

bring all the decisions upon this branch of the law into absolute line with one another; but having listened to the careful and exhaustive citation of the reported cases by counsel at the Bar, I am not aware of anything previously decided that should prevent us from determining this case in the manner which your Lordships propose. The marriage contract, as has been pointed out, directed the trustees to hold the fee or capital of the estate for behoof of the child or children, subject to apportionment by Mrs Ewing, who was authorised to adjust or impose conditions, limitations, and restrictions. Now when one turns to the exercise of the power by Mrs Ewing, so far as concerns her appointment to Miss Ewing, the daughter of the marriage, it seems to me to be within the terms and scope of the power. The trustees are directed to set aside and retain a specific part of the capital of the estate for behoof of Miss Ewing, and then follow words of restriction and limitation, for the trustees are directed not to pay over the daughter's share to her, but only to pay her the income for her alimentary life rent use, and on her death to apply the capital, so far as not already advanced for her more comfortable maintenance, to anyone whom the daughter might nominate by writing to take effect after her death. It was urged that the effect of this appointment was to cut down a fee to a bare life rent. I do not think that this is really the effect of Mrs Ewing's appointment. It is to be observed that the whole capital of the daughter's share is directed to be set aside and retained for her behoof, and, as your Lordships have pointed out, no part of it is given by Mrs Ewing to strangers to the power, for, of course, the daughter's nominees will take the fee from her, and from her only. It is true that Mrs Ewing has limited her daughter's right in her appointed share because she apparently considered that her daughter's "behoof" would best be served by giving her a life rent only, and a *mortis causa* power of disposing of the capital. But none the less, as it seems to me, the capital of Miss Ewing's share has been appointed for behoof of her and of her only, and therefore I can see nothing illegal in this exercise of the mother's power of appointment. The only other matter on which I shall say a word is the question whether Miss Ewing's appointment to her share confers on her a right of fee such as to entitle her to demand payment of the capital from the trustees. This question must, I think, be answered in the negative, because that seems to follow from the authoritative statement of Lord Dunedin in the most recent case on the subject (*Mackenzie's Trustees*, 46 S.L.R. 217), where he says that "as the law stands at present upon authority, it is . . . that the Court will not declare a fee unless there is both an unlimited life rent and an absolute power of disposal as opposed to a mere testamentary power of disposal." As regards the other points in the case, I have merely to say that I concur in what has been already said.

The LORD JUSTICE-CLERK concurred.

The Court pronounced this interlocutor:—

"Answer the first question of law . . . by declaring that the deed of appointment by Mrs Harriett Janet Jones or Ewing, dated 3rd August 1898, . . . was a valid exercise of the powers conferred upon her under her contract of marriage, dated 28th January . . . 1886: Find it unnecessary to answer the second question: . . . Answer the third question in the negative: Answer the fourth question . . . by declaring that the holograph testamentary writing, dated 9th February 1901, is effectual in so far as it directs that the capital of the provisions in favour of the third party are to be paid over to the second parties, to be administered by them: Answer the fifth question . . . by declaring that the first parties are bound to hand over the capital of the provisions in favour of the third party under the deed of appointment to the second parties: Answer the sixth question . . . by declaring that the second parties are bound to administer the capital of the said provisions in favour of the third party in terms of the said deed of appointment: Find and declare accordingly, and decern."

Counsel for the First Parties—Dean of Faculty (Scott Dickson, K.C.)—Horne. Agents—Alex. Campbell & Son, S.S.C.

Counsel for the Second Parties—Bartholomew. Agents—Gill & Pringle, W.S.

Counsel for the Third Party—M'Lennan, K.C.—Jameson. Agents—Gill & Pringle, W.S.

Counsel for the Fourth Party—M. P. Fraser. Agents—Gill & Pringle, W.S.

Friday, January 15.

## SECOND DIVISION.

[Sheriff Court at Glasgow.]

M'GUIRE v. THE UNION COLD STORAGE COMPANY, LIMITED.

*Expenses—Appeal from Sheriff Court—Abandonment—Application under Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, c. 51), First Schedule, Rule 96, for Leave to Abandon Appeal—A. S. 5th January 1909, sec. 4 (4)—A. S. 10th March 1870, sec. 3 (5).*

*Held* that the expenses which the Court may award against an appellant who has applied for leave to abandon his appeal under rule 96 of the First Schedule of the Sheriff Courts (Scotland) Act 1907 are not limited by section 4 (4) of the A. S. of 5th January 1909 and section 3 (5) of the A. S. of 10th March 1870 to three guineas, but are matter for the discretion of the Court, who may either remit the account to

the Auditor or award such sum as they may think proper; and five guineas allowed.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, c. 51), First Schedule, Rule 96, enacts—"After an appeal has been noted, the appellant shall not be entitled to abandon it unless of consent of all parties or by leave of the Appellate Court."

The A. S. 5th January 1909, section 4 (4), enacts—"Upon the process being so remitted" [i.e., remitted to the Court of Session under sec. 30 of the Sheriff Courts (Scotland) Act 1907] "the same regulations as to printing, boxing, lodging, etc., shall apply as are contained with regard to Appeals in the said Act of Sederunt of 10th March 1870, with this qualification, that in the event of an application for a remission of the cause being abandoned, or held to be abandoned, the docket written by the Clerk of Court or his assistant shall be in the following terms:—'Retransmitted in respect of the abandonment of the application for a remit to the Court of Session.'"

The A. S. 10th March 1870, section 3 (5), enacts—"On the expiry of the . . . period of eight days after the appeal has been held to be abandoned . . . the judgment or judgments complained of shall become final . . . and the Clerk of Court shall forthwith retransmit the process to the Clerk of the Inferior Court: Provided always that before retransmitting the process the Clerk of Court or his assistant shall engross upon the interlocutor sheet and sign a certificate in these or similar terms:—'[Date] Retransmitted in respect of the abandonment of the appeal'; and, in respect of said certificate, the Sheriff, or other judge of the Inferior Court, shall, upon a motion being made before him to that effect, grant decree for payment to the respondent in the appeal of the sum of £3, 3s. of expenses."

Hugh M'Guire, boilerman, 39 Tylefield Street, Glasgow, as tutor and administrator-in-law of his pupil son John M'Guire, brought an action of damages for personal injury in the Sheriff Court at Glasgow against the Union Cold Storage Company, Limited, Glasgow.

Proof was allowed on 11th November 1908, and on 17th November the pursuer required the cause to be remitted to the Court of Session in terms of section 30 of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, c. 51). On 27th November the cause appeared in the Single Bills of the Second Division and was sent to the Summar Roll. On 15th January 1909 the pursuer presented a note to the Lord Justice-Clerk praying his Lordship to move the Court to pronounce an order allowing him to abandon his application for remit, and to retransmit the process to the Sheriff Court for further procedure.

Counsel for respondents moved for expenses.

Argued for appellant—The question of expenses was ruled by section 4 (4) of the Act of Sederunt of 5th January 1909, which applied the Act of Sederunt of 10th March 1870 to all cases where the appeal was aban-

doned with leave of the Court, or was held to be abandoned on failure to print. Under the said Act of Sederunt of 1870 the defender could only recover three guineas of expenses. If rule 96 of the First Schedule of the Sheriff Courts Act 1907 (7 Edw. VII, cap. 5) gave the Court power to award further expenses, it had been modified in that respect by the later Act of Sederunt.

Argued for respondents—The question of expenses was matter for the consideration of the Auditor, and the Court should remit the account to him to tax and report.

LORD JUSTICE-CLERK—It is, in my opinion, most desirable that everything should be done to discourage parties bringing ill-considered appeals to the Court of Session under the Sheriff Courts (Scotland) Act 1907. Those who are conducting proceedings in the Court below should not appeal to the Court of Session unless they are prepared to go through with their appeal, and if they are in doubt as to whether they have reasonable grounds on which to appeal they would be well advised to seek advice from those who, from their experience in the Court of Session, would be able to direct them. It is much to be deprecated that appeals should be brought and then dropped, such proceedings causing inconvenience to the Court, and indeed to all concerned.

The present case clearly falls under rule 96 of Schedule I of the Sheriff Courts (Scotland) Act 1907—"After an appeal has been noted, the appellant shall not be entitled to abandon it unless of consent of all parties or by leave of the Appellate Court." Now we have been asked for leave to abandon, and there is no reason why we should not comply with the appellant's request. We accordingly grant him leave, the only question being on what terms as regards the payment of expenses.

Mr Macmillan, for the respondents, asked us to remit the question to the Auditor. Mr Fleming, for the appellant, founding on section 4 (4) of the Act of Sederunt of 5th January 1908 and section 3 (5) of the Act of Sederunt of 10th March 1870, contended that his liability was limited to £3, 3s.

I am of opinion that in the case before us our discretion in the matter of awarding expenses is in no way curtailed by any statutory provision or provision by Act of Sederunt, and if we thought it desirable we might remit the account to the Auditor. The matter, however, is a small one. I do not consider that it is a case for a minimum award such as the pursuer pleads for. I think we shall best dispose of it by modifying the expenses due by the appellant to the respondents at five guineas.

LORD LOW—I agree with your Lordship.

LORD ARDWALL—I concur. I wish to say that the note we are dealing with is a note for leave to abandon an appeal under Rule 96 of the First Schedule of the Sheriff Courts Act 1907, and that we are not expressing any opinion on the cases which are provided for in the first portion of sec-

tion 4, sub-section (4), of the Act of Sederunt of 5th January 1909. I mention this because counsel for the appellants founded his argument to a great extent on that sub-section, and on the relative provisions of the Act of Sederunt of 10th March 1870.

LORD DUNDAS concurred.

The Court allowed the appellant to abandon his appeal on payment of five guineas of modified expenses.

Counsel for Appellant—D. P. Fleming.  
Agents—Clark & Macdonald, S.S.C.

Counsel for Respondents—Macmillan.  
Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, January 23.

### FIRST DIVISION.

[Sheriff Court at Edinburgh.]

#### GILROY v. MACKIE AND OTHERS (LEITH DISTRESS COMMITTEE).

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), sec. 13—Employer—Distress Committee—Workman Injured while Engaged in Temporary Work Provided by Distress Committee—Unemployed Workmen Act 1905 (5 Edw. VII, c. 18), sec. 1, sub-secs. (1), (3), (5), and sec. 2.*

A distress committee under the Unemployed Workmen Act 1905 provided temporary work for an applicant, in the course of which he was injured.

Held that the distress committee were employers within the meaning of the Workmen's Compensation Act 1906, and were therefore liable in compensation.

*Porton v. The Central Unemployed Body for London, (1908) 25 T.L.R. 102, followed.*

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), First Schedule, sec. (3)—Amount of Compensation—Set off—Compensation from Distress Committee—Relief Received from Poor Law Authorities during Incapacity.*

A workman who was engaged by a distress committee under the Unemployed Workmen Act 1905, received injuries which totally incapacitated him from work. During his incapacity he received poor relief at the rate of 10s. per week.

Held that the amount received by him in poor-law relief did not fall to be computed in discharge of the compensation to which he was found entitled under the Workmen's Compensation Act 1906 from the distress committee.

The Unemployed Workmen Act 1905 (5 Edw. VII, c. 18), sec. 1, enacts—"Organisation for London—(1) For the purposes of this Act there shall be established by order of the Local Government Board under this

Act a distress committee of the council of every metropolitan borough in London, . . . and a central body for the whole of the administrative county of London. . . (3) If the distress committee are satisfied that any such applicant is honestly desirous of obtaining work, but is temporarily unable to do so from exceptional causes over which he has no control, . . . they may endeavour to obtain work for the applicant, . . . but the distress committee shall have no power to provide or contribute towards the provision of work for any unemployed person. (5) The central body may . . . in the case of an unemployed person referred to them by a distress committee, assist that person by . . . providing or contributing towards the provision of temporary work in such manner as they think best calculated to put him in a position to obtain regular work or other means of supporting himself."

Section 2 (as applied to Scotland by section 5 of the Act) enacts—"Organisation Outside London—(1) There shall be established by order of the Local Government Board [for Scotland] for each [royal, parliamentary, or police burgh] with a population . . . of not less than fifty thousand . . . a distress committee of the council for the purposes of this Act, with a similar constitution to that of a distress committee in London, and the distress committee so established shall, as regards their [burgh], have the same duties and powers, so far as applicable, as are given by this Act to the distress committees and central body in London."

Section 4 (as applied to Scotland by section 5) enacts—"Local Government Board Orders and Regulations. . . (3) The Local Government Board for Scotland may make regulations for carrying into effect this Act, and may by those regulations . . . provide—(a) for regulating, subject to the provisions of this Act, the conditions under which any application may be entertained by a distress committee under this Act. . ."

[For the regulations issued by the Local Government Board for Scotland for carrying into effect the provisions of the Act, see Statutory Rules and Orders for 1905, p. 1401, et seq.]

The Workmen's Compensation Act 1906 (6 Edw. VII, c. 58) enacts—First Schedule, sec. (3)—"In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning, or is able to earn, in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

John Gilroy, 4A St Andrew's Wynd, Leith, claimed compensation under the Workmen's Compensation Act 1906 from the Distress Committee of the Burgh of