

Further, I may observe, although perhaps it has no direct bearing upon the present question, that by the Local Government Act 1894 the duty of protecting and keeping open rights-of-way is laid upon the District Committee, or where there is no District Committee upon the County Council; and if a Parish Council or six parish electors represent to the District Committee or the County Council, as the case may be, that a right-of-way has been shut up or obstructed, the Committee or the Council are bound, if they are satisfied that the representation is well founded, to take such proceedings as may be requisite for the vindication of the right-of-way. I mention that circumstance, because it shows that the view which I take of the case does not involve the hardship of the respondent, and other workmen in a like position, having either to lose the use of a right of way which would be a great convenience to them, or to embark upon an expensive litigation to vindicate the right.

I am therefore of opinion that the question submitted to the Court should be answered in the affirmative.

LORD STORMONTH DARLING and LORD ARDWALL concurred.

The Court answered the question of law in the affirmative.

Counsel for the Appellants—Blackburn, K.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondent—M'Lennan, K.C.—Findlay. Agents—Dalglish & Dobbie, W.S.

Friday, June 21.

FIRST DIVISION.

MACPHERSON'S TRUSTEES v. MACPHERSON.

Apportionment — Will — Construction — Direction to Pay Dividends "as Received" — Apportionment Act 1870 (33 and 34 Vict. c. 35), sec. 7.

A testator, who died on 9th July, as to certain shares in a company the accounts of which were made up on 30th April, the dividend being declared in the October following, directed his trustees to pay the dividends accruing thereon "as received" to his wife during her life. *Held* that the widow was entitled, without any apportionment, to the whole of the dividends declared subsequent to the testator's death, irrespective of the period during which they had been earned.

The Apportionment Act 1870, sec. 7, enacts—"The provisions of this Act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place."

William Macpherson, managing director of the Globe Express, Limited, died on 7th

July 1905, leaving a trust-disposition and settlement whereby he assigned and disposed to his widow Mrs Annie Mitchell or Macpherson and others as trustees his whole estate. At the time of his death the testator held 197 shares of £100 each (fully paid) in his company.

By the sixth purpose of his trust-disposition and settlement he directed his trustees to make over upon his death a number of shares, 50 as it turned out, in his company to certain legatees, "each share carrying with it the current year's dividend corresponding thereto." The seventh purpose was—"The remainder of my shares in the company shall be retained by my trustees during the survivorship of my wife, and the dividends accruing from said shares shall, as received, be paid over to her. . . ."

The Globe Express, Limited, in accordance with its articles of association, made up its accounts to 30th April of each year, and, while there was no provision as to the date of the annual meeting when the dividend should be declared, by invariable custom such meeting had been held in the October following. On 10th October 1905 the annual meeting was held, and a dividend for the year ending 30th April preceding was declared at the rate of 7 per cent. The testator's trustees were subsequently paid £1379, being the dividend on the testator's 197 shares.

A question having arisen as to Mrs Macpherson's right to the dividends declared after her husband's death, a special case was presented for (*first*) the trustees, and (*second*) Mrs Macpherson.

The case stated—"The second party now maintains that the whole of the said dividend on the remaining 147 shares, amounting to the sum of £1029, should, in terms of the 7th purpose and other provisions of the said trust-disposition and settlement, have been paid to her by the first parties when received by them, or at all events that she is entitled to the whole of the dividend which may be paid by the company for the year ending 30th April 1906, when received by the first parties. The first parties, on the other hand, maintain that the dividends payable in respect of the year ending 30th April 1905, and for the period from 30th April to 7th July 1905, form part of the capital of the trust estate and that the second party is only entitled, in terms of the eighth purpose of the said trust-disposition and settlement, and in accordance with the Apportionment Act 1870, to the free liferent of the sums representing the said dividend for the year ending 30th April 1905, and the portion of any dividend which may be declared for the succeeding year applicable to the period from 1st May 1905 to 7th July 1905, the date of the truster's death."

The questions of law were—"1. Does the whole of the dividend for the year ending 30th April 1905 on the said 147 shares of the Globe Express, Limited, held by the first parties, fall to be paid to the second party under the provisions of the said trust-disposition and settlement? 2. In the event of the first question being answered

in the negative, does the portion of the dividend for the year ending 30th April 1906, for the period from 1st May 1905 to 7th July 1905, fall to be paid to the second party under the provisions of the said trust-disposition and settlement?"

Argued for the first parties—The question was one of intention. The provision in the sixth purpose that the shares therein bequeathed "should carry the current year's dividend corresponding thereto" clearly excluded apportionment, and the absence of any such words in the seventh purpose showed that apportionment was intended there. Moreover, the word used was "accruing," not "accrued," and that meant dividends actually accruing during her survivorship. The words "as received," founded on by the second party, meant that the widow's share of the dividends were to be paid when they fell due and not when the liferent of the general estate (also bequeathed to her) was payable, and without being debited with any charges affecting the liferent of the general estate. Apart from intention, the Apportionment Act read into every settlement the provision that periodical payments should accrue from day to day, and be apportionable accordingly—Apportionment Act 1870 (33 and 34 Vict. c. 55), secs. 2 and 5; *Tyrrel v. Clark* (1854), 2 Drewry's Rep. 86; *Pollock v. Pollock* (1874), L.R. 18 Eq. 329; *Oppenheimer v. Boatman*, [1907] 1 Ch. 399.

Argued for the second party—The words "as received" showed clearly that the dividends in question were to be paid over without any apportionment—Apportionment Act (*cit. sup.*), sec. 7; *Lysaght v. Lysaght*, [1898] 1 Ch. 115.

LORD M'LAREN—I think the trustees of Mr Macpherson could hardly be expected without the authority of the Court to decide this question for themselves. The Apportionment Act was, I think, primarily intended to regulate the division of termly payments in cases where the division of such payments was not arranged by the parties interested. In such cases the Act of Parliament provides that where parties have not arranged how these payments are to be allocated a proportional part shall vest *de die in diem* in the parties interested. That principle is applicable alike to contracts and to wills or rights in succession. But then I see no evidence in the Act that it was intended to interfere with, or to have any overruling influence upon, contracts or voluntary provisions which were expressed in clear language appropriate to the division of the termly payments in question. On the contrary, the concluding clause of the statute, providing for the exclusion of the Act where it is expressly stipulated that no apportionment shall take place, makes it evident that it was really intended to supply what the parties had omitted, and was not intended in any way to run counter to the intention of parties where that intention was clearly expressed.

Now, in this case we have to consider a will dealing with a substantial amount of personal property, and dealing with it in

reasonably clear terms. Among other things Mr Macpherson, after disposing of 70 shares in the Globe Express, Limited, valued at £7000, directs, with respect to the remainder of his shares in that company, that they "shall be retained by my trustees during the survivorship of my wife, and the dividends accruing from said shares shall, as received, be paid over to her." Now there is here a trust to hold for the benefit of Mrs Macpherson, the testator's widow. He then goes on to say what is to be done with the capital, but that does not enter into the present question, and therefore I do not pursue the subject further. The shares are to be held by the trustees during Mrs Macpherson's life, and the trustees are charged with the duty of paying over to her the annual produce or income of these shares. If the direction had been given in these general terms, that the lady was to receive payment of the income of the shares, I do not doubt that the Apportionment Act would have taken effect upon the provision and would have made it necessary to apportion the termly payment accruing in the year of the testator's death, because in the case supposed there would have been an omission on the testator's part to provide how that particular year's income should be dealt with. But, then, I do not think there has been any omission in this case, because the direction is given that the dividends accruing from the shares shall, "as received," be paid over to his wife. I think that under that provision the first of the dividends received after the testator's death falls to be dealt with exactly as all the others accruing in the course of her life would be treated. If the trustees, following out the directions literally, had, in the month of October, when a dividend was declared, paid it over to Mrs Macpherson, and if the next-of-kin or anyone having an adverse interest were to challenge the payment, I have difficulty in seeing on what argument such a challenge could be rested. I think the answer would be that the trustees had followed the trustor's direction by paying the dividend as it accrued, and that the lady, in accordance with that direction, was entitled to apply the income, "as received," for her own benefit.

This seems to me to be the preferable view, because in the absence of any direction as to apportioning the year's income, I think it may be inferred that the testator did not contemplate any apportionment, and did not think it necessary to give any direction on the subject. I think that his meaning was that the income should be treated as accruing to his wife as and when it was received by the trustees, and that it should be without delay paid over to her for her own benefit. I am therefore of opinion that the first question should be answered in favour of the second party.

LORD KINNEAR—I agree. The statute prescribes the manner in which termly payments, such as the dividends in question, are to be apportioned between parties in the relative positions of the widow and

the trustees. But it does not prevent the testator disposing of the income of his estate in any manner he thinks fit, provided only that he does so in sufficiently clear and express language; and if he directs in express terms that dividends shall go wholly to a legatee and that no part of them shall be apportioned to the general estate, that is a perfectly effectual testamentary direction which will receive effect. In the case of *Tyrrel* (1854, 2 Drewry's Rep. 86), which was cited to us, it was held that the Apportionment Act was not to be excluded by any inference which might be drawn from the general terms of a will. But, on the other hand, in the case of *Lysaght* ([1898] 1 Ch. 115), and apparently from the report of a case which was not cited—in *re Meredith* (1898, 67 L.J. Ch. 409)—but which is referred to in the case of *Oppenheimer* (1907, 1 Ch. 399) quoted to us, it was decided with equal clearness that when a testator expressly directs that income which would be otherwise apportionable shall be given to a particular legatee, the Act will not apply. I think the present case falls under the latter rule. The trustor says that the dividends accruing from the said shares "shall, as received, be paid over" to his wife. In saying so he gives his trustees a clear and express direction which they are bound to follow.

I entirely agree, however, with the observation which fell from your Lordship in the chair that although we think the direction clear enough it was nevertheless perfectly natural and proper on the part of the trustees to bring this question before the Court in order that they might have judicial authority for the course they might agree to follow.

LORD PEARSON—I am of the same opinion.

The LORD PRESIDENT was absent.

The Court answered the first question in the affirmative, found it unnecessary to answer the second question, and decerned.

Counsel for First Parties—D. P. Fleming. Agents—Webster, Will, & Company, S.S.C.

Counsel for Second Parties—R. S. Horne. Agents—P. Gardiner Gillespie & Gillespie, S.S.C.

Tuesday, July 9.

SECOND DIVISION.

[Lord Johnston, Ordinary.

M'CREADIE v. THOMSON.

Reparation—Administration of Justice—Wrongous Imprisonment—Magistrate—Immunity from Action of Magistrate—Malice—Jurisdiction—Sentence of Imprisonment without Option of Fine where Option Provided—Relevancy—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), secs. 380 (10), 487, 501 (b).

A woman was brought before a magistrate in a police court of a burgh on

a complaint charging her with using "indecent language to the annoyance of . . . police constable of said burgh on duty, contrary to the Act 55 and 56 Vict. cap. 55, sec. 380 (10), whereby the accused is liable to a penalty not exceeding 40s., and by sections 487 and 501 of that Act she may be sentenced to imprisonment until the same is paid for a period not exceeding one month." The complaint craved that she might be adjudged "to suffer the penalties provided by the said Act." The woman pleaded guilty, whereupon the Magistrate sentenced her to be imprisoned for fourteen days without imposing any pecuniary penalty, and by virtue of this sentence she suffered twelve days' imprisonment before being liberated under a process of suspension and liberation.

The woman having raised an action of damages against the Magistrate, held that the action was not incompetent or irrelevant, and that the wrong complained of being an entirely *ultra vires* act by the Magistrate, grossly illegal and irregular, it was not necessary for the pursuer to prove malice.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), secs. 380 (10), 487 and 501 (b), is quoted in the Lord Ordinary's opinion (*infra*).

Mrs Helen Folan, otherwise Tolan, or M'Creddie, brought an action of damages for wrongous imprisonment against William Brown Thomson, writer, Wishaw, Provost and one of the Magistrates of the burgh of Wishaw, who had pronounced sentence against her in a complaint in the Burgh Police Court.

The pursuer pleaded—“(1) The defender having, contrary to the terms of the Burgh Police (Scotland) Act 1892 and the terms of the complaint above narrated, maliciously and without any cause, or at all events without any reasonable or probable cause, sentenced the pursuer to be imprisoned for fourteen days, and the pursuer having in consequence suffered imprisonment for twelve days, decree should be granted as craved. (2) The defender having been guilty of wilful corruption, oppression, and culpable negligence in incompetently sending the pursuer to prison for fourteen days, whereby she was imprisoned for twelve days, he is liable in damages as concluded for. (3) The defender having granted a warrant for the imprisonment of pursuer that was grossly illegal and irregular, and the pursuer having suffered twelve days' imprisonment in virtue thereof, is entitled to damages as craved.”

The defender, *inter alia*, pleaded—“(1) The action is incompetent in respect no action lies against the defender in consequence of his acting as magistrate sitting in the Police Court. (2) The pursuer's averments being irrelevant and insufficient to support the conclusion of the summons, the action should be dismissed. (4) The defender having in the matters complained of acted in his judicial capacity, he is not liable in reparation for the consequences