v. Muir*, July 12, 1889, 16 R. 954, opinion of Lord President Inglis, p. 956. The doctrine of accretion applied in order to prevent the testator being held to have died *pro parte* intestate—*Paul v. Horne*, July 5, 1872, 10 Macph., opinion of Lord Neaves, p. 942. Where a liferent had been destined to members of the same family, share and share alike, the liferent interest of one dying had been held to accrete to the survivor—*Barber v. Turner*, February 6, 1835, 13 S. 422; *Tulloch v. Walsh*, November 23, 1838, 1 D. 94; *Fergus v. Conroy*, July 13, 1872, 10 Macph. 968. If it were held that there was accretion in regard to the liferent, then in terms of the deed the children of the liferenters succeeded to the proportions liferented by their parents. (2) If the fee of the share liferented by Lyon Wilson, junior, had fallen into intestacy, it belonged to the heirs of the testator as at the death of the liferenter, and fell to be divided equally among the third parties and the fifth party as heirs *in mobilibus* and heirs-portioners at that date—*White's Trustees v. Chrystal's Trustees*, March 2, 1893, 20 R. 460. (3) If the fee of the said share were held to belong to the heirs of the testator at the date of his death, they were entitled as heirs, along with the fourth parties as representing one of the heirs *in mobilibus* of the testator at that date, to succeed *per capita* to such part of the fee as was moveable, the second parties as representing the heir in heritage taking such part as was heritable.

Argued for the second parties—(1) The share liferented by Lyon Wilson, junior, fell into intestacy, and belonged to the heirs of the testator *ab intestato* as at the date of his death. The estate was divided into as many shares as there were children, and, as children were never born to Lyon Wilson, junior, the fee of one share had not been disposed of and fell into intestacy. There was here no case for accretion; the rule laid down in *Paxton's Trustees v. Cowie* applied. The children in the present case were the testator's children, and were sufficiently described for identification—*Fulton's Trustees v. Fulton*, Feb.

6, 1880, 7 R. 566; *Simpson's Trustees v. Simpson*, December 10, 1889, 17 R. 248. (2) Alternatively, the fee of the share life-ferented by Lyon Wilson, junior, on a just construction of the testator's settlement, belonged to Lyon Wilson, junior, and had been conveyed to them by his settlement.

The fourth parties concurred in the third alternative of the third parties' argument.

Argued for the fifth party—(1) Under the destination in the settlement she was entitled to payment of, or at least was vested in, one-fourth of the capital of the share in question; (2) alternatively, she concurred in the second alternative of the third parties' argument.

At advising—

LORD JUSTICE-CLERK—The question here is, whether the share of the estate of the late Lyon Wilson, which would have fallen to his son Lyon in life-ferent and to his children in fee under the settlement of Lyon Wilson in respect of Lyon Wilson, junior, having died without issue, is now intestate succession of Lyon Wilson, senior, or falls to be added to the shares of the other children. The sixth purpose of the settlement, which is the one in question, is as follows:—"I direct my trustees to hold the residue of my estate for behoof of my whole children equally in life-ferent for their life-ferent alimentary use allenerly, and for behoof of their respective issue in fee; declaring that the issue of any of my children who may die shall succeed always to the share the life-ferent of which is hereby provided to their parent, and that in such proportions as may have been appointed by their parent, and failing such appointment equally among them *per stirpes*." Under this direction Lyon Wilson, junior, could never be entitled to more than a life-ferent of his share. He could have no beneficial fee. His children would have had the fee, but there were none. There is no alternative disposal of residue by substitution or otherwise. All we have here is a division into equal shares according to the number of surviving children and the families of predeceasing children, children being limited to an alimentary life-ferent allenerly of their shares. I think it has been well settled that where the whole estate is divided among a certain number of beneficiaries, and nothing is said about residue, then if a share lapses from unforeseen causes, that share becomes intestate succession of the testator, and must be dealt with accordingly.

I therefore would move your Lordships to answer the first and second questions in the affirmative, and if this be done the remaining questions do not require to be answered.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD TRAYNER—The testator in this case directed his trustees to hold the residue of his estate for behoof of his whole

children equally in life-ferent. According to the rule laid down, or rather recognised, in *Paxton's* case, this gave the children each an equal share in the life-ferent, but conferred no right on the survivors to the share of any one of their number who might die. There was no right of accretion. Accordingly, when Lyon Wilson died, no one succeeded to his share in the life-ferent. The fee of the residue was destined to the issue of the life-ferenters, but such issue succeeded only to the share of the residue life-ferented by their respective parent. As none of his brothers or sisters life-ferented the share of which Lyon Wilson was the life-ferenter, none of their issue succeeded to the fee of that share. If they do not succeed, then the fee of the share life-ferented by Lyon Wilson is not disposed of by the testator, and becomes intestate succession, the heir entitled to which must be ascertained as at the date of the testator's death. I am therefore for answering the first and second questions in the affirmative, which makes it unnecessary to answer any of the other questions put in the case.

The Court answered the first and second questions in the affirmative.

Counsel for the First and Fifth Parties—M'Clure. Agents—Cumming & Duff, S.S.C.

Counsel for the Second Parties—Guy. Agents—Gill & Pringle, W.S.

Counsel for the Third and Fourth Parties—Constable. Agent—N. Briggs Constable, W.S.

Friday, November 16.

FIRST DIVISION.

COUNTY COUNCIL OF DUMBARTON v. POLICE COMMISSIONERS OF CLYDEBANK.

Public Health—Special Water Supply District partly in County and partly in Burgh—County Council—Local Authority—Management and Maintenance—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), esp. secs. 11 and 81.

In 1873 a special water supply district was formed in a county under the Public Health Acts. In 1886 part of the district was formed into a police burgh. The whole water district, including the burgh, was administered by the parochial board of the parish until the passing of the Local Government (Scotland) Act 1889, which, by subsection 4 of section 11, vested in the council of each county "the whole powers and duties of the local authorities under the Public Health Acts of parishes so far as within the county (excluding burghs and police burghs)."

A question having thereafter arisen between the County Council and the Commissioners of the burgh as to which