

Argued for the respondents—All the provisions of sec. 9, sub-sec. a, of the Act of Sederunt had been violated—there was no proper minute, no question of law, no deposit. The deposit had not even yet been paid, which was in itself a sufficient ground for dismissing the case, as the Court would not consider a process in which the statutory fees remained owing.

Argued for the appellant—The regulations of the Act of Sederunt were not of so peremptory a nature as to preclude the Sheriff-Substitute from relaxing them in his discretion. There was no special form of minute required, the note on the interlocutor sheet was sufficient, and for the failure to make the deposit the clerk and not the appellant's agent was to blame. The Summary Prosecutions Appeals (Scotland) Act 1875 (38 and 39 Vict. cap. 62), sec. 3, sub-secs. 1 and 5, was closely analogous, and the two following decisions under that statute showed that provisions of this nature were leniently construed—*Niddrie and Benhar Coal Company, Limited v. Young*, March 2, 1895, 22 R. 413, 32 S.L.R. 303; *Greig v. Finlay*, March 4, 1901, 3 F. J.C. 36, 38 S.L.R. 545.

LORD JUSTICE-CLERK—This is a matter in which it is essential that a certain regularity of procedure should be observed, and for that purpose the Act of Sederunt of 3rd June 1898, sec. 9 (a), enacts certain rules which regulate the method to be adopted in an application to a sheriff to state a case on a question of law. I am clearly of opinion that these rules have not been observed in the present case, and that we cannot therefore consider the appeal which has come before us.

The history of the case is short. On the last day allowed for taking an appeal a telegram was sent to the Linlithgow agent in charge of the case asking him to take the necessary steps to obtain a stated case. Unfortunately he happened to be absent in Glasgow, but his clerk found another practitioner, who went to the Court offices and wrote upon the interlocutor sheet the words, "The pursuer appeals against the foregoing judgment and requests a case to be stated." This practitioner apparently was not very familiar with the procedure in this matter, for under the Act of Sederunt there are two conditions essential to an application for a stated case—first, the minute of application must set forth the question (or questions) of law which is (or are) proposed as the subject-matter of the case; secondly, the minute must be accompanied by a deposit of £1. Neither of these conditions were complied with, and it appears to me that the party who wished to obtain the stated case must bear the consequences which have arisen from the mistakes or ignorance of those who acted for him. While therefore the fact that no proper minute was lodged is a sufficient ground for the decision I have come to, I may point out that we could not in any event consider this appeal, as the fee of £1 has, I understand, even yet not been paid. The cases to which we were referred in the

course of debate were entirely different. If fees have not been timeously lodged owing to circumstances for which those who ought to lodge them are not responsible, as, for example, the impossibility of finding a magistrate or a clerk of court, then I can well understand that the parties will not be allowed to be prejudiced by a failure for which they were not responsible. I need hardly point out that we have no such case here.

LORD KYLLACHY, LORD KINCAIRNEY, and LORD STORMONTH DARLING concurred.

The Court pronounced this interlocutor:—

"The Lords, in respect the appellant has failed to comply with sec. 9 (a) of the Act of Sederunt, dated 3rd June 1898, regulating the procedure under the Workmen's Compensation Act 1897, dismiss the case, and decern: Find the appellant liable in expenses."

Counsel for the Appellant—Crabb Watt, K.C.—Burt. Agent—John Robertson.

Counsel for the Respondents—Cullen, —D. Anderson. Agents—Cunningham & Lawson, solicitors.

Friday, June 23.

FIRST DIVISION.

SMITH'S TRUSTEES v. SMITH'S TRUSTEES AND OTHERS.

Succession—Marriage-Contract—Heritage—Conditional Institution or Substitution.

By their marriage-contract spouses disposed certain heritable property belonging to the wife, to her in life, and on her decease to the husband in life, so long as he should remain unmarried, and to the children of the intended marriage equally among them, "whom failing to the heirs and assignees of" the wife in fee.

The wife having died, survived by a daughter who died in infancy, held that the heirs and assignees of the wife were substituted, and fell to be ascertained at the date of the death of her infant daughter.

Kirkwood v. Keeling, March 5, 1842, 4 D. 878, followed.

Succession—Testament—Destination—"Survivor" Equivalent to Other.

A testator bequeathed certain heritable property to one of his children, whom failing to the heirs of the body of his other children, and in case of the death of any of his said other children without issue, or that the children of any of them should fail, "then to the heirs of the bodies of the survivors or survivor of" the said other children.

Held that the words "survivors or survivor" were to be read as "others or other."

*Succession — Testament — Destination —
“And their Foresaids.”*

By his disposition and settlement dated in 1847 a testator disposed different heritable properties to each of his five children respectively, and two other heritable properties, each to two of the children equally between them. The destination in every case save one was to the child (or children) “and the heirs whomsoever of his (or her) body, whom failing to the heirs of the bodies respectively of the said . . . my other children, in the proportion of one-fourth to the heirs of each, and in case of the death of any of the said” (the other four children) “without issue, or that the children of any of them should fail, then to the heirs of the bodies of the survivors or survivor. . . .” In the obligation to infest the testator bound himself, his heirs and successors, to infest and seise (the five children) in the said subjects “severally as conveyed to them as aforesaid, and their foresaids.” The procuratory of resignation was in similar terms.

The clause in which the destination differed came sixth among the eight dispositive clauses dealing with the testator's properties. It disposed a property to two of the children equally between them “and their foresaids.”

The question having arisen whether the words “and their foresaids” in this clause merely meant “the heirs whomsoever of their bodies,” or were to be taken as importing the whole destination as contained in the preceding clauses, *held* that the whole destination was thereby imported.

John Smith, portioner in Bridgeton, Glasgow, died on 10th November 1847, leaving a disposition and deed of settlement dated 3rd September 1847 and recorded 30th July 1855, and survived by his widow Jean M'Kerrow and five children, viz.—(1) John, born in 1821, (2) Andrew (hereafter called Andrew Smith, senior), born in 1823, (3) Jean, born in 1829, (4) Alexander, born in 1832, and (5) Ann, born in 1836.

The disposition and deed of settlement in eight dispositive clauses dealt with eight different heritable properties, five of which were disposed to the five children respectively, two were disposed, each to two of the children equally between them, and one, the seventh, was disposed to the widow in liferent and all the children in fee. The destination of the properties disposed directly to the children was in every case in similar terms (*v. infra*) save in the case of the one dealt with in the sixth place. The following were three of the provisions—“In the fourth place, I do hereby, give, grant, assign, dispoise, convey, and make over from me, my heirs and successors, to and in favour of Ann Smith, my youngest daughter, and the heirs whomsoever of her body, whom failing to the heirs of the bodies respectively of the said John Smith, Andrew Smith, Jean Smith, and Alexander Smith, my other children, in the proportion of one-fourth to the heirs of

each, and in case of the death of any of the said John Smith, Andrew Smith, Jean Smith, and Alexander Smith without issue, or that the children of any of them should fail, then to the heirs of the bodies of the survivors or survivor of the said John, Andrew, Jean, and Alexander Smiths, and their heirs, successors, and assignees whomsoever, heritably and irredeemably, all and whole [here follows description of subjects IV]. In the fifth place, I do hereby give, grant, assign, dispoise, convey, and make over from me, my heirs and successors, to and in favour of Alexander Smith, my youngest son, and the heirs whomsoever of his body, whom failing to the heirs of the bodies respectively of the said John Smith, Andrew Smith, Jean Smith, and Ann Smith, my other children, in the proportion of one-fourth to the heirs of each, and in case of the death of any of the said John Smith, Andrew Smith, Jean Smith, and Ann Smith without issue, or that the children of any of them should fail, then to the heirs of the bodies of the survivors or survivor of the said John, Andrew, Jean, and Ann Smiths, and their heirs, successors, and assignees whomsoever, heritably and irredeemably, all and whole [here follows description of subjects V]. In the sixth place, I do hereby give, grant, assign, dispoise, convey, and make over from me, my heirs and successors, to and in favour of the said Ann Smith and Alexander Smith, equally between them, or share and share alike, and their foresaids, heritably and irredeemably, all and whole [here follows description of subjects VI].”

The obligation to infest and procuratory of resignation in the testator's disposition and settlement ran—“I bind and oblige me . . . duly and validly to infest and seise the said John Smith, Andrew Smith, Ann Smith, Alexander Smith, and Jean Smith, and the said Jean M'Kerrow, severally as conveyed to them as aforesaid, and their foresaids, and that by two several infestments and manners of holding . . . and for completing the said several infestments by resignation I hereby . . . in favour and for new infestment of the said subjects above disposed . . . to be made, given, and granted to the said John Smith . . . as severally and respectively conveyed to them as aforesaid, and their foresaids . . .”

The testator's widow died in 1872. Of the children (1) John, the eldest son, died in 1898 without issue but testate. (2) Andrew Smith senior, the second son, died in 1873 testate, and leaving *inter alios* an eldest son, Andrew Smith junior, who died in 1891 testate and leaving an eldest son Andrew Smith *tertius*. (3) Jean, the elder daughter, married Alexander Cross, and died in 1864 intestate leaving a son, Cochran Barr Cross, and a daughter. (4) Alexander, the third son, died in 1853 uninfest without issue and intestate. (5) Ann, the younger daughter, while a minor, married in 1854 John Burnside and died in 1855 intestate but after entering into a marriage-contract, leaving an only child Jane M'Kerrow Burnside, who died an infant in 1856 after having been served heir of provision to her mother and to her uncle Alexander.

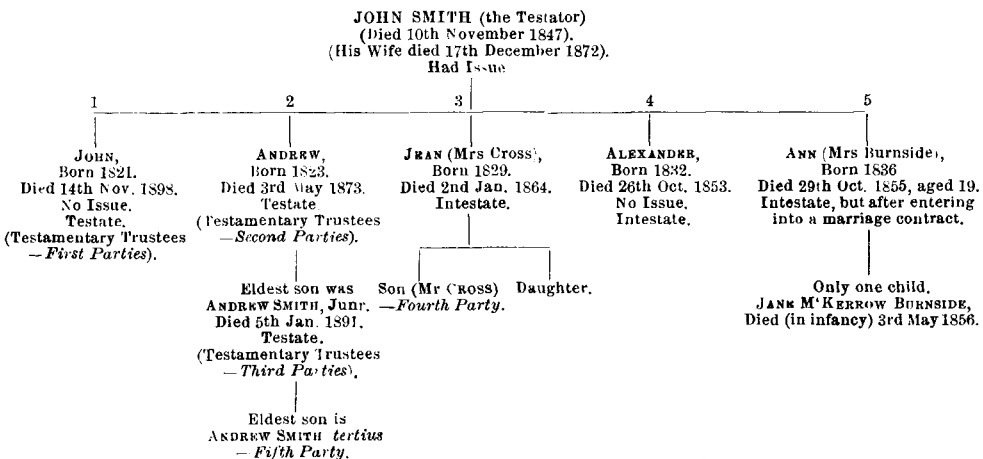
The marriage-contract between Ann Smith and John Burnside, dated 5th June 1854, contained a provision—"And we" (*i.e.*, the future spouses) "both, with joint assent and consent, assign, dispone, and convey from us, our heirs and successors, to and in favour of me the said Ann Smith in liferent, for my liferent use allenary, exclusive of the *jus mariti* or other right of me the said John Burnside, hereby specially renounced as aforesaid, and after the decease of me the said Ann Smith, to and in favour of me the said John Burnside in liferent, for my liferent use allenary, but that only so long as I the said John Burnside shall remain unmarried, and to and in favour of the children of the said intended marriage equally among them, share and share alike, whom failing to the heirs and assignees of me the said Ann Smith in fee, heritably and irredeemably, all and whole—[here follows description of subjects IV]. In the second place, one just and equal half *pro indiviso* of all and whole—[here follows description of subjects VI]."

John Burnside, by disposition dated 20th November 1858, describing himself as heritable proprietor of or otherwise interested in the several lands and others therein-after mentioned, in consideration of a sum of money, sold, alienated, and disposed from him, his heirs and successors, to and in favour of Andrew Smith, John Smith, and Jean Smith or Cross equally, and their respective heirs and assignees whomsoever, (1) all and whole (subjects IV); (2) in the second place, one just and equal share *pro indiviso* of all and whole (subjects VI); (3) in the third place, all and whole the fourth thereof, and generally his whole right, title, and interest in and to all and whole (subjects V); and (4) in the fourth place, in general his whole right, title, and interest in the several heritable subjects which belonged to the said deceased John

Smith, father of his said late spouse, under his disposition and settlement, and also in the succession of his said deceased spouse and under the antenuptial contract between them in regard to any part of the said heritable subjects, and his whole right, title, and interest in the succession of his deceased daughter Jane M'Kerrow Burnside in regard to any part of the said heritable subjects, together with all right, title, or interest in and to the said heritable subjects which might have accresced or might accresce to any of them under the destinations in the said disposition and settlement.

Doubts having arisen as to the effect of the provisions in the testator's disposition and settlement and the other deeds, a special case, dealing, *inter alia*, with subjects IV, V, and VI, was, on 1st November 1904, presented to the Court. The parties to the case were—1. James Boyd, writer in Glasgow, and Campbell Barr, residing at Cathcart, the testamentary trustees of John Smith, the eldest son, acting under his trust-disposition and settlement dated 5th July 1888, and codicils thereto. 2. John Edmiston, auctioneer in Glasgow, and James Boyd junior, writer there, the testamentary trustees of Andrew Smith senior, the second son, acting under his trust-disposition and settlement dated 12th January 1872. 3. Richard Edmiston, auctioneer in Glasgow, and the said James Boyd junior, the testamentary trustees of Andrew Smith junior (Andrew Smith senior's eldest son), acting under his trust-disposition and settlement dated 24th October 1883. 4. Cochran Barr Cross, cabinetmaker in Bridgeton, Glasgow, the only son of the deceased Jean Smith or Cross, the elder daughter. 5. Andrew Smith *tertius*, brass-finisher, Bridgeton, Glasgow, eldest son of Andrew Smith junior.

The relationship of the parties is shown in the following genealogical tree:—



The rights of the parties depended, as regarded subjects IV, on the meaning of the words in the destination contained in the marriage-contract of Ann Smith and John Burnside, "whom failing to the heirs and assignees of me the said Ann

Smith in fee," *i.e.*, whether such heirs were merely conditional institutes or were proper substitutes; as regarded subjects V, on the meaning to be imputed to the words in the destination in the testator's settlement—"then to the heirs of the bodies of the sur-

vivor or survivors of the said John, Andrew, Jean, and Ann Smiths;" and as regarded subjects VI, on the meaning to be imputed to the words in the destination in the testator's settlement, "and their fore-saids."

The questions as submitted in the special case were not answered by the Court.

The following cases were referred to during the discussion:—Subjects IV—*Watson v. Giffen*, January 23, 1884, 11 R. 444, 21 S.L.R. 299; *Brown's Trustees v. Smith*, March 17, 1900, 2 F. 817, 37 S.L.R. 673. Subjects V—*Ramsay's Trustees v. Ramsay*, December 21, 1876, 4 R. 243, 14 S.L.R. 168; *Forrest's Trustees v. Rae*, December 20, 1884, 12 R. 389, 22 S.L.R. 285; *Gregory's Trustees v. Alison*, April 8, 1889, 16 R. (H.L.) 10, 26 S.L.R. 787; *Paterson's Trustees v. Brand*, December 9, 1893, 21 R. 253, 31 S.L.R. 200; *Hairsten's Judicial Factor v. Duncan*, July 14, 1891, 18 R. 1158, 28 S.L.R. 873; *Ward v. Lang*, July 13, 1893, 20 R. 949, 30 S.L.R. 823; *Pearson v. Corrie*, June, 28, 1825, 4 S., 1st ed., 119; *Mortimer v. Slater*, L.R. 1877, 7 Ch. Div. 322; *Danvers v. Clarendon*, 1 Vern. 35, Jarman, vol. ii. 932. There were also referred to *Ratray's Trustees v. Ratray*, February 1, 1899, 1 F. 510, 36 S.L.R. 388; *Frog's Creditors v. His Children*, 1735, M. 4262.

At advising—

LORD PRESIDENT—The present case arises out of the testamentary arrangements of the late Mr John Smith. The points raised are not either of very great difficulty or importance at law, but the whole case is involved in no inconsiderable complexity, arising from the fact that there are four different subjects in dispute which are contended for by five different persons, and their various contentions are represented to your Lordships by no fewer than fifteen questions.

Under these circumstances I think it will conduce to lucidity if I take the subjects in dispute one by one. The subjects in dispute are all various parts of a heritage which was left by Mr Smith under a scheme of very elaborate destinations contained in his settlement.

The present and past state of the family, which it is necessary to understand in order to apply the provisions of the settlement, is most conveniently made out by referring to the genealogical tree which is made part of the case.

Subject IV. The destination of this subject is in these terms.—[*His Lordship here read the clause of the deed.*]

Under this destination, Ann, who survived her father, took these subjects, which she conveyed by a marriage-contract entered into between her and John Burnside, who became her husband. In the case as stated by some of the parties it was contended that the marriage-contract was not valid, in respect that it had not been entered into with consent of her curators nominate, she being at the time a minor, but as the curators never acted, this plea was not insisted upon before your Lordships. The said marriage-contract forms part of the case.

It dealt with the property specially conveyed to Ann, mentioned in subjects No. IV., in these terms—[*His Lordship here read the clause from the marriage-contract.*]

Ann Smith or Burnside died survived by one child, Jane Burnside, who accordingly took under this destination. Jane Burnside died in infancy and necessarily intestate, her heir-at-law being her father John Burnside, who is still alive. John Burnside, as heir of his daughter and in respect of the interest he had through the marriage-contract in properties left by his father-in-law, disposed to his two brothers-in-law John and Andrew Smith, and his sister-in-law Jean Smith, all his right, title, and interest in any properties in any way coming to him from his father-in-law. The first question that arises therefore with regard to these subjects depends upon the meaning and import of the destination in the marriage-contract. If the destination-over in favour of the heirs and assignees of Ann Smith on failure of the children of the marriage is only a conditional institution, or if, being a substitution, the heirs and assignees of Ann Smith are to be sought as at the date of the death of Ann Smith, then in either of these two cases the property passed to Burnside and was carried by his disposition, the parties presently in right under that disposition being the testamentary trustees to John, the first party, the testamentary trustees of Andrew, the second party, and Mr Cross, the fourth party, who is the heir of his deceased mother Mrs Cross, who died intestate. If, on the other hand, the clause in question being a substitution, the heirs of Ann are to be sought at the date of the failure of the children of the marriage—that is to say, at the date of Jane Burnside's death—then the heir of Ann at that date was her elder brother Andrew *primus*, Alexander being already dead, but he having never served, and not having survived the passing of the Conveyancing Act of 1874, the heir has come to be Andrew Smith junior, who survived the Act of 1874, and in whose rights are his testamentary trustees, the third parties. Upon this question I am in favour of the latter view, being of opinion that the case is ruled by a case not cited before us—*Kirkwood v. Keeling*, 4 Dunlop 878. See also Lord M'Laren's book, sec. 1388.

Subject V—The clause dealing with these subjects is in these terms—[*His Lordship here read the clause from the disposition.*]

Alexander died in 1853 childless and intestate, and accordingly the portion of the destination came into effect which devolves the share on the heirs of the body respectively of his brothers and sister. At that time his brothers and sister were alive, so that matters were in suspense till it came to be seen who answered the description of the heirs of the body of the various brothers and sister. As regards two of them there is no question. Jean died in 1864, and after her death of course the fourth party became the heir of her body. He therefore obviously takes one-fourth, which for

purposes which will become evident I will call three-twelfths of Alexander's share. Andrew died in 1873 survived by Andrew Smith junior, who in the same way thereupon took the share, and as he survived 1874 his testamentary trustees, the third parties, are now in right of his original three-twelfths. Ann died in 1855 survived by one child, Jane Burnside. She served as heir of provision to her uncle Alexander, and thereby became vested in her share, but as she died in infancy she was unable to evacuate the destination, and accordingly her share passed on to the heirs of the body of the others. In substituting the word "others" for "survivors" I am not throwing any doubt on the general principle that survivors must "*prima facie*" receive its natural meaning. But in the present case I think it must mean "others"—a result which has already been arrived in cases like that of *Ramsay's Trustees*—because in all the cases in which "survivor" received its natural meaning there is always somebody who either as survivor takes or indicates the person who at that moment can take (*e.g.*, issue of the survivor). But to say that a property is to go to the heirs of the body of the survivor at the time of the opening of the succession is obviously a contradiction in terms. One-twelfth therefore of Jane Burnside's three-twelfths goes in the same way as before to the third party, and one to the fourth party, while the third is hung up for the eventual determination of who are the heirs of the body of John. John died in 1898 without issue, and therefore with no heirs of the body. Following the same process of reasoning as before, his original three-twelfths plus one-twelfth, being the part of Jane Burnside, is divided into two-twelfths each to the third and fourth parties, the result being *in toto* that the third and fourth parties divide the subject equally between them.

Subjects VI—The destination regulating these subjects is as follows:—[*His Lordship read the clause from the disposition*].

The question here is as to the meaning of "their foresaids"—whether that applies to heirs of the body, or whether it imports the longer destination introduced by the words "whom failing" in the description of subjects IV and V respectively. Ordinarily speaking I should be of the opinion that their foresaids was limited to that class of heirs connected with the original disponee by the word "and," and not to the longer catalogue introduced by the words "whom failing," but I am driven to the conclusion that this testator did not so use it, because he uses the words "their foresaids" in obviously the larger sense, in the obligation to infest and in the procuratory of resignation.

That being so, Ann's share follows the fate of subjects IV, and Alexander's share follows the fate of subjects V.

I propose therefore to your Lordship's that we should say that in the opinion and judgment of the Court the subjects fall to be divided as follows:—Subjects IV to the third party. Subjects V, one-half

to the third party and one-half to the fourth party. Subjects VI, Three-fourths to third party and one-fourth to fourth party; and that it is unnecessary to answer the fifteen questions as put.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was not present.

The Court issued an interlocutor in accordance with the Lord President's opinion.

Counsel for the First Parties — Wm. Thomson. Agents—Steedman, Ramage, & Bruce, W.S.

Counsel for the Second Parties—Younger—Cowan. Agents—J. & J. Ross, W.S.

Counsel for the Third Parties — C. N. Johnston, K.C. — M'Diarmid. Agent—R. Ainslie Brown, S.S.C.

Counsel for the Fourth Parties — M'Lennan—J. W. Forbes. Agents—Cumming & Duff, S.S.C.

Counsel for the Fifth Party—M'Millan. Agent—R. Barclay Alison, W.S.

Saturday, June 24.

FIRST DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

PARISH COUNCIL OF RUTHERGLEN
v. MAGISTRATES OF RUTHERGLEN.

Burgh — Street — Improving the Line of Street — Resolution by Commissioners Fixing New Line of Street so as to Occupy with Buildings the Solum of Another Street and Close up Existing Entrance thereto—Competency—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), secs. 157, 158.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), section 157, enacts—"The commissioners may allow, upon such terms as they think fit, any building within the burgh to be set forward for improving the line of the street in which such building or any building adjacent thereto is situated." Section 158, *inter alia*, enacts—"When any house or building has been taken down in whole or in part in order to be altered, or is to be rebuilt, the commissioners may require the same to be set backwards to or toward the line of the street, or the line of the adjoining houses or buildings, or such other line as may be fixed by the commissioners, in such manner as the commissioners may direct for the improvement of such street."

In 1904 the magistrates of a burgh resolved to fix a new building line for one of the streets in that burgh. The proposed new line enabled them as frontagers to bring forward their buildings a considerable way, occupying,