

Saturday, January 23.

SECOND DIVISION.

[Sheriff-Substitute of
Berwickshire, &c.

JERDON v. FORREST.

*Executor—Competition—Nomination of
A B to be "My Heir."*

By holograph will a testatrix provided—"My cousin Thomas Forrest is to be my heir. . . . £1000 to Thomas Forrest. The rest to Mary Leslie, if she will have it, and if not to the Bible Society." Then followed a number of special legacies of moveable property, including several to Thomas Forrest. The only heritage of which the testator died possessed was specially destined to another legatee. Mary Leslie predeceased the testatrix. In a competition for the office of executor, the Court, not being satisfied that the nomination of Thomas Forrest as "heir" was equivalent to a nomination as executor or as universal donee, preferred the claim of the testator's next-of-kin to that office.

Miss Jane Hall died on 25th September 1896, having her ordinary or principal domicile in the county of Roxburgh, and leaving the following holograph will dated "Octr. 1863":—

"*My Will.*—[I leave] My cousin Thomas Forrest is to be my heir. I leave £1000 to Mr Archibald Bonar, senr., our kind and best friend. £1000 to Thomas Forrest. The rest to Mary Leslie if she will have it, and if not to the Bible Society. My Bible to Tooty; my house at Brighton to my sister Mrs Jerdon; my furniture to my [niece] cousin T. Forrest; my watch [and chain] to Tooty; my chain and gold pencil to my niece Gertrude Jerdon; my books to Tooty; my pictures to Tooty; my jewels to Tot; Edward's ring to Mag; Aunt Boswell's to Blanche E.; my large sofa to Mrs Jerdon; my reading glass to Mrs Jerdon; my blue inkstand to Mrs J.; my marble candlesticks to do.; my green scent-bottle to Mary Leslie; my 'Kirke White' 'M'Cheyne's Sermons' to my nephew A. E. Jerdon; my oak box to do.; 'Lady Powerscourt's Letters' to Mrs Proby; Baxter's 'Saints' Rest' to Miss Robertson; the cellarette to be sent to the Archd. Bonars (N. Zeald.); 'Mary Lundie' to Tot; 'Little Test' to Mag. JANE HALL."

(The words within square brackets had been deleted.)

In October 1896 Mrs Margaret Hall or Jerdon, the only surviving sister-german, and as such next-of-kin of the deceased, presented a petition in the Sheriff Court at Jedburgh praying the Court to decern her executrix-dative *qua* next-of-kin to the deceased Miss Hall.

This petition was opposed by Thomas Edmund Forrest, who lodged defences to Mrs Jerdon's petition, and himself pre-

sented a petition praying the Court to issue confirmation in his favour as executor-nominate or as executor-dative *qua* general donee and universal legatory of the deceased Miss Hall, in virtue of the holograph will above set forth.

In the condescence annexed to his petition he averred—" (Cond. 3) The petitioner, who is thirty-eight years of age, with the consent of his father and mother, resided with and was brought up by the deceased Miss Jane Hall, otherwise Miss Jane Theresa Hall, from about the year 1862, when he was three years of age or thereby, and continued to reside in family with her until her death on 25th September 1896."

To the averments in Cond. 3 Mrs Jerdon answered—"Not known, but believed to be true."

Mr Forrest pleaded, *inter alia*—" (1) The deceased Miss Jane Hall, otherwise Miss Jane Theresa Hall, having appointed the petitioner her heir, and it being implied by the terms of her will that he should be and act as her executor, he is in respect thereof, and of the circumstances condescended on; entitled to have the prayer of the foregoing petition granted. (2) The petitioner being the general donee and universal legatory of the deceased Miss Jane Hall, otherwise Miss Jane Theresa Hall, should be decerned executor-nominate or executor-dative in that character."

It was admitted that the petitioner Thomas Forrest was the "my cousin Thomas Forrest," the "my cousin T. Forrest" the "Tooty" and the "Tot" referred to in the will; that he was the grandson of a cousin of the deceased; that Alexander Bonar and Mary Leslie mentioned in the will both predeceased Miss Hall; and that the only heritage of which the deceased died possessed was the house in Brighton given by the will to Mrs Jerdon.

In his defences to Mrs Jerdon's petition Mr Forrest, in addition to averments and pleas similar to those in his own petition, pleaded, *inter alia*—" (3) The petitioner being resident outwith Great Britain is ineligible for the office of executor-dative, especially of a deceased in whose estate she has no pecuniary interest."

The petitions were conjoined, and thereafter the Sheriff-Substitute (SPEIRS) having heard parties, issued the following interlocutor dated 26th November 1896—" Finds in point of fact (*First*) That No. 5 of process for petitioner Forrest purports to be a copy of a holograph will left by the late Miss Jane Hall, in which she states that her 'cousin' Thomas Forrest is to be her heir, but in which no executor is actually appointed; (*Second*) That the Thomas Forrest referred to in the said will is the petitioner; (*Third*) That it was admitted that Mr A. Bonar and Miss Mary Leslie are both dead, and consequently any legacies left to them by the will in question lapse; (*Fourth*) Finds that it was evidently the intention of the late Miss Hall to make Thomas Forrest her heir, and that he should succeed to whatever she had not willed to others; in

fact, he was to be her 'universal donee or residuary legatee,' and that the word 'heir' must thus be interpreted: Finds in point of law that the Court is bound to prefer the claim of Thomas Forrest, as universal donee, to be executor-nominate to the late Miss Hall, to that of the petitioner Mrs Jerdon, who is undoubtedly the next-of-kin: Therefore sustains plea-in-law 2 for petitioner Thomas Forrest, and appoints the said Thomas Forrest executor-dative *qua* general donee and universal legatory: Finds the petitioner Mrs Jerdon liable to the petitioner Thomas Forrest in expenses," &c.

"*Note.*—The chief point in deciding this case is the intention of the testatrix. She was anxious that 'Thomas Forrest should be her heir.' She knew nothing about legal phraseology, or she would not have said 'my cousin Thomas Forrest to be my heir,' and a few lines further on, 'the rest to go Mary Leslie if she will have it,' thus as it were substituting the latter to a certain extent for the former, nor would she have forgotten to expressly nominate an executor. Mary Leslie, however, has not lived to say whether she 'will have it or not.' The Bible Society is too indefinite a term; in 1863 there may have been several 'Bible Societies,' but none exactly of that name. Any legacy to Mary Leslie or 'The Bible Society' must therefore fall. Mr A. Bonar is dead; the legacy to him also falls. Hence we must revert to the original intention, 'Thomas Forrest to be my heir.' It is quite evident that although Thomas Forrest was only four years old when the will was written, that the testatrix had intended to adopt him, and as a matter of fact he continued to live with her as a son until her death. This will has never been annulled by any other; we are therefore entitled to suppose that the wish of the testatrix was that in spite of any eventualities that might occur—and some did occur (such as the deaths of Archibald Bonar and Mary Leslie, of which the testatrix must have been cognisant)—Thomas Forrest was still 'to be her heir.' Supposing even that it was originally intended that Mary Leslie, to whom 'the rest' was bequeathed, was to be 'residuary legatee' (which I do not admit), this bequest falls, and we recur to the commencement of the will—'Thomas Forrest is to be my heir,' that is, Thomas Forrest is to succeed to everything of mine that I have not left to others; he is to be my residuary legatee or universal donee, and as such is, the Court holds, entitled to be preferred as executor to the next-of-kin."

Mrs Jerdon appealed to the Court of Session, and argued — The petitioner Forrest claimed either (1) as executor-nominate, or (2) as residuary legatee, or universal donee. As to the first alternative a person who has been nominated heir could not claim the administration of the estate as executor-nominate. Moreover, the fact that at the date of the will Forrest was only 3 years old raised a presumption against its being supposed to have been the intention of the testatrix that he should

have the administration. As to the second alternative, it did not appear from an examination of the will that Forrest was intended to be general donee, for (1) he was a special legatee, and (2) the residuary legatee was Mary Leslie or the Bible Society. In any view, Forrest's success involved the decision of a doubtful question of construction which ought not to be decided in this process, and in these circumstances Mrs Jerdon, who was undoubtedly next-of-kin, should be preferred. It was no objection to her being appointed that she was resident abroad, but apart from that her residence abroad was only temporary.

Argued for the respondent (the petitioner Forrest)—It clearly appeared from the tenor of this will, especially when taken with the fact that the petitioner had been brought up by, and for 35 years had lived with, the testatrix, that her leading intention was to benefit him. If the other petitioner's contention was sustained, no effect whatever would be given to the words "Thomas Forrest is to be my heir," although these words evidently embodied the ruling idea present to the testatrix's mind. Some meaning must be given to these words, and they could only mean either that this petitioner was to be the administrator of her estate, or her general donee. In either view he would be entitled to the office of executor. There was no difficulty in the way of attaching either meaning to the word "heir" here. The expression "heir" was a flexible one, and must be construed *secundum subjectam materiam*—*Blair v. Blair*, November 16, 1849, 12 D. 97, and *Irvine v. Irvine*, July 15, 1851, 13 D. 1367. That rule was especially applicable where the will was written by a person to whom the special technical meaning of the term was probably unknown. "Heir" might quite well signify executor in the sense of administrator. It was not necessary that the word "executor" should be used in order to entitle a person to be appointed executor-nominate, if it appeared that the testator intended such person to have the administration of his estate. If "heir" did not mean administrator, then it could only mean general donee, and it must refer to moveables, for the only heritage left by the deceased was specially destined to Mrs Jerdon. The other petitioner ought not to be deemed executrix-dative as she was resident out of Great Britain.

At advising—

LORD JUSTICE-CLERK—It is quite impossible at this stage that we can formulate, still less express, any opinion as to the ultimate effect of the provisions of this will, or the legacies therein set forth. Certainly we cannot decide now as to the legacy in favour of the Bible Society. Thomas Forrest claims here to be heir to this lady, and says that in the circumstances "heir" is equivalent to universal legatee, the expression "heir" being construed, in accordance with the well-known general rule, with reference to the subject-matter dealt with by the testatrix. If it

were quite plain from the rest of this will that such was the intention of the testatrix, I think Thomas Forrest would be entitled to prevail. But so far as we can see at present that was not her intention. Her intention appears to have been that the residue of her estate, after deducting special legacies, should go to a certain person named; and that if she would not take it then it should go to the Bible Society. I do not see any ground for holding that we must interpret a will containing such provisions as meaning that Thomas Forrest was to be the testator's universal legatee. It cannot be said that that can be safely held on the terms of the will as we find them. Mrs Jerdon, on the other hand, apart from the will, would be entitled as next-of-kin to be decerned executrix-dative to the deceased. The only objection stated to her being appointed is, that she is resident in Canada. We are told that she is not settled there permanently, and that she intends to return to this country. In any case she cannot be decerned executrix-dative without finding caution, and the actual management of the estate is a matter of business which will be carried on by business men in the ordinary way. In these circumstances my opinion is that Mrs Jerdon is entitled to be decerned executrix-dative, and that we should recal the Sheriff-Substitute's interlocutor and remit to him to decern her executrix-dative accordingly.

LORD YOUNG — The Sheriff-Substitute has found "that it was evidently the intention of the late Miss Hall to make Thomas Forrest her heir, and that he should succeed to whatever she had not willed to others; in fact, he was to be her 'universal donee or residuary legatee,' and that the word 'heir' must thus be interpreted;" and found "in point of law that the Court is bound to prefer the claim of Thomas Forrest, as universal donee, to be executor-nominate to the late Miss Hall, to that of the petitioner Mrs Jerdon, who is undoubtedly the next-of-kin." I dissent entirely from these findings. If we are not in a position to affirm that Thomas Forrest by being named heir has been appointed universal legatee, then we cannot pronounce a judgment which will preclude other persons from taking under the will. I am not prepared to affirm the proposition that Thomas Forrest was intended by the deceased to be her universal legatee. Unless we are prepared to affirm that, we cannot sustain his petition to be decerned executor as against the claim of the next-of-kin. I therefore think that the Sheriff-Substitute's interlocutor should be altered, and that we should remit to him to decern the other claimant executrix-dative. The decision leaves the question open whether anything is given to Thomas Forrest by the will beyond £1000. So much is clear that he gets £1000. Whether he gets more or not is a question still quite undecided.

LORD TRAYNER and LORD MONCREIFF concurred.

The Court pronounced the following interlocutor:—

"Having heard counsel for the parties on the appeal, Sustain the same, and recal the interlocutor of the Sheriff-Substitute of Berwickshire, &c., dated 26th November 1896, and remit to the said Sheriff to appoint Mrs Margaret Hall or Jerdon executrix-dative *qua* next-of-kin to the deceased Miss Jane Hall, otherwise Miss Jane Theresa Hall, in terms of her petition: Find the petitioner entitled to the expenses incurred by her in this and in the inferior Court in consequence of the respondent's opposition to her petition," &c.

Counsel for the Appellant—Salvesen—P. J. Blair. Agents—Strathern & Blair, W.S.

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

Thursday, January 28.

SECOND DIVISION.

M'MURDO'S TRUSTEES v. M'MURDO.

Marriage-Contract—Trust—Whether Right Conferred on Grandchildren as "Issue of Marriage"—Renunciation of Liferent, and Distribution of Estate.

By antenuptial contract of marriage it was provided that on the death of the wife the marriage-contract trustees should pay the free interest or income of the residue of her estates to her husband "during all the days of his life, for his own use, and for the maintenance and education of the issue, if such there be, of the said intended marriage," and should hold the fee and capital of such estate for behoof of "the whole children" of the marriage, in such proportions as the spouses or the survivor of them should appoint, and failing such appointment "for behoof of her whole lawful children" and the survivors, share and share alike, "the issue of any of them predeceasing her succeeding to their parent's share."

The wife died in 1869 without having executed the power of appointment, and survived by her husband and four children. In 1883 the husband executed a deed of appointment whereby he directed the trust-estate to be divided equally among the children. In 1896 the husband and the four children—all of whom were of full age, and three of whom were married and had issue—became desirous of winding-up the trust. The husband having agreed to renounce his liferent, they called on the trustees to divide the estate among the children according to the deed of appointment. The trustees refused to do so without judicial authority, as they had doubts whether the grandchildren