

once for all. I do not understand that the pursuer objects to this view if there was no other consideration in the case. But he thinks he can assimilate this case to *Peters'* case in respect of two circumstances to which I shall now advert. The first of these is, that the interlocutor of the Court in which the obligation is expressed "decerns in the disjunction, erection, and annexation *quoad sacra* as libelled." These last words, according to the pursuers' contention, import into the interlocutor the conclusions of the summons, and among the conclusions there is one that the defenders should be bound and obliged "to provide the minister of the said church in a competent stipend," &c. But that conclusion is not one of those for which decree was given. The decree of disjunction, erection, and annexation "as libelled" does not cover the conclusion as to stipend at all. The decerniture as libelled only applied to the conclusions (1) that certain lands should be disjoined from an existing parish; (2) that these lands should be erected into a new parish; and (3) that the disjoined lands should be annexed *quoad sacra* to the new parish. Decree as libelled was certainly pronounced so far as these conclusions went, but no further. With reference to the conclusion as to stipend, quite separate from the three I have alluded to, no decree was pronounced by the interlocutor of 8th March 1809. If there had been—if, as the pursuer says, there was then pronounced a decree against the defenders for payment of a "competent stipend"—it would have been superfluous to stipulate, as the interlocutor does, that the interlocutor creating the new parish should only become operative on the defenders engaging to be answerable for a fixed stipend of £200 per annum. But, as I have said, the words as libelled have only reference to the conclusions of the summons relative to disjunction, erection, and annexation. The interlocutor is so limited in distinct terms. The Lords "decern in the disjunction, erection, and annexation *quoad sacra* as libelled,"—they decern as libelled in nothing else.

The second matter on which the pursuer specially relies is this, that in the minute of Council lodged by the defenders in compliance with the order contained in the interlocutor above quoted, the defenders undertook to be "answerable for a stipend of not less than £200 sterling per annum," &c. This, he says, shows that the stipend for which the defenders became answerable was a competent stipend, and not less than £200 a-year. I think this is not an admissible reading of the defenders' undertaking. The words "not less" were certainly unnecessary as matter of compliance with the order of Court, and I think the undertaking should be read in connection with the order in obedience to which it was lodged. The defenders were only ordered to lodge a minute in which they undertook to be answerable for £200 a-year. That they undertook to be answerable for not less than £200 a-year cannot in any reason be read as an undertaking that they under-

took to be liable for more. The words "not less" had a different signification in the case of *Peters*, but they were there used in a very different connection.

I think the pursuer has failed to show that the defenders are liable to him in any stipend beyond £200 a-year, and that therefore the interlocutor of the Lord Ordinary assoilzieing the defenders should be adhered to.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Pursuer—Dean of Faculty, Q.C. — M'Lennan. Agents — Duncan & Black, W.S.

Counsel for the Defenders—Ure—Sym. Agents—Cumming & Duff, S.S.C.

Wednesday, January 22.

SECOND DIVISION.

STEWART'S TRUSTEES v. STEWART.

Succession—Fee and Liferent—Fee with Protected Succession—Intestacy.

A testator by his trust-disposition and settlement directed his trustees to convey to the children of his marriage his whole means and estate, heritable and moveable, share and share alike, subject in the case of daughters to the proviso, that upon their severally attaining majority, the trustees were to reinvest their shares, "taking the conveyances or securities thereof in favour of my said daughter or daughters in liferent for their liferent use alienarily, and to the child or children to be lawfully procreated of her or their bodies in fee." By a supplementary deed of settlement the trustees were directed, "upon my daughters attaining majority or being married, . . . to denude themselves of their, my said daughters' . . . respective portions of my estate in terms of" the above proviso of the trust-disposition and settlement. The trustees conveyed the share of a daughter to trustees nominated by her, the destinations being taken in the terms above quoted. She died without issue, leaving a settlement by which she bequeathed her share to certain beneficiaries. Held (following *Lindsay's Trustees v. Lindsay*, 8 R. 281; *DalGLISH'S Trustees v. BANNERMAN'S Executors*, 16 R. 559; and *Logan's Trustees v. Ellis*, 17 R. 425) that under the destination in her father's settlement the fee of her share had vested in her, defeasible only in the event of her having issue, and was consequently carried by her will.

Mr James Stewart of Clydebank, Greenock, died on 11th November 1837, leaving a trust-

disposition and settlement and a supplementary deed of settlement dated respectively 19th July 1825 and 2nd June 1830. By the first of these deeds he conveyed his whole estate, heritable and moveable, then belonging or which should belong to him at the date of his death, to trustees for the purposes therein mentioned. The fifth trust purpose was as follows:—"In the fifth place, after setting aside such a sum of money as will secure the payment of the foresaid annuity to my wife, I hereby direct and appoint my said trustees to redispone, convey, and make over to the issue of my present marriage the whole of my means and estate, heritable and moveable, in the event of there being only one child of the said marriage; but in the event of there being more than one, then to the said children equally among them, share and share alike; and in either case, I appoint the said conveyance to be made at the periods and subject to the conditions following, namely, if a son or sons, upon his or their attaining the age of twenty-five years complete, but not sooner, a reasonable yearly allowance being made to him or them by my said trustees for their education and support, from the time of my death, or after they shall have attained the age of ten years, until they shall have arrived at the age of twenty-five years; and if a daughter or daughters, upon her or their severally attaining majority; but my said trustees are in this last case hereby directed and required to reinvest the share or shares of my estate, heritable or moveable, coming to her or them, on such security as they shall see proper, taking the conveyances or securities thereof in favour of my said daughter or daughters in life-ferent, for their life-ferent use alienarily, and to the child or children to be lawfully procreated out of her or their bodies in fee, an allowance being also to be made by the said trustees for their support similar to the above, until they shall have attained majority as aforesaid." In the second deed he made certain additions to and alterations on the first (immaterial to the present case), and in the third place he provided as follows:—"I hereby appoint and direct my said trustees, upon my daughters attaining majority or being married, or upon my sons attaining the full age of twenty-five years, to denude themselves of their, my said daughters' and sons' respective portions of my estate, in terms of the fifth proviso of the said deed of settlement; and in the event of any of my said children dying without lawful heirs of their own bodies, I direct and appoint the share or shares of the decesser or decessers to be equally divided among or invested in the name and for the behoof of the survivors or survivor, share and share alike, in terms of the said deed of settlement."

In 1849, certain questions having arisen as to the division of the trust-estate, an action of multiplepounding was brought by the trustees in the Court of Session (*Stewart's Trustees v. Stewart*, 13 D. 1386, 14 D. 298) in which it was decided that the clauses in the supplementary deed provid-

ing for a substitution in favour of survivors in the event of any of the children dying without lawful heirs of their own bodies, referred to the case of children predeceasing the terms of division and investment which had then already arrived; and that no substitution could competently be added to the trustor's direction to invest said sums in favour of his daughters "in life-ferent for their life-ferent use alienarily, and to the child or children to be lawfully procreated of their bodies in fee." In the course of these proceedings Miss Helen Love Stewart executed a deed of nomination of trustees dated 16th December 1852, to whom her share was accordingly conveyed by Mr James Stewart's trustees in trust for behoof of the said Helen Love Stewart in these terms.

Miss Helen Love Stewart died unmarried on 17th June 1895 leaving a holograph settlement dated 10th June 1895, by which she assigned and disposed her whole estate and effects heritable and moveable to trustees for the purposes therein mentioned of which the principal was to pay legacies of £1500 each to each of her nephews and nieces who should survive her.

In these circumstances, doubts having arisen as to Miss Stewart's power to dispose of the fee of her share of her father's trust-estate, a special case was presented for the opinion of the Court. There were nine parties to the case, of whom the third, fourth, and seventh represented brothers and sisters of Miss Helen Love Stewart. The fifth parties were the testamentary trustees under the settlement executed by Miss Helen Love Stewart. The separate contentions maintained by the other parties were given up at the bar.

The fifth parties maintained that the testator gave an absolute gift of a share of his estate to each of his children, that the destination in favour of children's children was a mere burden on the fee, which was vacated on Miss Helen Love Stewart's death without leaving issue, and that in any view Miss Helen Love Stewart having survived the period of division, to which alone the destination to children's children was referable, was entitled to dispose of the fee of her share.

The third, fourth, and seventh parties maintained that the testator made no absolute gift of a share of his estate to each of his daughters in fee, but that their right in such shares was restricted to a life-ferent; that Miss Helen Love Stewart had no power to dispose of the share life-ferent by her; that the said share fell into intestacy of the testator, and must be divided among his next of kin as at the date of his death.

The opinion and judgment of the Court was desired upon, *inter alia*, the following question of law—(1) Had Miss Helen Love Stewart power to dispose by will of the share of her father's trust estate, bequeathed to her by his trust-disposition and settlement.

Argued for the fifth parties—There was here in effect an absolute gift to Miss Stewart in the event, which happened, of

her dying without issue. The case was ruled by *Lindsay's Trustees v. Lindsay*, 8 R. 281, as followed in *Dalglish's Trustees v. Bannerman's Executors*, 16 R. 559, and *Logan's Trustees v. Ellis*, 17 R. 425. This case was a contrast to the case of *Muir's Trustees v. Muir's Trustees*, 22 R. 553, inasmuch as there the direction to the trustees was "to hold for behoof of children" the shares being "to be set aside, and held and invested, and otherwise dealt with as after mentioned," viz., for the beneficiaries' life-rent use alienably with a fee to their children—*Fulton's Trustees v. Fulton*, 7 R. 566, if in point here, is now overruled by *Lindsay's Trustees, cit.* See per Lord Lee in *Dalglish's Trustees, cit.* at p. 564.

Argued for the third, fourth, and seventh parties—The daughter's right was to a life-rent only. The rule in *Lindsay, Dalglish, and Logan, cit.*, was applicable solely to the case of an absolute and unconditional gift subsequently modified in a certain event which does not take place—See *Muir's Trustees, cit.*, per Lord M'Laren at p. 557. That case was an authority in favour of these parties, because in the deeds here under construction the testator never gave anything except a life-rent to his daughters. The cases of *Lindsay, Dalglish, and Logan* were, moreover, distinguished from the present, in respect that in all these cases there was present the element of repugnancy, which was absent here. This case was on all fours with *Fulton's Trustees v. Fulton, cit.* The fund therefore fell into intestacy, and passed to the testator's next-of-kin as at the date of his death.

At advising—

LORD JUSTICE-CLERK—If the question which comes before us in this case were open, there would be great room for argument on both sides, but I have no doubt that it is already decided by the case of *Lindsay's Trustees* and the other cases following upon it to which our attention has been directed. I think, therefore, that we should answer the first question in the affirmative, and I think it is unnecessary to answer any of the other questions in the case.

LORD YOUNG—I think so also. The question in the case of *Lindsay's Trustees* and in the other cases cited to us by Mr Dundas was one which it was then reasonable to raise and argue and have decided, but it has now been decided, and, if I may be permitted to say so, in my opinion, reasonably decided. At any rate, we must follow these decisions. I think in this case that Miss Stewart's share was so vested in her as to be liable for her debts and deeds, and it must go according to her will. I think we shall satisfactorily dispose of the case by answering the first question in the affirmative, and leaving the other questions unanswered.

LORD TRAYNER—I agree. I think this case is ruled by the decisions in the case of *Lindsay's Trustees* and the other cases following upon it which have been quoted to us.

LORD RUTHERFURD CLARK was absent.

The Court answered the first question in the affirmative.

Counsel for the First Parties—James Reid.

Counsel for the Second Party—Balfour, Q.C.—Macfarlane.

Counsel for the Third, Fourth, and Seventh Parties—Dean of Faculty, Q.C.—J. H. Millar.

Counsel for the Fifth Parties—H. Johnston—Dundas.

Counsel for the Sixth, Eighth, and Ninth Parties—Rankine—E. H. Robertson.

Agents for all the Parties—Carment, Wedderburn, & Watson, W.S.

Thursday, January 23.

FIRST DIVISION.

(Before Seven Judges.)

[Junior Lord Ordinary.]

LORD BELHAVEN AND OTHERS,
PETITIONERS.

Entail—Provisions to Widow and Children—Aberdeen Act (5 Geo. IV. cap. 87), sec. 1—“Free Yearly Rent of Lands”—Mineral Lordships—Valuation of Provisions.

The Aberdeen Act authorises an heir of entail in possession to make provision for his widow by way of annuity out of the entailed estates, "provided that such annuity shall not exceed one-third part of the free yearly rent of the said lands and estates when the same shall be let, or of the free yearly value thereof where the same shall not be let . . . all as the same shall happen to be at the death of the granter."

Held, by a majority of Seven Judges (*diss.* Lord M'Laren), that for the purpose of ascertaining the maximum provision authorised by the statute, the lordships payable by the lessees of minerals for the year of the granter's death, formed part of the rents of the entailed estates, irrespective of the probable exhaustion of the minerals in the immediate future.

Contra by Lord M'Laren, who held that the lordships so payable did not exclusively represent rent, and that the capitalised value of the unexhausted minerals at the date of the granter's death ought to be taken as the basis of calculation in computing the yearly rent or value.

Wellwood v. Wellwood, 10 D. 1480, 11 D. 248, and *Douglas v. Scott & Yorke*, 8 Macph. 360, *doubted*.

In November 1894 a petition was presented to the Junior Lord Ordinary (Low) by the present heir of entail in possession of the entailed estates of Wishaw, under section 7 of the Aberdeen Act, to have the widow's and children's provisions granted by his