

character of the streets of Lerwick, I agree with Lord Adam that the objections to the competency of the appeal may be repelled. I think that in the case of the burgh of Lerwick there are grounds for the contention that this is not a mere question of fact, because the streets of Lerwick are not constructed for vehicular traffic, and there is no distinction of footway and causeway. Again, it is said that the whole streets are the property of the burgh, and that this is merely a question of assessment. At the same time I do not wish to be understood to say that in any burgh, where the streets are of the ordinary character, the householder, by merely saying that the pavement is not his property, can exclude the jurisdiction of the Sheriff and obtain the benefit of the appeal to this Court. That will have to be considered if the question should arise.

**LORD KINNEAR**—I agree with Lord Adam for the reason he has given. I think the 339th section provides an appeal generally to various classes of persons—persons who may be “liable to pay or to contribute towards the expense of any work ordered by the commissioners,” and persons “whose property may be affected” by the order of the commissioners, or who may “think themselves aggrieved by such order,” though not called upon to pay or contribute towards the expense. Now, I assume that if the present appeal could be shown to fall under section 143, it would be incompetent by reason of the provision that the appeal given in section 339 shall be open only if it is not otherwise specially provided in the Act. But I agree with what Lord Adam has said, that the 143rd section gives an appeal, not to persons who complain of an order on the ground that they may be wrongfully called upon to contribute towards the expense of its execution, but only to persons whose property may be affected by such an order, and who think themselves thereby aggrieved. Now, the appellant does not complain upon that ground. He does not allege that the footpath to be repaired is his property, nor that the repair will in any way affect the property belonging to him and bounded by the footpath. On the other hand, the Commissioners do not allege that the footpath is the property of the complainer, but on the contrary they call upon him to contribute to the expense of a footpath bounding his property. And therefore I cannot find anything to disclose a complaint that the order in question affects the property of the appellant. I think it is a complaint upon another ground, and therefore within the 339th section.

**LORD PRESIDENT**—I do not differ.

The Court repelled the objection to the competency of the appeal.

Counsel for Appellant—Balfour, Q.C.—Galloway. Agents—Carmichael & Miller, W.S.

Counsel for Respondent—J. G. Stewart. Agents—Irons, Roberts, & Co., S.S.C.

Saturday, November 14.

FIRST DIVISION.

[Lord Pearson, Ordinary.]

GEMMELL (CUMING'S TRUSTEE) v.  
CUMING AND OTHERS.

*Trust—Marriage-Contract Trust—Denuding of Trust Funds—Fund Held as Security for Annuity.*

By antenuptial contract of marriage, a husband, after providing an annuity to his wife and binding himself to pay £500 at his death to the children of the marriage, assigned a life insurance policy to trustees “in security and for payment *pro tanto* to the said M. S. [his wife], in the first place, of the foregoing provisions in her favour, and in the second place, for security and payment of the foresaid provisions in favour of the children of the marriage . . . which sum of” £500, “and the sums to be received in virtue of the foresaid policy, in so far as the same may not be applied for payment of the foresaid provisions to the said M. S. are to be divided among the said children in such proportions as the said” spouses, “or the survivor of them, shall appoint by a writing under her or his hand, and failing of such appointment, to be divided equally among the survivors of them and the issue of such as may have predeceased leaving issue.” The husband was survived by his widow, two daughters, and a grandson by a predeceasing daughter. *Held (aff. the judgment of Lord Pearson)* that the trustee was not entitled to pay the proceeds of the policy to the two daughters during the widow's lifetime in terms of a deed of appointment executed by her, but must retain and administer them as trust funds.

*Opinion reserved* as to the date of vesting of the proceeds of the policy.

*Succession—Vesting—Marriage-Contract—Clause of Survivorship—Power of Appointment.*

By antenuptial marriage-contract a wife conveyed her whole property and *acquiverenda* to trustees for payment of the yearly profits thereof to herself and her husband during their joint lives, and, on the death of either, to the survivor, “and after the death of the longest liver of the said” spouses “the said trustees shall be bound to denude of the said trust and pay over or convey the said trust estate to the children of the marriage in such shares or proportions as may be appointed by the said” spouses, “or the survivor of them, by any writing under their hands, and failing such writing, then the said trustees shall be bound to pay and convey the same to the said children equally and to the issue of such child or children as may have predeceased, such issue having only the share to which their parents would have

been entitled had they been in life." The husband was survived by his widow, two daughters, and a grandson by a predeceasing daughter. *Held* (aff. judgment of Lord Pearson) that the clause of survivorship referred to the death of the widow, and that inasmuch as the provisions to children did not vest till that period, no deed of appointment executed by the widow could take effect during her lifetime.

This was a multipolepointing raised by the trustee under the antenuptial marriage-contract of Mr and Mrs Cuming dated 1845.

By the said marriage-contract Mr Cuming bound himself to provide to his widow an annuity of £40; and to pay to the child or children of the marriage the sum of £300 if there were not more than three children, and the sum of £500 if there were more, at the first term of Whitsunday or Martinmas after his death. He further bound himself to insure his life for £500, and to assign the policy to trustees "in security and for payment, *pro tanto*, to the said Mary Skirving, in the first place, of the foregoing provisions in her favour, and in the second place, for security and payment of the foresaid provisions in favour of the child or children of the marriage, declaring that the sums when received by the said trustees from the Insurance Company are to be managed by them with the like powers of management and under the like declarations as are herein contained with respect to the sums hereinafter conveyed by the said Mary Skirving to them for other purposes, all which are declared to be applicable in the same way as if the said declarations were here set down at length, which sum of £300, and in the event foresaid the further sum of £200, and the sums to be received in virtue of the foresaid policy, in so far as the same may not be applied for payment of the foresaid provisions to the said Mary Skirving, are to be divided among the said children, if more than one, in such proportions as the said Mary Skirving and George Ronaldson Cuming, or the survivor of them, shall appoint by a writing under her or his hand; and failing of such appointment, to be divided equally among the survivors of them, and the issue of such as may have predeceased leaving issue, such issue succeeding always only to the shares to which their parents would have been entitled had they been in life."

Mrs Cuming, of the other part, conveyed her whole property and *acquirenda* to the trustees for the following purposes—"For payment of the interest or other yearly profits or proceeds of the sums and other estate hereinbefore conveyed to them in trust, to the said Mary Skirving and George Cuming during their joint lives, and on the death of either to the survivor of them, and after the death of the longest liver of the said Mary Skirving and George Ronaldson Cuming, the said trustees shall be bound to denude of the said trust and pay over or convey the said trust estate, with any interest or other profits thereof remaining in their hands unapplied, to the child or

children of this intended marriage in such shares or proportions, if more than one child, as may be appointed by the said Mary Skirving and George Ronaldson Cuming or the survivor of them, by any writing under their hands, and failing such writing then the said trustees shall be bound to pay or convey the same to the said children equally and to the issue of such child or children as may have predeceased, such issue having only the share to which their parents would have been entitled had they been in life, and in case of no children of the marriage, or if children, in case of their predeceasing their parents, then and in either of these events the said trustees shall be bound to pay over or convey the said trust estate to the said Mary Skirving, her heirs and assignees whomsoever."

The circumstances in which the action was raised are thus narrated in Lord Adam's opinion—"The marriage was dissolved by the death of Mr Cuming in January 1890. He was survived by two daughters, Mrs White and Miss Cuming, and by a grandson George Olden, who is the son of a predeceasing daughter. The fund *in medio* consists of three several sums—(1) a sum of £500 which Mr Cuming bound himself to pay to the children of the marriage, in the terms set forth in the contract, at the first term of Whitsunday or Martinmas after his death; (2) the proceeds of a policy of insurance effected on his life in terms of the contract, and which are said to amount to £630 or thereby, and (3) the whole estate, heritable and moveable, which belonged to Mrs Cuming at the date of the marriage or which she has acquired or may acquire during its subsistence. On the 18th of January 1895 Mrs Cuming executed a deed of appointment, alleged to be in virtue of powers to that effect conferred by the marriage-contract, by which she appointed to her daughters, Mrs White and Miss Cuming, the whole provisions in the contract in favour of the children of the marriage, and directed the trustee to pay the same over to them equally.

"In these circumstances the claimants Mrs Cuming and her daughters claim the whole fund *in medio*, or alternatively the whole fund under deduction of one-third of the sum of £500 claimed by the claimant George Olden. George Olden claims this one-third of the £500, and the only other claimant, the trustee, claims to retain the whole fund until the death of Mrs Cuming, in order to administer it in terms of the contract."

The deed of appointment executed by Mrs Cuming in 1895, after referring to the provisions of the marriage-contract, proceeded—"Therefore, and in exercise of the said powers conferred on me as survivor foresaid, by the said antenuptial contract of marriage, I do hereby appoint to the said Susannah Cuming and Mary Skirving Cuming or White, equally between them and their respective heirs and assignees, and I direct the trustees or trustee of the said contract of marriage to pay or convey to the said Susannah Cuming and Mary Skirving Cuming or White, equally between them

and their foresaids, the whole sums, subjects, and others, heritable and moveable, real and personal, by the said contract of marriage settled on, or declared to be held for behoof of, the child or children of the said marriage."

On 2nd June 1896 the Lord Ordinary (PEARSON) pronounced an interlocutor ranking and preferring George Olden to one-third share of £500, and *quoad ultra* ranking and preferring the trustee in terms of his claim.

*Opinion.*— . . . . "The next question is whether the policy money was provided by way of security only, or whether it forms a substantive additional provision to the children so far as it may not be required in security of the widow's provision. I think it clear that the latter is the sound view. The fund to be divided among the children is described as the 'sum of £300, and in the event foresaid the further sum of £200, and the sums to be received in virtue of the foresaid policy, in so far as the same may not be applied for payment of the foresaid provisions' to the widow. I understand, from the 6th article of the pursuer's condescendence, that all parties are willing that both funds should be dealt with in this action.

"The trustee and the grandson George Olden next maintain that notwithstanding the deed of appointment the trustee is not entitled to denude, and that the trust must be kept up, both as regards the husband's policy money and the estate settled by the wife, until the death of the surviving spouse. They maintain this on the alternative ground that these trust-funds will not vest until that event, or that if they have vested, the vesting is subject to defeasance in the case of any child who may predecease the widow leaving issue.

"As regards the policy money, there is this difficulty in affirming a postponed term of vesting, that the clause appears to contemplate but one period of division as regards both the £500 and the policy money, and that parties are agreed that the former vested at the father's death, and was exigible at the first term thereafter. On the other hand, the policy-moneys were to secure the widow's annuity in the event of her survivance, and the division is to be in such proportions as the spouses or the survivor of them should appoint.

"In the event, which has happened, of the wife's survivance, these words are not consistent with a distribution of this fund at the husband's death.

"The division of the fund amongst the children is to be 'among the survivor of them and the issue of such as may have predeceased leaving issue.' As regards the policy-moneys, I can only read these words as referable, in the event which has happened, to a division as at the death of the surviving wife, the full vesting being suspended till then.

"In my opinion, the settlement of the wife's estate, which follows, presents also a case of suspended vesting. After the death of the surviving spouse, the trustees are to denude and to pay and convey the estate

to the children, and the issue of such as may have predeceased. These words are, I think, all referable to the period prescribed for denuding and payment, and their effect does not appear to me to be taken off by the words that follow, which are applicable to two events which have not happened."

The claimants Mrs Cuming and her daughters reclaimed, and argued—(1) The proceeds of the policy of insurance did not constitute a substantive and cumulative fund for the benefit of the children in addition to the £500 which the husband bound himself to pay. They were merely in security of the liferent, and of that provision, and were expressly stated to be so. Any balance, therefore, remaining over after the liferent had been provided for was disposed of by the deed of appointment. (2) With regard to the share contributed by the wife to the marriage-contract funds, its disposal was regulated by the deed of appointment. The general rule was that marriage-contract provisions vested at the dissolution of the marriage, and that the period to which the condition of survivorship referred in such cases was the dissolution of the marriage—*Romanes v. Riddell*, January 13, 1865, 3 Macph. 348; *Rogerson's Trustees v. Rogerson*, March 10, 1865, 3 Macph. 684. If that were so, the liferentrix was quite entitled to renounce her liferent, to exercise her power of appointment, and to call upon the trustees to denude in favour of those whom she appointed. In *Blackburn's Trustees v. Blackburn*, March 20, 1896, 23 R. 698, a definite period was fixed at which the marriage-contract provision was to be payable. There was no such fixed period here.

[Counsel for Mrs Cuming and her daughters consented at the bar to the claim for George Olden, to one-third of the first sum of £500, being sustained.]

Argued for the trustee and for the claimant George Olden—(1) The proceeds of the policy of insurance were a substantive provision to the children of the marriage, and any balance thereof, after providing for the widow's annuity, should be held by the trustees for distribution among the surviving children upon the widow's death, when vesting would take place. (2) Vesting did not take place as regards the sum settled by the widow until her death. The case was precisely analogous to *Blackburn's Trustees*, *ut sup.*, and the condition of survivorship had also been referred to the death of the liferenter in *Vines v. Hillou*, July 13, 1860, 22 D. 1436, and *Laing v. Barclay*, July 20, 1865, 3 Macph. 1143. In *Romanes* there was no survivorship clause. But if the period of vesting were postponed till the widow's death, she was not entitled by renouncing her liferent to accelerate it—*Muirhead v. Muirhead*, May 12, 1890, 17 R. (H.L.) 45. *Fyfe's Trustees v. Fyfe*, February 8, 1890, 17 R. 450, also referred to. The fund should therefore continue to be held and administered by the trustee.

At advising—

LORD ADAM—[After narrating the facts as above, his Lordship proceeded]—With reference to that part of the fund brought into settlement by Mrs Cuming, the trustees are directed to pay the income of it to the spouses and to the survivor, and after the death of the survivor to pay over the trust-estate to the child or children of the marriage in such shares or proportions, if more than one child, as may be appointed by the spouses or the survivor of them by any writing under their hand, and failing such writing to pay the same to such children equally, and to the issue of such children as may have predeceased, such issue having only the share to which their parents would have been entitled had they been in life, and there is a gift-over, failing children, to Mrs Cuming, her heirs and assignees.

It appears to me that the objects of the power of appointment here specified are the children alive at the period of payment, that is, the death of the longest liver of the spouses, and the issue of such of the children as may have predeceased that period. Until that period shall arrive it is impossible to say who will be entitled to take, or among whom the appointment would have to be made. For example, neither of the daughters, the appointees under the present deed of appointment, may be alive and entitled to share at that period, and the deed can confer no present right upon them. I therefore agree with the Lord Ordinary that this portion of the fund must remain under the administration of the trustee.

With reference to the remaining portion of the fund *in medio*, viz., the proceeds of the policy on Mr Cuming's life, Mr Cuming bound himself by the contract to effect a policy on his life for the sum of £500, which, and all sums of money derived therefrom, he assigned to the trustees in security, and for payment *pro tanto* to Mrs Cuming, in the first place, of the provisions in her favour, which were an annuity of £40 per annum, and certain other provisions; and in the second place, in security and for payment of the provisions in favour of the child or children of the marriage, and he declared that the sums when received by the trustees should be managed by them, under the like declarations as regarded the sums conveyed to them by Mrs Cuming, and then he provides that the foresaid sum of £500 and the surplus, if any, to be received in virtue of the foresaid policy, in so far as the same may not be applied in payment of the provisions to Mrs Cuming, were to be divided among the children in such proportions as the spouses or the survivor might appoint, and failing such appointment, equally among the children and the issue of such of them as may have predeceased.

We are not informed whether the whole of the proceeds of the policy will be required to satisfy the provisions in favour of Mrs Cuming, or whether there will be any surplus over for division as directed by Mr Cuming. But however that may be, it seems sufficiently clear that this part of the fund must in the meantime remain under

the management of the trustee, and I agree with the Lord Ordinary that his claim to this effect must be sustained.

I think it right to notice that the Lord Ordinary has expressed an opinion that a right to the proceeds of the policy or the surplus, if any, will not vest till the death of Mrs Cuming. It does not appear to me to be necessary to decide that question at present, as, for anything we know, there may never be any surplus for division, but I am not to be held as concurring in his Lordship's opinion on this point.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer, Real Raiser and Claimant (The Trustee)—W. Campbell—A. Grainger Stewart. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Claimant George Olden—Dundas—W. E. Mackintosh. Agent—P. Morison, S.S.C.

Counsel for the Claimants Mrs Cuming and Daughters—H. Johnston—T. B. Morison. Agent—P. Morison, S.S.C.

Saturday, November 14.

#### FIRST DIVISION.

FAIRGRIEVE AND OTHERS (STIRLING'S TRUSTEES) *v.* STIRLING AND OTHERS.

*Succession—Clause of Survivorship—Conditional Institution—Period to which Condition of Survivorship Referable.*

A testator, after providing an annuity to his widow, directed his trustees to divide his estate as follows:—"My son William and my daughter Annie, and any children that may be born of my present marriage, to have the rest of my means and estates equally amongst them, their respective shares thereof being payable on their respectively attaining majority, but subject always to the said annuity of my said wife, in regard to which I give my trustees full powers to make all necessary arrangements in the event of her surviving all or any of the periods of majority of my said children, born or to be born; and I direct that on the death of my said wife . . . my trustees shall divide the capital yielding the said annuity equally amongst my said children." There followed a declaration that in case of any child dying without leaving lawful issue before his share became "payable," his share was to accresce to the survivors of the family of children; and that if the child so dying should have left lawful issue, such issue should be entitled to the parent's share.