

ing, or a fitting of moveable adjuncts to it. The same kind of question has been raised in another department of law between heir and executor. I think that the question which the Sheriff was asked to submit to the Court does or may involve matter of law, viz., the construction of the statute, and that we ought to pronounce an order in the terms proposed by your Lordship.

LORD KINNEAR—I agree. I do not think the appellants can be allowed to raise on this application a question which was not decided by the Sheriff acting as arbitrator, and was not brought before him for his decision. The question which they are entitled to raise in this Court must be one which was decided by the Sheriff, and on which he was asked and refused to state a case for our consideration. I agree, for the reasons stated by your Lordship in the chair, that we cannot direct the Sheriff to state a case on the specific questions with which the note concludes. But I think that the question which the Sheriff was really asked to state, as set out in his certificate, does disclose a question of law. He refused to state a case, because he said the question was solely one of fact. That may turn out to be so, from the circumstances which were under his consideration, and which we have not before us, but I observe that in stating his reasons for refusing the note the Sheriff omits any reference to the important words inserted on the question he was asked to state—to wit, the reference to section 7, sub-section (1), of the statute. It is clear enough that there may—I do not say more than may—be a question of legal construction as to whether this particular operation was or was not “construction” in the sense of that section, and not merely a question of fact.

I agree with Lord M'Laren that if there had been any doubt on this point it is removed by the decision in *Wood* where the question was treated as one of law suitable for the consideration of the Appellate Court. There is, I think, nothing in the form of the note which prevents us from doing justice by allowing the true question stated by the Sheriff to be raised. It is not a formal legal pleading, a record closed by the parties by which they are bound, but is merely a written notice of a motion for the consideration of the Court, which under the Act of Sederunt may be disposed of by any judge. It is therefore not of so formal a character that from a technical deference to its form we are precluded from doing justice between the parties and getting at the true question which the appellants desire to raise.

For these reasons I concur.

The Court pronounced an order directing the Sheriff to state a case on the question whether the work on which the deceased was engaged at the time of the accident was “construction” of the building in question in terms of section 7 (1) of the Workmen's Compensation Act 1897.

Counsel for Applicants—W. Campbell, Q.C.—G. Watt. Agents—Cuthbert & Marchbank, S.S.C.

Counsel for Respondents—A. Jameson, Q.C.—Orr. Agents—George Inglis & Orr, S.S.C.

Wednesday, March 14.

SECOND DIVISION.

M'CULLOCH'S TRUSTEES v.  
 MACCULLOCH.

*Succession—Trust—Vesting—Payment—Payment of Vested pro indiviso Share of Residue before Period of Division and Payment.*

A testator conveyed his whole estate, heritable and moveable, to trustees, and directed them, on the death of his wife, to hold the residue for behoof of his children in liferent, and equally among them and their lawful issue in fee, the income being payable to his children and the issue of deceased children equally, and being declared to be an alimentary provision for his children, and on the death of all his children to convert his heritable estate into money, and along with his personal estate to divide it among the children of his sons and daughters who should have left children *per stirpes*. The son of one of the testator's sons, who was dead, attained majority after the death of the testator's widow, and thereupon claimed payment of his share of residue. Two of the testator's children were still alive and had issue. It was admitted that a share in the residue had vested in the beneficiary who claimed payment. *Held* that he was not entitled to payment or conveyance of his share of residue upon the ground that the amount available for division could not be ascertained until the period of payment fixed by the testator, and that consequently if a beneficiary received payment of the supposed amount of his share now, there might not ultimately be enough to make payments of equal amount to the other sets of beneficiaries.

*Haldane's Trustees v. Haldane*, December 12, 1895, 23 R. 276, *followed*.

James M'Culloch of Trees, near Barrhead, in the county of Renfrew, died on 17th June 1871 leaving a trust-disposition and settlement dated 6th December 1870, whereby he conveyed his whole real and heritable estate, as also his whole personal and moveable means and estate, to the trustees and for the trust purposes therein mentioned.

After providing for payment of debts, sick-bed, and funeral charges, making certain provisions in favour of his wife and others, and directing his trustees to hold the lands of Trees for behoof of his wife in liferent, and after her death for behoof of his son Andrew Mair M'Culloch in liferent and his children in fee, and to hold a cottage at Grahamston for behoof of his son George M'Culloch in liferent and his lawful issue in fee, the testator directed as follows:—“(Thirteenth) I hereby direct and appoint

that on the death of my said wife, whereby the liferent before provided to her shall cease, my said trustees shall hold my said means and estate other than the lands of Trees, and furniture, and Grahamston Cottage, for behoof of my said children in liferent, and equally among them and their lawful issue in fee; and I direct that the said free income, after deducting all charges and expenses, shall be divided among and paid to my said children, equally share and share alike: Declaring and specially providing that the whole of said income shall be an alimentary provision for the better aliment and support of my said children respectively, and that their several shares thereof shall not be assignable by them, nor arrestable, nor affectable by their respective debts or deeds or the diligence of their creditors, all which are hereby expressly secluded and debarred: (*Fourteenth*) In the event of any of my said children dying leaving lawful issue the share of the income of such deceiver shall belong to such issue, and shall be paid to them and applied for their aliment, support, and education; and in the event of any of my children dying without leaving lawful children, the share of my estate liferented by such deceiver shall revert to and form part of the income for division among the survivors and the issue of any deceiver who shall have died leaving issue, who shall always succeed in the parent's place to the share to which the parent would have been entitled if in life: (*Fifteenth*) In the event of the death of my eldest son Andrew Mair M'Culloch without leaving lawful issue, my trustees are authorised and empowered to sell the said property of Trees to any of my said children who may wish to take it over at a valuation to be obtained by my trustees from persons of skill, the eldest having the first choice in preference to the younger, but if none of them shall elect to take it, then the same shall be sold, and the proceeds shall form part of the residue of my estate for division: (*Sixteenth*) On the death of all of my said children I direct that my said estate shall be winded up by the real or heritable portion thereof still remaining unsold being sold and converted into money except the property of Trees, which shall be conveyed to the children of my eldest son if he shall leave issue, and after deducting all charges and expenses the free proceeds shall along with my personal estate be divided among the children of my said sons and daughters who shall have left children *per stirpes*—that is, the family or children of each of them shall succeed in the parent's place to the share or proportion of capital which was liferented by the parent, and equally share and share alike among themselves."

By the seventeenth purpose the testator authorised and empowered his trustees at any time during the subsistence of the trust to sell the whole or any part of his heritable estate not specially destined.

The testator died on 17th June 1871 survived by his wife, his sons Andrew Mair M'Culloch and George Wallace Macculloch, and his daughters Miss Mary Elizabeth M'Culloch, afterwards Mrs Brown, and

Mrs Jane Louisa M'Culloch or Maclachlan. The testator's widow died on 19th January 1878. Andrew Mair M'Culloch died unmarried on 25th October 1878. George Wallace Macculloch died on 3rd February 1880 survived by an only child, Bertram Douglas Macculloch, who had been born on 3rd March 1877. Mrs Brown and Mrs Maclachlan both had issue.

Bertram Douglas Macculloch attained majority on 3rd March 1898, and thereupon requested the trustees to pay or make over to him the one-third share of the residue of the trust-estate in which he was interested as the only child of George Wallace Macculloch. The trustees were of opinion that he was not entitled to make this demand, and the present special case was presented for the opinion and judgment of the Court.

The testator's estate at the date of his death had consisted of a copyhold property in England called Springvale (since enfranchised and carried into freehold), of the property of Trees, and the cottage at Grahamston, in Scotland, and of personal or moveable estate in Scotland, England, and abroad. The property of Trees was sold after Andrew Mair Macculloch's death, and the price added to residue. The cottage at Grahamston was, on George Wallace Macculloch's death, conveyed to Bertram Douglas Macculloch. At the date of the presentation of this case the residue of the trust-estate consisted of Springvale, having a rental of about £300 per annum, and of personal estate amounting to about £40,000.

The parties to the present case were (1) the trustees, and (2) Bertram Douglas Macculloch.

The second party maintained that the right to the fee of one-third of the residue, both moveable and heritable, having vested in him, he was entitled to immediate payment of one-third of the residue so far as it consisted of moveables, and also to either a conveyance of a one-third share of Springvale or payment of one-third of the value of Springvale, as that value might be determined by sale or otherwise.

The parties of the first part maintained that, looking to the terms of the trust-disposition and settlement, and more particularly the sixteenth purpose thereof, the second party was not entitled to demand from them, prior to the death of the survivor of Mrs Brown and Mrs Maclachlan, payment of his share of the residue of the moveable estate or a conveyance of his share of Springvale.

The questions of law were—" (1) Is the second party now entitled to payment of one-third of the residue of the said moveable estate? (2) Is the second party now entitled to (a) a conveyance of one-third share of Springvale, or (b) payment of one-third of the value of Springvale?"

The parties were agreed that a conveyance of an undivided third share of the entirety of the freehold premises at Springvale could be granted according to English law.

After the case had been partly heard the trustees lodged a minute, in which they stated that Mrs Brown and Mrs Maclachlan,

and those of their families resident in this country who were major, were unanimously and strongly in favour of the first parties retaining Springvale as an investment, and that, after careful consideration, the trustees did not see any reason why their discretionary powers of selling Springvale should be exercised at present.

Argued for the first parties—The first parties were prepared to concede that a *pro indiviso* share in the residue had vested in the second party. But the period of payment had not yet arrived, as both of the truster's daughters were still alive, and the trust purposes had not yet been fulfilled. Before the death of the last surviving daughter the estate might shrink, and the second party was not entitled to be paid out a third share of the amount at which the estate was valued at present—*Haldane's Trustees v. Haldane*, December 13, 1895, 23 R. 276. That case ruled the present. The amount payable to the beneficiaries was to be determined by sale of the whole residue after the death of all the testator's children. The trustees were not bound to sell until that period arrived, and they were not entitled to pay out the share of any beneficiary upon the basis of a valuation except by consent of all parties interested. In particular, the Court had no power to compel the trustees to realise the real property in England, or to convey a one-third *pro indiviso* share of it to the second party. Such a *pro indiviso* conveyance would have the same effect as a sale, because the second party as a *pro indiviso* owner could compel a sale. Even if he did not, the result would be that the remaining two-thirds would be unsaleable. The case of *Miller's Trustees v. Miller*, December 19, 1890, 18 R. 301, and the other cases following upon it did not apply here. This case fell under the exception recognised by Lord President Inglis in that case at p. 305, and given effect to in the case of *Graham's Trustees v. Graham*, November 30, 1899, 37 S.L.R. 163, for there were here trust purposes which could not be secured without the retention of the vested estate or interest of the beneficiary in the hands of the trustees. In *Miller* the estate vested in the beneficiary was finally ascertained, whereas here the amount due to each set of beneficiaries could not be ascertained until the death of the last survivor of the daughters.

Argued for the second party—It was admitted here that the second party's share had vested. That being the case he was entitled to immediate payment unless there was some good reason to the contrary. No such good reason could be stated by the trustees. This case was ruled by the cases of *Miller's Trustees v. Miller, cit.*; *Wilkie's Trustees v. Wright's Trustees*, November 30, 1893, 21 R. 199; *Stewart's Trustees v. Stewart*, December 14, 1897, 25 R. 302; and *Ballantyne's Trustees v. Kidd*, February 18, 1898, 25 R. 621. In the last-mentioned of these cases the period of division had not arrived, but notwithstanding it was held that as the shares had vested those of the children who had attained majority were entitled to payment. All

the cases in the books were in favour of the second party's contention except *Haldane's Trustees v. Haldane, cit.* That case was special, and turned upon the form of the question of law stated for the opinion of the Court.

LORD JUSTICE-CLERK—I must say that upon consideration of the case of *Haldane* I can see no distinction between that case and the present. Perhaps it is a hardship that the second party cannot get the share which is vested in him paid to him now; but the testator has provided that on the death of all his children his estate is to be turned into money and the proceeds divided among the children of his sons and daughters *per stirpes*. That period has not yet arrived, for two of his daughters are still living. If the second party got payment now, there would be a risk of the other beneficiaries' interests being seriously affected. It is true that they might get more, but on the other hand they might get less, and if that were the case there would be no way in which the trustees could make up the deficiency. I am afraid therefore that in accordance with the case of *Haldane* both questions must be answered in the negative.

LORD YOUNG—I agree in thinking that both questions must be answered in the negative.

LORD TRAYNER—I agree with your Lordships in the chair.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor—

“The Lords having heard counsel for the parties in the special case, Answer the two questions therein stated in the negative: Find and declare accordingly, and decern: Find the whole parties to the special case entitled to their expenses as the same may be taxed out of the trust estate of the deceased James M'Culloch of Trees.”

Counsel for the First Parties—W. Campbell, Q.C.—C. K. Mackenzie. Agents—Bell, & Bannerman, W.S.

Counsel for the Second Party—Dundas, Q.C.—Craigie. Agents—Strathern & Blair, W.S.

Thursday, March 15.

## SECOND DIVISION.

[Lord Pearson, Ordinary.]

### HUNTER v. HUNTER.

*Husband and Wife—Divorce—Desertion—Second Marriage by Wife in bona fide Belief that Husband Dead—Reasonable Cause for Non-Adherence.*

In an undefended action of divorce for desertion raised in 1899 by a wife against her husband, the pursuer averred that she was married to the defender in 1883, that the defender went to Canada