

a penalty. The suggestion that the officer may look at the register but may not take a note of the quantity or destination of any margarine entered in it is untenable to the extent of being extravagantly ridiculous. I think there is no foundation in law or in sense for such a proposition. I do not see why he should not take a copy of any entry which he may think it in the interest of the public service to take. But the proposition is that he is not entitled to take a copy of all or of any entries. I am of opinion that the Sheriff most properly rejected that contention.

LORD TRAYNER—I agree.

LORD MONCREIFF was absent.

The Court dismissed the appeal and answered both the questions of law in the affirmative.

Counsel for the Appellants—Campbell, K.C.—T. B. Morison. Agents—Drummond & Reid, W.S.

Counsel for the Respondent—M'Clure, A.D.—A. O. M. Mackenzie, A.D. Agent—W. J. Dundas, C.S., Crown Agent.

Wednesday, January 22.

## SECOND DIVISION.

### POLLOK'S TRUSTEES v. ANDERSON.

*Succession—Testament—Trust—Direction to convey Heritage “so far as the same shall belong to me at my death”—Subjects agreed to be sold after Notice given to take under Statutory Powers, but not disposed before death of Testator—Legacy—Special Legacy—Ademption.*

A testator directed his trustees to convey to A certain heritable subjects, “so far as the same shall belong to me at my death, but under all burdens affecting the same.” His settlement contained a residuary clause in favour of other parties. Prior to the testator's death notice to acquire certain of these subjects had been served on him by a corporation acting under statutory powers, and he had entered into an agreement to sell, but died before executing a conveyance of the property. After the testator's death his trustees conveyed this property to the purchasers in terms of the agreement. In a question between A and the residuary legatees regarding the right to the price, held that the property in question had belonged to the testator at his death; that A would have been entitled to have had it conveyed to him under burden of the agreement to sell; and that, as the trustees had conveyed it direct to the purchaser under the agreement, A was entitled to the price.

*Heron v. Espie*, June 3, 1856, 18 D. 917, distinguished.

Walter Whyte Pollok, sometime writer in Glasgow, died on 3rd September 1899, leav-

ing a trust-disposition and settlement and codicils thereto.

By codicil dated 5th October 1895 the truster, in the second place, directed his trustees to dispoise, convey, and make over to and in favour of his nephew John Anderson and the heirs-male of his body, whom failing, his nephew William Pollok John Anderson and the heirs-male of his body, certain lands and others “now belonging to me, so far as the same shall belong to me at my death, but under all burdens affecting the same, . . . and that with entry to said several lands, subjects, and others as at the date of my death.” Amongst the subjects in the second place directed to be dispoised was “that property in Saint Ninian's Street, Hutchesontown, Glasgow, which lately belonged to the said Robert Pollok.”

The testator directed his trustees to convey and make over the residue of his heritable and moveable means and estate to other relatives in certain proportions.

Prior to his death the testator had received notice that the Corporation of Glasgow desired to acquire from him, under the Glasgow Improvements Act 1897, the property in St Ninian's Street above mentioned; and he had, by letters dated 18th and 22nd August 1899, entered into an agreement to sell the said property to the Corporation at the price of £1051, 10s. 4d., with entry as at Martinmas 1899. The testator died on 3rd September 1899 without having executed any conveyance of this property. Thereafter his trustees executed a conveyance of the subjects in favour of the Corporation, with entry as at Martinmas 1899, and received payment of the price, which amounted after adjustment to £1049, 6s.

Questions having arisen among the beneficiaries as to the right to the said sum of £1049, 6s., a special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the testamentary trustees of the deceased, (2) John Anderson, (3) the residuary legatees.

The second party maintained that he was entitled to payment of the said sum of £1049, 6s., with the interest accrued thereon, on the ground that the said heritable subjects had not been conveyed by the truster to the Corporation of Glasgow as at the date of his death and that the property in them at that date was still in the truster.

The third parties maintained that the said subjects having been sold to the Corporation of Glasgow before the death of the truster, the price received for them became residue of the estate and fell to be paid to the third parties as directed by the truster in his codicil of 5th October 1895.

The questions of law for the opinion and judgment of the Court were:—“Are the first parties, as Mr Walter Whyte Pollok's trustees, bound in terms of the said codicil of 5th October 1895 to pay over the said sum of £1049, 6s., with the interest accrued thereon, to the second party as *surrogatum* for the said heritable subjects purchased by the Corporation of Glasgow? Or are

they bound to pay over the said sum and interest accrued thereon to the third parties as part of the residue of the truster's estate in the proportions directed by him in the said codicil?"

Argued for the second party—The only question was whether the subjects in question belonged to the testator at the time of his death; for if so, then they were included in the gift to the second party. It was clear that they did belong to the testator. He was feudally vested in them, and he was also the beneficial owner. The trustees would therefore have been bound to convey them to the second party under the burden of the contract to sell to the Corporation. But the fact that the trustees had conveyed the subjects directly to the Corporation could not affect the second party's right, and he was now entitled to receive the price. The case of *Heron v. Espie*, June 3, 1856, 18 D. 917, had no bearing on the present case.

Argued for the third parties—(1) This was a special legacy of certain heritable subjects, and it had been adeemed. That was the result of what had taken place here.—*Chalmers v. Chalmers*, November 18, 1851, 14 D. 57; *Farrar v. Earl of Winterton* (1842), 5 Beavan, 1; *Davidson v. Davidson*, November 14, 1901, 39 S.L.R. 106. (2) If the subjects did not belong to the testator at the time of his death the second party had no claim, and the price was payable to the third parties under the residuary clause. The case of *Heron v. Espie*, *supra*, decided that in the case of a sale under statutory compulsory powers, which was the case here, the property passed from the seller to the purchaser as soon as notice was served, and the seller's right thereafter was merely a right to demand payment of the price. That rule was not affected by the circumstance that the price had been fixed by agreement; the right to the property had passed at the time notice was served. The subjects therefore did not belong to the testator at the time of his death.

LORD JUSTICE-CLERK—If I thought that the case of *Heron v. Espie* bore on the present question, I think we should have to give the matter longer consideration than we have done. But I do not think that that case has any bearing on the present. In *Heron v. Espie* the Railway Company had a right by statute to take the property in question. They gave notice, consigned the price, and took possession under statutory powers, and the whole subject of the dispute was the price consigned. The present case is quite different. The testator was possessed of property, and before his death he entered into a private bargain to sell it at a certain date. Before that date arrived he died. By his testament the property was left to his nephew, but under any burden with which it might be affected at his death. Now, the burden with which it was then affected was the obligation to convey to the purchaser under the private bargain entered into by the deceased, and the legatee accordingly took it under burden so to part with it and to accept the

price. That, however, is not a case of *surrogatum*, and accordingly I think we should make a special finding, as we cannot answer the first alternative question in the affirmative as it stands.

LORD YOUNG—I regard this as a very clear case. The testator conveyed the property in question to his trustees, and when he died his testamentary disposition became operative and carried the property to the trustees. Before his death he had entered into a contract of sale of this property, but he had not conveyed it to the purchaser. Now, there is all the difference in the world between a contract of sale and a conveyance of the property. The contract may be enforced by either party. The seller may compel the purchaser to take the property and pay the price, or the purchaser may compel the seller to take the price and convey the property to him. But that is the enforcement of the contract. Now, when the testator died the contract had not been fulfilled, and he was still the owner of the property, subject to the contract of sale, which could then only be enforced against his trustees. His trustees took the property under the testator's settlement, which instructed them what to do with it. These instructions were—[his Lordship read the second purpose of the codicil]. The trustees became the owners, and under the deed were bound to dispense and convey these two houses to his nephew John Anderson, "so far as the same shall belong to me at my death." Now, these houses belonged absolutely to the testator at his death, subject only to the contract of sale—that is, if he had lived he would have been bound to convey them to the purchaser. That is the position into which the testator directed his trustees to put his nephew—to convey to him under an obligation upon him to convey to the purchaser. That is not a case of *surrogatum*. It is simply carrying out the settlement according to its terms. The case would have been the same if the purchaser had been a private person who was unable to pay the price. The trustees would have been bound to convey the subjects to the nephew, who was absolutely entitled to receive them. But if the purchaser is able to pay then the nephew gets the price. To hold otherwise, and to say that the price must be paid to the testator's residuary legatees, is to my mind an extravagant result. If the nephew does not get the house he must get the price. That is simply carrying out the settlement. I am therefore of opinion that the question should be answered as your Lordship proposes.

LORD TRAYNER—I arrive at the same conclusion. The testator conveyed certain heritable property to his trustees with directions to convey that property to his nephew John Anderson. The terms of these directions were that the trustees should convey the lands "now belonging to me, so far as the same shall belong to me at my death."

The first question is, whether this property belonged to the testator at the time

of his death. If not, it is not included in the conveyance; if it did belong to him, then it is included. The position of matters was that the testator had agreed to sell the property to the Corporation of Glasgow, with entry at Martinmas. But he died before executing a conveyance. Was he, then, the proprietor? In the first place, he was feudally vested in the property at the time of his death. Had he not also the beneficial right? The beneficial right had not been conveyed to the purchasers. So much was he the beneficial owner of the property that it might have been attached by the diligence of his creditors. If that is so there is an end of the question. The trustees conveyed the property directly to the Corporation in terms of the testator's obligation under the missives of sale. That was done as a matter of convenience. There could be no object in conveying it to the nephew in order that he might carry out the obligation to convey, for he could only take it subject to that obligation. But the fact that the trustees conveyed directly to the purchaser did not affect the right or title of the legatee. Therefore I am of opinion that the trustees are bound to hand over the sum in question to the second party, not as a *surrogatum* for the property, but as the price of his property which they have sold. I do not regard the case of *Heron v. Espie* as bearing upon the present question. That case is very distinguishable from this one, and we are not deciding anything by our judgment which affects the authority of that decision.

LORD MONCREIFF was absent.

The Court answered the first question of law in the case by declaring that the first parties as trustees of Walter Whyte Pollok are bound in terms of his codicil of 5th October 1895 to pay over the sum of £1049, 6s., with the interest accrued thereon, to the second party; found and declared accordingly, and decerned.

Counsel for the First Parties—Graham. Agents—Bell & Bannerman, W.S.

Counsel for the Second Parties—Campbell, K.C.—Horne. Agents—H. B. & F. J. Dewar, W.S.

Counsel for the Third Parties—Clyde, K.C.—M'Clure. Agents—Webster, Will, & Co., S.S.C.

Thursday, January 23.

## SECOND DIVISION.

[Sheriff of Lanarkshire.

M'LELLAND v. JOHNSTONE.

*Reparation—Negligence—Duty to Public—Public Road—Unfenced Brazier on Footpath—Injuries to Children—Road.*

A child of five years was injured through going too near a lighted brazier which was being used by a contractor

for the purposes of his work in connection with the laying of a sewer along a public road. The brazier was placed on the footpath, in a space which was blocked on one side by the excavated material and on the other by a watchman's box, but the approach to the brazier from the road was open. It was not fenced, nor was it constantly watched. There were no men working nearer to it than 50 yards. It was proved that such braziers were in common use in connection with such operations, and that it was not usual either to fence them or to provide a watchman.

In an action of damages by the father of the child against the contractor, *held (diss. Lord Young)*, that the pursuer had failed to prove that the defender had been negligent in his use of the brazier, and that the defender was entitled to be assolizied.

William M'Lelland, miner, Blantyre, as tutor and administrator-at-law of Catherine M'Lelland, his pupil daughter, brought an action in the Sheriff Court at Hamilton against James Johnstone, contractor, Bellshill, in which he craved decree for £100 in name of damages.

The pursuer averred that the defender, while constructing a sewer along the public road from Blantyre to Cambuslang, had recklessly and carelessly placed a brazier containing burning coal on the footpath of said road at a considerable distance from where his men were working; that the brazier was not fenced in any way or guarded by a watchman; and that the pursuer's child, the said Catherine M'Lelland, five years of age, while walking past the brazier sustained severe injuries through her clothing becoming ignited by the flames which were issuing from the brazier.

The defender, in answer, averred that the brazier was placed on the footpath on a space which was blocked on one side by the heaping up of excavations from the sewer and on the other by a watchman's box, and that it was out of the track of passengers; that it contained only coke, which gave out no flame; and that it required no fencing or further supervision than that given by his workmen, who were working about 50 yards away.

The pursuer pleaded—“(1) The injuries to the pursuer's pupil child having been caused through the fault or negligence of the defender or of those for whom he is responsible, the defender is liable in damages.”

The defender pleaded—“(2) The said Catherine M'Lelland not having been injured through any fault of the defender or the fault of anyone for whom he is responsible, the defender is entitled to be assolizied.”

He also pleaded—(3) Contributory negligence on the part of the child, and (4) gross negligence on the part of its parents.

Proof was allowed and led.

The following facts were proved:—The brazier, which was in use in connection with the defender's work on the pipes underneath the public road, abovementioned, was