

the law of Scotland, at any time since it has been systematised, to say that money acquired by a married woman became so completely the property of the husband that a reasonable postnuptial deed giving equal rights to the heirs of the spouses was revocable as a donation. It is no doubt a fair subject of controversy whether the doctrine of the *communio bonorum*, as expounded by the institutional writers, is a sound theory in the sense of being a true representation of the law regulating the rights of the family in the husband's estate. But as regards the personal estate of the wife at least, the theory fairly enough represented the effect of marriage on such estate, because it cannot be said that the wife's estate ever vested in the husband unconditionally. The husband, in virtue of his *jus mariti*, had the administration of the wife's estate, but her interest in it was so far recognised that a reasonable postnuptial settlement was binding in a question between the spouses, and was even effectual against the husband's creditors to the extent of affording a provision to the wife after the husband's death.

The surrender of the claim of *jus relicte* was regarded as sufficient consideration to support an annuity or life-interest to the wife secured out of her estate, and the exclusion of the claim of the wife's next-of-kin was consideration for such a testamentary provision in their favour, or in favour of selected relations of the wife, as the spouses might agree on.

This principle was no doubt to some extent trenching upon by the 6th section of the Intestate Moveable Succession Act 1855, which deprived the wife's next-of-kin and legatees of all right to a share of the goods in communion. It may be doubted whether the Legislature when it enacted this law, was fully informed as to the state of the common law with respect to wife's personal estate, as it can hardly be supposed that it was intended to deprive married women in Scotland of the only vestige of right which they possessed in their personal estates. But this anomalous condition of the law did not long continue. By the Conjugal Rights Act 1861 the husband or his creditors are not to be entitled to claim the wife's money as falling under the *jus mariti* except on condition of making therefrom a reasonable provision for the support and maintenance of the wife if a claim therefor be made on her behalf. It is only in case of dispute that the amount is to be determined by the Court, and it follows that if the spouses are agreed they may themselves apportion the wife's money so as to secure for her an equitable share of the fund to be held by her exclusive of the *jus mariti*. Again, it is not necessary that this provision shall take the form of an annuity; in cases that have come before the Court for decision it has been held that a capital sum may be set aside as a provision to the wife, which would of course be subject to her testamentary disposition.

In the present case the spouses have divided the fund equally, giving the fee,

in the event of their being no issue of the marriage surviving, in the proportion of one-half to the heirs of each. This seems to me to be according to the statute, and in the case of *Kidd v. Kidd*, cited by the Lord Ordinary, it is recognised that the statute is a sufficient foundation for a postnuptial settlement of the wife's estate. I am accordingly of opinion that the reclaiming-note should be refused.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer—A. S. D. Thomson—W. Thomson. Agents—W. & J. L. Officer, W.S.

Counsel for the Defender—D. F. Asher, Q.C.—Guy. Agent—David Milne, S.S.C.

Friday, July 17.

#### FIRST DIVISION.

[Lord Pearson, Ordinary.]

#### THE EARL OF STAIR AND OTHERS (THE EARL OF STAIR'S TRUSTEES), PETITIONERS.

*Trust—Administration of Trust—Exercise of Discretionary Power to Sell Estate—Judicial Factors (Scotland) Act 1889 (52 and 53 Vict. c. 39), sec. 18—Directions of Court—Investment and Distribution of Trust-Estate.*

Trustees, empowered to sell part of the trust-estate at such time as they thought advantageous or expedient, obtained an order under sec. 18 of the Judicial Factors Act 1889 for superintendence of the administration of the estate by the Accountant of Court. The trustees being in doubt as to whether it would be more for the advantage of the trust estate that they should sell the estate or delay selling, the Accountant reported to the Court for directions in the matter.

The Court declined to give the direction sought, on the ground that the question raised related neither to the "investment" nor the "distribution" of the trust-estate as required by sec. 18.

*Opinion (per Lord President and Lord M'Laren)* that the jurisdiction conferred by sec. 18 of the Judicial Factors Act 1889 in regard to the administration of a trust-estate is similar to that exercised by the Court in superintending judicial factors.

The Judicial Factors Act 1889, sec. 18, explained and commented on.

By trust-disposition and settlement the ninth Earl of Stair, who died in 1864, conveyed his estates of Ravenston and Cleland to trustees for certain purposes. *Inter alia*,

he directed his trustees to sell the said estates, except Ravenston, at such time as they thought advantageous or expedient, to apply the trust funds so realised in the purchase of lands contiguous to Ravenston, with power to build a mansion-house, and to convey the said estate of Ravenston and additions to his second son George Grey Dalrymple and the heirs whomsoever of his body. The income was to be paid to the said George Grey Dalrymple after he attained the age of twenty-five, and during the subsistence of the trust, but so long as Cleland was unsold, one-half of the proceeds of the minerals therein was to be held and applied as an addition to capital.

Power was conferred on the trustees to work the minerals, to cut wood, &c., but no power of investment otherwise than in the purchase of land was conferred.

By subsequent deed of alteration, power was conferred on the trustees to sell the estate of Ravenston if they considered it advisable, and to apply the proceeds in the purchase of any other lands in Scotland to be settled in the same manner as Ravenston was directed to be settled, and in case the said George Grey Dalrymple should desire to occupy the mansion-house of Cleland, they were authorised to allow him to do so, and to delay the sale of the estate of Cleland while he should continue to occupy the house.

Ravenston was sold in 1874, but no purchase of new estate was made with the proceeds. No deed of entail was executed, and Cleland House was let since 1889.

The Judicial Factors (Scotland) Act 1889 (52 and 53 Vict. c. 39), sec. 18, enacts that "where a person deceased has left a settlement appointing trustees or other persons with power to manage his estate, it shall be competent for such trustees or other persons to apply to the Court of Session for an order on the Accountant to superintend their administration of the estate in so far as it relates to the investment of the estate and the distribution thereof among the creditors of the deceased and the beneficiaries under the settlement, and the Court may grant such order accordingly, and if such order be granted, the Accountant . . . at any time, if he thinks fit, may report to the Court upon any question that may arise in the administration of the estate with regard to any of the aforesaid matters, and obtain the directions of the Court thereupon."

In June 1895 the Earl of Stair and others, trustees under the trust-disposition and settlement aforesaid, presented a petition to the Court under this section of the Act for an order on the Accountant of Court to superintend the administration of the trust, upon the narrative that various questions of difficulty had arisen relating to the investment of the estate and its distribution among the beneficiaries. The order craved was granted.

In December 1895 the Accountant of Court reported to the Court under the said section for directions as to whether the terms of the Thellusson Act applied to the direction contained in the trust-disposition

and settlement to accumulate one-half of the proceeds of the minerals of Cleland.

On 14th January 1896 the Court (Lord Low, Ordinary) decided that the Thellusson Act did apply, and that Mr George Grey Dalrymple was entitled to the whole rents and proceeds of the said estate from the expiry of twenty-one years from the testator's death.

In view of this judgment the trustees resolved to take steps for selling Cleland estate and minerals.

The agricultural land and feu-duties were valued at £32,000. The minerals were valued by Messrs J. & G. H. Geddes at £26,000, and at the end of their report these gentlemen said that they "could not advise the trustees to sell the mineral portion of Cleland estate" for less than that sum.

In a subsequent letter, however, Mr G. H. Geddes stated that the unlet portion of the mineral field had been left out in arriving at that valuation, and added—"In the whole circumstances I am rather inclined to recommend the trustees to delay the sale for a time until the lower seams can be effectually proved, as I am satisfied that if they can be developed they will be likely to yield a large income for many years."

In consequence of this recommendation by Mr Geddes the trustees asked the Accountant to report to the Court, in terms of the said section 18, for directions as to whether they should sell the lands of Cleland at once, or should delay doing so until the value of the lower seams of coal should have been proved. The Accountant accordingly reported to the Court for directions on the matter.

On July 1st 1896 the Lord Ordinary (PEARSON) reported the petition to the First Division.

*Note.*—"This application raises a new and wide question touching the scope of a recent statute (the Judicial Factors (Scotland) Act 1889), and the relations established by that statute between the Court and all trusts which may be brought under its superintendence. . . .

"The question I have to report is, whether the matter thus reported by the Accountant falls within the scope of the 18th section of the Judicial Factors Act 1889. In my opinion that section ought to receive a favourable construction, and I should not hesitate to aid trustees in matters falling within the scope of it. This application, however, asks for direction on a matter which is not only a question of law, but is peculiarly within the region of discretion. It is the kind of question which would usually be left entirely to the decision of trustees acting honestly, and with the best advice that they can get. The question on the merits is, whether, having regard to the probabilities and possibilities of a certain mineral estate, the rents of which are now paid away under the previous decision as to the application of the income, the trustees ought to sell it now or to keep it? And there is the further question which has been raised on the suggestion of the eminent mining engineers whom the trustees have consulted, viz., Whether, if they are not to sell it now,

they ought to be authorised to spend between £1000 and £2000 of the trust-estate in proving the minerals with a view of getting a more favourable sale if they should turn out to be present in workable quantity. Now, the position of trustees as regards matters falling within the ordinary limits of their discretion is that they are bound to exercise it on the best advice and honestly. Here they are aided in the exercise of their discretion by consulting the Messrs Geddes, who are among the foremost mining engineers in Scotland. It is obvious that if the Court is to do anything by way of advising or directing the trustees so as to keep them safe in the future, it must either accept the report of the men of skill whom the trustees have consulted or must invite fresh advice. The latter course would probably not advance matters much, and, on the other hand, the report and relative letter do not give a very certain sound. While the valuation, which amounts to £26,246, is arrived at apart from the unlet portion of the mineral field, Messrs' Geddes' report, read as a whole, does not leave out the unlet portion, and in advising the trustees whether they should sell or not, it balances the chances of certain mineral fields presently worked being exhausted against the chances of further minerals being developed. On the balance of these considerations Messrs Geddes report that they would not advise the trustees to sell the mineral portion of the estate now for a lower sum than £26,000. That report, taken by itself, looks as if Messrs Geddes were prepared to advise a sale if that amount could be got. But the letter which accompanied it contains these words—'In the whole circumstances I am rather inclined to recommend the trustees to delay the sale for a time until the lower seams can be effectually proved, as I am satisfied that if they can be developed they will be likely to yield a large income for many years. Now, I profess myself unable to see how the Court could in any useful way or to any useful purpose undertake to direct the trustees in a matter of that sort. It seems to me to be a matter on which the trustees must still exercise their discretion honestly, and on the best advice they can get, and unless I can find something in the section which clearly imposes such a duty on the Court, I should hesitate to undertake it. The present petition is, I suppose, one of the earliest presented under this section, and it has already furnished an instance of the usefulness of the statute, for the trustees have obtained the direction of the Court as to the application of the Thellusson Act. But if this application were granted, it seems to me that the Court would be put into the position of directing trustees upon a matter which does not fall within the intention of the statute. As I said before, the 18th section is one which ought to be widely construed, but referring to the words of the section, I doubt whether this particular application is within the limits of it at all. It is limited in its terms to the superintendence of the trustees' administration of the estate by the Accountant in so far as the administration relates

to the investment of the estate and the distribution thereof among the creditors or beneficiaries. The question is whether I am to direct a sale to be made or to be deferred? That does not relate to distribution among creditors or beneficiaries, though if a sale were directed it might lead up to a stage at which questions as to distribution would arise. Is this, on the other hand, a question of administration relating to the investment of the estate? It is a question as to realisation, and realisation may be for investment or distribution. The region of investment is not reached until after realisation, except in cases where the item proposed to be dealt with is in the ordinary sense one of the trust investments, and I doubt whether that can be predicated of the mineral estate of Cleland."

The petitioners, besides discussing fully the arguments for and against sale or delay, argued—The present application for directions was competent, inasmuch as it related to the investment and distribution of the trust-estate.

At advising—

LORD PRESIDENT—The 18th section of the Judicial Factors (Scotland) Act 1889 introduces an entirely new and, from the point of view of trustees, a highly beneficial change in the administration of Scotch trusts. It enables the trustees acting under any private trust to obtain immunity for their acts, in the important articles of investment and distribution, by subjecting their administration to the supervision of the Accountant of Court.

It was said at the bar that the section has been sparingly made use of. If so, this must be either because trustees are not so timid of the responsibilities of administration as the complaints of recent years had persuaded the Legislature, or because they have not been informed of the remedy provided. I am not aware of any reason, in regard to expense or otherwise, which should deter honest administrators of a trust from coming under the supervision of the Accountant of Court, and thereby obtaining protection from that responsibility about investments which has frightened so many men away from the office of trustee.

I have said thus much of the importance and beneficence of the Act, because I think that much of its usefulness depends on a distinct understanding of its limits. It does not "throw into Court," to use a popular expression, the whole administration of the trusts coming under its operation. Those trusts go on, on the responsibility of the trustees, except in the matters of investment and distribution, as to which the trustees are entitled to the direction of the Accountant and through him of the Court.

Now, in nine-tenths of the cases which arise, there can be no doubt as to what is within the section, and this is especially so as regards investment. It is purely administrative work. The word distribution seems to touch more controversial matter. Holding, as I do, that the matter now

proposed for the direction of the Court is neither investment nor distribution, I am not anxious to define or dogmatise as to the scope of the words. But I think it sufficiently plain that in disposing of matters of distribution, the Court will not, under this section, apply what are really powers of administration to the determination of contentious rights. So long as distribution is more or less plain sailing or consequential the Court will sanction it; but should a conflict of right arise, the Court would presumably relegate it for decision *in foro contentioso*. In short, the jurisdiction would seem, as Lord M'Laren suggested, to be similar to that exercised by the Court in superintending judicial factors.

Now, the question reported by the Accountant is, whether the trustees shall now proceed to sell the estate of Cleland which is vested in them. It is to be observed that the truster expressly directed his trustees to sell certain lands of which Cleland forms part; and I do not know very well why the sale of Cleland has been so long delayed, as the discretion allowed is only the usual one—at such time as they think advantageous or expedient. It appears, however, that there is something to be said for further delaying the sale in order to prove the lower seams of the minerals (it might be at some expense), with a view to getting a higher price if the minerals were proved to be valuable. The pros and cons of this question may easily be imagined, and show it to be one of discretion, on which skilled opinion and good judgment in balancing alternatives would be chiefly of account. The matter is, however, further complicated by the effect which the postponement would have on the relative interests of the heirs in possession and the subsequent heirs.

It seems, however, quite clear that this is not a question of investment. The trustees are not even comparing the desirableness of some contemplated investment with the land which they now hold. As the Lord Ordinary says, the stage of investment has not been reached.

On the other hand, I do not see how the question reported by the Accountant is one of distribution. It is true that by the combined action of the trust-disposition, and the Thellusson Act, so long as Cleland is unsold the whole of the minerals go to the heir in possession. But that does not affect the quality of the question—sell or delay selling.

I am therefore for finding that the matter reported does not relate to the investment or distribution of the estate, and with that finding the case would go back to the Lord Ordinary.

LORD ADAM—Like your Lordship, I am of opinion that the questions raised in this case relate to the administration of the estate as regards neither investment nor distribution. It is on these questions alone that the Court is entitled to give its assistance. I therefore concur with your Lordship both as to this particular case and as to the general purpose of the Act.

LORD M'LAREN—I am, like all your Lordships, anxious to give full effect to the provisions of this Act for the relief of gratuitous trustees; and I think we do give it if we realise as the guiding principle that we should be prepared to give the same assistance to trustees as we would give to the officers of the Court. The Court has always declined to advise a judicial factor as to the exercise of his purely discretionary power. We have not the means of judging the circumstances which render the exercise of a discretion beneficial or the reverse to the trust, and I agree with your Lordship that it was not within the contemplation of the statute that the Court should either assist a trustee in the exercise of a discretion, or decide contentious matters.

LORD KINNEAR—I concur.

The Court pronounced the following interlocutor:—

“Find that the question of the sale of the estate of Cleland submitted is not a question relating to the distribution or investment of the estate, and with that finding remit to the Lord Ordinary: . . . Find the trustees entitled to the expenses incurred by them out of the trust-estate.”

Counsel for the Petitioners—Dundas.  
Agents—Dundas & Wilson, C.S.

Friday, July 17.

## SECOND DIVISION.

[Sheriff-Substitute at  
Edinburgh.]

BARR v. BAIN.

*Proof—Admissibility of Evidence—Filiation and Aliment—General Statement in Record Allowed to Go to Proof without Objection.*

In an action of filiation and aliment for an illegitimate child, born on 7th December 1895, the defender in his defences denied the pursuer's statements, and made a general averment “that about 1894 and 1895 the pursuer was indulging in sexual intercourse with several young men living in her own neighbourhood,” among them being three persons named, and that one of them was the father of the child.

The case having gone to proof without objection on the part of the pursuer—held that the defender was entitled to ask two of the persons named, who appeared as witnesses for the defence, whether on particular occasions they had connection with the pursuer.

Jane Barr, with consent and concurrence of her father William Barr, farmer, Carnwath, raised in the Sheriff Court at Edinburgh, an action against Peter Horn Bain, insur-