

ballot effectively to object to the sixth special juror chosen, his proper course was to do so then, and I see no sufficient reason why the provision of section 16 should not apply in respect that he did not do so. That provision is without question applicable to many cases where the interests of an accused may be susceptible of greater prejudice than is likely to arise through the substitution of a special for a common juror. I accordingly think that this first ground of suspension fails.

The second ground of suspension as presented by the complainer's counsel was limited to this, that the verdict of the jury when recorded by the Clerk was not read over to the jury, and their assent to its recorded terms was not obtained. This was a departure from ordinary practice which should not have occurred. It was, however, admitted that there is no absolute requirement on the subject such as to make the non-reading of a recorded verdict of the nature of a fundamental nullity. In the present case it appears that the chancellor of the jury announced the verdict of the jury as a general verdict of "guilty." No exception to the verdict as so announced in the hearing of the jury was taken by any member of it. Further, it is conceded that the record of the verdict made by the Clerk was in all respects a correct record of the verdict as so announced. In these circumstances I am unable to hold that there was any such material failure of justice as would make it necessary to quash the proceedings and suspend the sentence.

Following these views I am of opinion that the bill of suspension should be refused.

**LORD SANDS**—In this case the complainer seeks to have a conviction against him quashed on the ground that the verdict against him was obtained from a jury composed of six special and nine common jurors, and not of five special and ten common jurors as prescribed by section 17 of the Act of 6 Geo. IV, cap. 22. It appears that by some mistake in the balloting of the jury six special jurors were included in the panel. No objection was taken by the accused at the time to the composition of the jury. By section 16 of the same Act it is provided that "it shall not be competent to take any objection to any juror after he has been sworn to serve." The accused might have taken objection to the sixth special juror called to the jury-box as not being competent to serve in respect that five special jurors had already been called. It is argued, however, that the provision above quoted making incompetent an objection not taken before the jury is sworn applies only to such an objection as might be made the ground of an ordinary challenge, and not to an objection in respect of deviation from the statutory rule. In view, however, of the decision of the Court in the case of *M'Arthur v. Lord Advocate* (10 S.L.T. 310) the contention cannot in my view be sustained. In that case the objection was that three jurymen had been balloted and served upon the jury whose names were not included in the copy of the list of the assize

supplied to the accused in accordance with statutory provision—Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. cap. 35), sec. 28. In giving the leading judgment in that case Lord Trayner said—"I think the first objection comes too late. Any objection to the constitution of the jury must be taken before the jury is sworn. The prisoner committed the question of his innocence or guilt to the fifteen men who were called and put into the jury-box in his presence for the purpose of determining the question." This judgment of Lord Trayner was concurred in by his colleagues, both judges of high authority in criminal law, Lord Justice-Clerk Macdonald and Lord Moncreiff. In my opinion we must follow the rule established by that decision.

In regard to the second ground of suspension I concur with Lord Cullen, and I am accordingly of opinion that the bill of suspension must be refused.

The LORD JUSTICE-GENERAL concurred.

The Court refused the bill of suspension.

Counsel for the Complainer—Watt, K.C.—Walker. Agents—Sturrock & Sturrock, S.S.C.

Counsel for the Respondent—Lord Advocate (Hon. William Watson, K.C.)—Lord Kinross, A.-D. Agent—John Prosser, W.S., Crown Agent.

## COURT OF SESSION.

Thursday, July 5.

### SECOND DIVISION.

#### WHITE'S TRUSTEES v. NICOL.

*Succession—Legacy—Acceleration—Trust—Direction to Accumulate Rents until Debts and Legacies Paid off—Offer by Heir, then Entitled to Succeed, to Pay off Debts and Legacies in Return for Immediate Deed of Entail.*

By his trust-disposition and settlement a testator directed his trustees to accumulate the rents of his landed estates "until they shall have paid off . . . all debts . . . and the legacies hereinbefore bequeathed . . . or until the heir called under the order of succession shall have attained the age of twenty-one years complete, whichever of these events shall last happen." The testator further directed that on the occurrence of these events his trustees should execute a deed of entail of his estates in favour of the heir so called. The heir called under the trustor's order of succession, being of full age, having offered to place in the hands of the trustees such sum as might be required to enable them to pay the debts and legacies on condition of their executing a deed of entail in his favour, held that the trustees were not restricted to paying debts out of accumulated rents, and that they were accordingly entitled to accept the offer.

*Home's Trustees v. Ferguson's Executrix*, 1921 S.C. 474, 58 S.L.R. 367, followed.  
*Searlett v. Lord Abinger's Trustees*, 1907 S.C. 811, 44 S.L.R. 525, distinguished.

William James White Nicol and another, the trustees acting under the trust-disposition and settlement of the deceased John White of Drummelzier and Netherurd in the county of Peebles, and relative deeds of assumption, *first parties*, William James White Nicol, as an individual, *second party*, and William G. D. H. Nicol, son, and Miss Jane B. E. Nicol, and Miss Margaret C. M. Nicol, sisters of William James White Nicol, *third parties*, presented a Special Case for the opinion and judgment of the Court.

The Case stated, *inter alia*—"2. In his trust-disposition and settlement the testator, after conferring wide powers upon his trustees, to whom he conveyed his whole means and estate, including his lands and estates of Drummelzier and Netherurd, gave certain general directions as to the payment of his debts and of various legacies and provisions. He further provided that his daughter Mrs Jane Aitken White should be paid for her life use the annual income and proceeds of the free residue and remainder of his trust estate. The sixth purpose of the said trust-disposition and settlement is in the following terms:—“(Sixth) After the death of the longest liver of me and my said daughter, my said trustees shall hold my said landed estates, and accumulate the rents thereof until they shall have paid off and discharged all debts and obligations incurred or to be incurred by me or them and the legacies hereinbefore bequeathed (but not including the said annuity of twenty pounds), or until the heir called under the order of succession after written shall have attained the age of twenty-one years complete, if he or she shall not then have attained that age, whichever of these events shall last happen (marriage being hereby declared equivalent to majority in the case of a female heir), but they shall allow such heir in existence for the time from and after the death of the longest liver of me and my daughter to have and enjoy the personal use and occupation free of rent of my mansion-house, garden, policy, and shootings of Netherurd, and the shootings of my estate of Drummelzier, and shall also pay to said heir an annuity of Two hundred pounds sterling per annum out of the rents of my said landed estates, payable half-yearly in advance; and in the event of my said daughter Mrs Jane Aitken White predeceasing me, I direct and appoint the household furniture, books, plate, articles of vertu, linen, wines, pictures, horses, carriages, and other household plenishing which may belong to me at the time of my death to be handed over to said heir in existence for the time at that date, for such heir's own absolute use and behoof; but declaring always that if my said daughter shall predecease me and leave no heir of her body, and my nephew William Nicol, Esquire, merchant in Bombay, shall survive me, he shall not be entitled absolutely to the furniture and other articles last above mentioned, but shall only be

entitled to the use thereof during his lifetime, his life interest thereto being strictly alimentary and not capable of being assigned by him onerously or gratuitously, or liable for his debts or deeds, or subject to the diligence of his creditors; and upon his death the said furniture and other articles shall be delivered to the heir of entail who shall succeed to my lands as after mentioned, after the death of the said William Nicol for such heir's own absolute use and behoof; and also declaring that if my said daughter shall leave no heir of her body, or if no such heir shall survive until the deed of entail first after mentioned is executed and perfected, and if the said William Nicol then survives and becomes entitled, as he will in these events be entitled, to the personal use and occupation, free of rent, of my mansion-house, garden, policy, and shootings of Netherurd, and the shootings of my estate of Drummelzier, and to payment of the said annuity of Two hundred pounds, all as before mentioned, these rights are hereby declared to be strictly alimentary provision for him, and not capable of being anticipated or assigned by him onerously or gratuitously, or liable for his debts or deeds, or subject to the diligence of his creditors; and as soon as my said trustees shall have paid off and discharged all debts and obligations incurred or to be incurred by me or them, and the legacies hereinbefore bequeathed (but not including the said annuity of twenty pounds), or upon the heir called under the order of succession after written attaining the age of twenty-one years complete, whichever of these events shall last happen (marriage being hereby declared equivalent to majority in the case of a female heir), but only if my said daughter shall leave an heir of her body, who shall survive both of the said events, my said trustees shall execute a deed of strict entail in terms of the law of Scotland, and shall perfect the said deed by recording the same in the Register of Tailzies, and also in the Register of Sasines both for publication and preservation, of the whole residue and remainder of my landed estates and heritages above conveyed, including my said estates of Drummelzier and Netherurd, and shall convey and dispone the same under the fetters of said entail and under burden of the said annuity of twenty pounds if then payable or subsisting to and in favour of the heirs-male of the body of my said daughter Jane Aitken White, whom failing the heirs whatsoever of her body, the eldest heir-female succeeding always without division, and excluding heirs-portioners throughout the whole order of succession prescribed by these presents, and failing heirs of the body of my said daughter, then to and in favour of my nephew the said William Nicol and the heirs-male of his body, whom failing the heirs whatsoever of his body, whom failing my niece the said Mrs Jane Stevenson or Maclaren, and the heirs-male of her body, whom failing the heirs whatsoever of her body, whom all failing to my own nearest heirs and assignees whomsoever; and my said trustees shall at the same time

as they shall execute and deliver said deed of entail pay over to the heir then entitled to succeed to my said landed estates for his or her absolute use and behoof any balance that may be in their hands arising from the accumulation of the rents thereof. . . .

3. The seventh purpose of the said trust-disposition and settlement is in the following terms:—“(Seventh) If my said daughter shall not leave an heir of her body who shall survive until the said deed of entail is executed and perfected as aforesaid, and if the said William Nicol shall be then in life, my said trustees shall delay the execution of the said deed of entail until his death, and from and after the date when all the said debts and obligations incurred by me and them, and the said legacies (excepting the said annuity of twenty pounds) shall have been paid and discharged, they shall hold the residue of my estates for behoof of the said William Nicol in liferent for his liferent use allenerly, and shall pay to him during his lifetime thereafter the free income of the said residue, and which liferent shall be a purely alimentary provision for him and his family, not capable of being anticipated or assigned by him onerously or gratuitously, or liable for his debts or deeds, or subject to the diligence of his creditors; but declaring always that notwithstanding the said William Nicol is restricted to a liferent in the events last mentioned, yet he shall be entitled after the said liferent opens to him to make provisions for his widow and children and their issue other than the heir who shall succeed to my landed estates as after mentioned out of my landed estates to the same extent and effect and in the same manner as if my said landed estates were strictly entailed and he had succeeded thereto as heir of entail; and after the death of the said William Nicol my said trustees shall execute the deed of entail before mentioned in favour of the heirs called after him, and otherwise fully carry out the sixth purpose hereof, any balance of funds in their hands being paid to the heir of entail who shall first succeed to the entailed estate after the death of the said William Nicol for his or her absolute use and behoof upon a discharge being granted by him or her in their favour, all as mentioned in the said sixth purpose.” 4. The said Mrs Jane Aitken White died upon 27th April 1923 without leaving issue. She was predeceased by the said William Nicol. William James White Nicol, who is as an individual the second party to the present case, is the heir-male of the body of the said William Nicol, and is entitled, subject to the hereinbefore recited provisions as to payment of debts and legacies, to have a deed of entail executed in his favour by the first parties in accordance with the directions of the testator. The third parties are the three next heirs at present entitled in their order to succeed the said William James White Nicol as heirs of entail, and are of full age and are not subject to any legal incapacity. 5. At the present date the lands and estates of Drummelzier and Netherurd, over which the said deed of entail falls to be executed,

are burdened with heritable debt to the extent of . . . £10,000

The first parties are also indebted to the executors of the said Mrs Jane Aitken White for sums advanced to them from time to time by her amounting approximately to . . . 1,300

The first parties are also indebted to the trustees of the late Miss Mary Christina White, another daughter of the testator who predeceased her father, for the amount of the said Mary Christina White's interest under her parents' marriage contract. The amount so due is . . . 21,000

£32,300

The sole income available to the first parties for discharging these burdens, as well as for the upkeep and repair of the heritable estates, is the rental from the lands of Drummelzier and Netherurd, the gross amount of which at the present date does not exceed £2000. The second party, who is the residuary legatee of the said Mary Christina White and of the said Mrs Jane Aitken White, has, however, offered and is willing to place in the hands of the first parties such sum as may be required to enable them to pay the said debts and legacies on condition of their applying such sum in payment of the same and thereupon executing a deed of entail in his favour in the terms directed by the testator's trust-disposition and settlement. The first parties are willing to accept the said offer if it is competent for them to fulfil the conditions subject to which it is made. 6. Questions have arisen as to whether the first parties are bound to pay the said debts and legacies entirely out of accumulations of the rents of the said heritable estates before executing a deed of entail in favour of the second party or whether they are entitled to accept the offer of the second party and to pay the said debts and legacies in the manner proposed by him and thereafter to execute a deed of entail in his favour.”

The *question of law* was—“(a) Are the first parties entitled to accept the offer of the second party subject to its conditions and to make immediate payment of the said debts and legacies out of sums contributed by him and thereupon to execute the said deed of entail in favour of him as institute and the substitute heirs specified in the testator's trust-disposition and settlement? or (b) Are they bound to delay executing a deed of entail until they are able to make payment of the debts and legacies out of the funds forming the testator's trust estate and the accumulated rents of the heritage comprised therein or until further accumulation becomes illegal?”

Argued for the second party—The present case was ruled by the case of *Hone's Trustees v. Fergusson's Executrix*, 1921 S.C. 474, 58 S.L.R. 367. In that case there was a direction to pay the debts out of the accumulated rents, and it was then held that the trustees were bound to accept a similar offer and that there was nothing to restrict them to the accumulated rents as a means of paying off the debts. The present case

was really a *fortiori* of that. *Scarlett v. Lord Abinger's Trustees*, 1907 S.C. 811, 44 S.L.R. 525, was the exact opposite of *Home's Trustees*, and of this case, because there was a direction there that the debts were to be paid out of the rents and in no other way. Further, the circumstances of that case made a continuing trust necessary. In any event accumulations for the payment of debts could only be made for a period of twenty-one years—Entail (Scotland) Act 1914 (4 and 5 Geo. V, cap. 43), sec. 9.

Argued for the third parties—Though not expressly directed, it was clearly implied that the trustees were to accumulate the rents and to pay the debts out of them—*Scarlett v. Lord Abinger's Trustees*, 1907 S.C. 811, 44 S.L.R. 525. While it was competent to anticipate the period of payment, it was not competent to accelerate the period of vesting—*Muirhead v. Muirhead*, 17 R. (H.L.) 45, *per* Lord Watson at p. 48, 27 S.L.R. 917. Even in *Home's Trustees v. Fergusson's Executrix*, *cit. sup.*, the Court said that if the testator had provided a method for payment the Court could not accelerate—*per* Lord President Clyde at p. 480. The provisions of the present deed clearly contemplated a continuing trust.

LORD JUSTICE-CLERK—The question in this Special Case is whether the first parties as trustees of the late Mr White are entitled to accept an offer which has been made to them by the second party to provide for the payment of debts and legacies of the trust on condition that the trustees should execute a deed of entail in his favour in terms of the trust-disposition and settlement, or whether on the other hand the trustees are bound to maintain the trust until these debts and legacies are paid out of trust revenue. The answer to that question must depend, I apprehend, upon the intention of the testator as it is ascertained from the writing under his hand; and in particular in this deed it largely depends upon the construction which the Court puts upon the sixth clause of the settlement.

Of that sixth purpose two views have been maintained in argument. On the one hand it was pointed out that the testator has not said in terms that the payment of the debts and legacies in question shall be made out of the accumulated rents. Nor has he enjoined that that payment shall not be made from any other source. And accordingly it is maintained that the trustees are entitled to accept the offer made. On the other hand the view was expressed that the rents of the estate are earmarked by the testator for the purpose of meeting these debts and legacies, and that the trustees could not go into the market and borrow for the purpose of meeting these obligations, or, indeed, I think it was said, pay them out of any windfall that might come their way. Accordingly it was maintained that the trustees were precluded from accepting the offer of the second party.

I suggest to your Lordships that the first view which I have stated is the correct view, and that this case is covered in terms by the decision of the First Division in the

*Bassendean* case—*Home's Trustees v. Fergusson's Executrix*, 1921 S.C. 474. In my opinion this case is a *fortiori* of *Home's Trustees*. The terms of the direction in that case were that the trustees "from time to time as they shall consider expedient shall pay and apply the same"—that is, the accumulated income—"in and towards payment *pro tanto* of the debts secured upon the said lands," and it might have been maintained I think with more force in that case than in this that the revenues of the estate were earmarked for the payment of debt. The distinctions which have been sought to be drawn in argument by the third parties between that case and this appear to me to be shadowy and insubstantial. Accordingly I think this case is covered by that decision.

I will only add that the case of *Scarlett* (1907 S.C. 811) cited in argument appears to me to be very different from the present. There were two features in that case, as was pointed out by Lord Mackenzie in *Home's Trustees*, which distinguished it from *Home's Trustees*, and accordingly in my view distinguish it from the present case. These were, first, that payment of the debts in *Scarlett* was directed by the testator in terms to be made from accumulated revenue and from no other source, and in the second place it appears that in that case there were other purposes in the settlement which required that the trust administration should be maintained. These, according to Lord Mackenzie, were the two grounds of judgment in *Scarlett*, and as I indicated a moment ago neither of these considerations has any application to the present case. The case of *Muirhead* (17 R. (H.L.) 45) to which reference was made is in my opinion entirely different also. There the bequest depended, as Mr Chree pointed out, on the death of the widow, which had not occurred. Accordingly I do not think it is possible to assimilate that case to the one with which we are here concerned.

It appears to me that the object uppermost in the testator's mind in this case—as, indeed, in the *Bassendean* case—was the disencumbering of his estate, and I think it is idle to speculate as to what may happen in the future. There is no statement on which the parties are agreed to the effect that the disencumbering of the estate may be immediately followed by the re-encumbering of the estate. That argument was open in the *Bassendean* case but did not if urged receive effect. I think that the object which the testator had in mind can best be secured in the manner proposed. I find nothing in the deed to forbid that course being followed.

Accordingly I suggest to your Lordships that the first question should be answered in the affirmative and the second in the negative.

LORD HUNTER—I agree. The question in this case, as I think, may be most simply stated thus—Did the testator intend that the institute under his entail should be selected when his estate was disencumbered of debt, in whatever way the disencumber-

ing took place, or did he provide that the selection of his institute should be postponed until the debt had been paid off out of the accumulated rents and out of no other source? Looking at the matter as a question of common sense and the construction one has to give to the language used by the testator, I have not much doubt that I should answer the first of the two questions in the affirmative.

If I require authority, however, for that course, I think it is to be found in the decision of *Home's Trustees*, 1921 S.C. 474, to which we were referred. This case appears to me to be a *fortiori* of that decision. On the other hand, the case of *Scarlett*, 1907 S.C. 811, was a very special case. There it was quite impossible that the trustees could follow the course which they were asked to adopt at the time the request was made without disregarding certain of the provisions of the testator to which your Lordship has made reference.

I agree that the questions should be answered as suggested by your Lordship.

LORD ANDERSON—I am of opinion that question (a) should be answered in the affirmative for these reasons—(First) because the only subsisting trust purpose is payment of debts and legacies. There is no liferenter or annuitant, as there was in the case of *Scarlett*, 1907 S.C. 811, whose rights might be prejudiced by the termination of the trust. In *Scarlett* there were also other trust purposes, fulfilment of which necessitated the continuance of the trust. My second reason is because of the terms of the sixth clause of the trust-disposition and settlement. This clause suggests the source from which the debts and legacies were to be paid. To the mind of the truster the accumulated rental was the most likely source, and the only one he could have in contemplation. But this is not the only possible source, and the language of the trust deed does not make it the sole source. It is not made imperative for the trustees to pay from accumulated rental. They are not even directed to do so. In this last respect this case is a *fortiori* of *Home's Trustees*, 1921 S.C. 474, which otherwise seems a direct authority in favour of the second party. The case of *Scarlett* is in contrast with the present case and with *Home's Trustees*, in respect that in *Scarlett* it was made imperative to pay the debts from accumulations. The argument of the third parties was to the effect that it was not legitimate for the first parties to accept the second party's offer and thereby anticipate the time contemplated by the truster for the execution of the entail. But the time contemplated by the truster for this event was the date when debts and legacies should have been paid. If, then, the trustees can legitimately pay these debts and legacies from the funds offered by the second party—as I think they can—there is no anticipation of the time contemplated by the truster.

LORD ORMDALE did not hear the case.

The Court answered the first question

in the affirmative and the second in the negative.

Counsel for the First and Third Parties—Leadbetter, K.C.—Macdonald. Agents—Russell & Dunlop, W.S.

Counsel for the Second Party—Chree, K.C.—Maconochie. Agents—Fraser, Stodart, & Ballingall, W.S.

Saturday, July 7.

## FIRST DIVISION.

### EDINBURGH SOUTHERN CEMETERY COMPANY, LIMITED, PETITIONERS.

*Company—Alteration of Objects—Cemetery Company—Powers to Carry on Business as Masons, Quarriers, Florists, or Gardeners—Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 89), sec. 9 (1).*

The Companies (Consolidation) Act 1908 enacts—Section 9 (1)—“Subject to the provisions of this section a company may by special resolution alter the provisions of its memorandum with respect to the objects of the company so far as may be required to enable it (a) to carry on its business more economically or more efficiently; or . . . (d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company. . . .”

A company, the objects of which were to acquire and enclose and lay out ground as a place of interment, to dispose of the ground for the purpose of burial, and to provide chapels and vaults or other buildings requisite and proper for a cemetery, by special resolution altered the form of its constitution by substituting for a contract of copartnership a memorandum and articles of association in which were included, *inter alia*, the following additional objects:—“To carry on business . . . as owners of cemeteries or burial grounds, and crematoriums, stone and marble cutters, masons, quarriers, and sculptors, florists, gardeners, and undertakers.”

On a petition by the company for confirmation of the proposed alterations the Court granted the powers craved, but only in so far as these could be used in connection with and incidental to the main business of the company as owners of cemeteries or burial grounds.

The Edinburgh Southern Cemetery Company, Limited, incorporated under the Companies Acts 1908 to 1917, presented a petition for confirmation of alterations in the form of its constitution and of its objects as effected by a special resolution in terms of the Companies (Consolidation) Act 1908, sections 9 and 264.

The petition stated, *inter alia*—“1. The constitution of the company consists of a contract of copartnership dated on or about 12th February 1845, with various resolutions,