

Friday, July 28.

(Before the Lord Chancellor (Halsbury),
Lord Shand, and Lord Davey.)

NAISMITH v. BOYES.

(Ante, May 27, 1898, vol. xxxv. p. 702, and
25 R. 899.)

Succession—Exclusion of Legal Claims—
Jus relictæ—*Legitim*.

A testator, by a settlement disposing of his whole estate, made certain provisions for his wife and children, subject to the declaration that these provisions should be in full of their legal claims.

The wife and children accepted the provisions of the settlement.

By the death of the residuary legatees before the period of vesting provided by the settlement part of the estate fell into intestacy.

Held (aff. judgment of the First Division, *dub.* Lord Davey) that the legal rights of the wife and surviving child were only excluded in so far as conflicting with the settlement, and were not excluded from estate falling into intestacy.

The case is reported *ante, ut supra*.

Mrs Naismith appealed against the judgment of the First Division.

At delivering judgment—

LORD CHANCELLOR—In this case the testator Mr James Hamilton conveyed the whole of his estate to trustees, making certain provisions in respect of his second wife and her two children. The appellant Mrs Naismith is the daughter by Mr Hamilton's first marriage. The sole point which is in debate is the true construction of one provision of the settlement made by Mr Hamilton in which he declared that the provision he made for his wife and children by the settlement he was then making, and the provisions previously made for Minnie Arthur Hamilton (now Mrs Naismith), "to be in full of all that my said wife can claim in name of terce, *jus relictæ*, or otherwise, and of all that my said children can claim in name of legitim, portion natural, bairns' part of gear, or otherwise, in respect of my death."

The children of the second marriage died under age.

Both the respondent and the appellant accepted and enjoyed the provisions made for them.

It is argued that though the portion of the estate in dispute has fallen into intestacy the provision which I have quoted bars both the appellant in respect of her legitim and the respondent in respect of her *jus relictæ* from any further claim than that which they had respectively enjoyed under the settlement made by the testator.

On the other hand, it is said that the provisions made, and which were intended only to apply to such part of the estate as was disposed of by the settler, and could not be intended to apply to any rights arising from intestacy which was not con-

templated by the terms of the settlement at all, and I think that is a reasonable and sensible view of the matter. To use the language of Lord M'Laren, with which I concur, such clauses are intended to enable full effect to be given to the testator's testamentary dispositions by putting all persons who take benefit from the will under a disability to put forward legal claims which would have the effect of withdrawing something from the estate disposed of.

As regards all that remains over when the provisions of the will are satisfied—in this case the whole residue—the law of intestacy takes effect upon it. This seems to me good sense, and I am satisfied that it gives effect to the intentions of the testator in the sense that he contemplated a state of things by the clause in question which as a fact did not arise, and that he never contemplated the clause as applying to intestacy at all.

I think the judgment ought to be affirmed.

The parties have by their agreement settled the question of costs.

LORD WATSON (*read by Lord Davey*)—On the 22nd December 1891 the late James Hamilton made a *mortis causa* settlement, by which he conveyed to trustees the whole estate, heritable and moveable, of which he had power to dispose. He had at that time a second wife, now the respondent Mrs Boyes, and two living children of the second marriage, a daughter and son. He had also one child by a former marriage, now the appellant Mrs Naismith, for whom he had already made a provision of £3000 as recited in his settlement.

By the terms of this settlement Mr Hamilton directed his trustees to pay the free annual income of the whole residue of his estate to his widow for her alimentary liferent, to be restricted to one-half of the free income in the event of the widow entering into another marriage. After the fulfilment of these purposes the trustees were directed to hold the residue for behoof of the children of the testator's second marriage, and the issue of such as might predecease until the youngest of the children had attained the age of twenty-one years, and upon that event to divide, pay, and convey the residue of the estate among the children of the second marriage, "and that equally among such children then surviving, and the issue of such as may have predeceased *per stirpes*—that is, such issue taking only the share which their parents would have taken if in life." The settlement contained no destination-over of the residue in the event of the failure of the children of the second marriage or their issue before the period appointed for distribution.

The settlement also contained the following declaration which has been the occasion of controversy in this case:—"And I declare the provision hereby made for my wife and the children of our present marriage, and the provisions previously made for the said Minnie Arthur Hamilton (the present appellant), to be in full of all that my said wife can claim in name of terce, *jus relictæ*, or

otherwise, and of all that my said children can claim in name of legitim, portion-natural, bairns' part of gear, or otherwise, in respect of my death."

The testator died on the 29th January 1892 survived by his wife and by the children of both marriages. The children of the second marriage died in pupilarity upon the 14th and 20th days of May 1892. The widow was married to her present husband upon the 8th July 1896, and thereupon her interest in the free income of the residue became, in terms of the settlement, restricted to one-half. The appellant and the respondent, after the testator's death, accepted the provisions which had been made for them respectively, which were declared by the settlement to be in full of their legal claims.

In July 1897 the appellant and the respondent concurred in stating a special case for the opinion and judgment of the First Division of the Court of Session, to which the trustees of the testator were formally made parties, but not as claimants. The estate submitted to the jurisdiction of the Court consisted of one-half of the free residue of the trust-estate, in which the respondent had lost her alimentary right of liferent upon her re-marriage in July 1896. The respondent (1st) maintained that by the terms of the settlement the whole residue vested *a morte testatoris* in her two children, and that she succeeded on their deaths successively to one-third of their interest; and (2nd), in the alternative, that on their deaths the residue, in so far as not affected by her liferent, fell into intestacy, and that accordingly she was entitled to her legal rights of terce and *jus relictæ* therein.

The appellant, on the other hand, contended that her own claim of legitim, and the respondent's claims of terce and *jus relictæ*, were effectually barred by the terms of the clause already quoted from the settlement, and by their subsequent acceptance of the provisions respectively made for them by the testator, and that the appellant was therefore entitled, as the sole heir *ab intestato* of her father, to take the half of residue which had been set free by the restriction of the respondent's alimentary liferent.

The residue held by the trustees of the deceased consists of a house and small leasehold property, together about the value of £1600, and of personal estate amounting to £5407, 3s. 5d. It is not stated in the special case that the testator died infert in the heritable property, but the Court, apparently without objection by the parties, have proceeded upon the footing that he was so, and that the widow's claim of terce was, if not barred as the appellant maintains, well founded.

The judgment of the First Division was delivered on the 27th May 1898 by Lord M'Laren, with the concurrence of the Lord President (Robertson), Lord Adam, and Lord Kinnear. Their Lordships negatived the respondent's contention that the residue had vested in the two children of the second marriage, and as neither of the parties to this appeal has attempted to disturb the

finding, I do not think it necessary to say more than that I agree with it. By their interlocutor they affirmed (1) that "the whole residue passed to the testator's heirs in intestacy as at the date of his death," and (2) that the respondent, the testator's widow, is entitled to her legal rights of terce and *jus relictæ* out of any estate which may have fallen into intestacy in addition to the liferent provision conferred upon her by the settlement. Their Lordships have thus distinctly affirmed that the legal claims of the respondent are not barred by the clause of the settlement already referred to, but their interlocutor does not make the same affirmation with respect to the appellant's claim of legitim. So long as the respondent only takes one-third as *jus relictæ*, it is not material to the appellant, in so far as the moveable estate is concerned, whether she takes in the capacity of her father's heir, or in the double capacity of his heir and of a child entitled to legitim. If the appellant's right of legitim was barred, and the respondent's legal claims were not, the result would be that the respondent would take one-half instead of one-third share of the moveable estate. The reasons which the learned Judges have assigned for holding that the respondent is not barred from claiming her legal rights apply with the same force to the appellant.

The legal claims of the widow and children are not, strictly speaking, rights of succession, and they infer no representation. They are in the nature of debts which attach to the free succession after the claims of onerous creditors have been satisfied. Hence it has been frequently said judicially that, in respect of their legal claims, the widow and children are heirs in competition with onerous creditors, and are creditors in competition with heirs. The widow's terce is one-third of the income of the heritage in which her husband died infert. Her *jus relictæ* is one-third of the *corpus* of his moveable succession when he is survived by children, and when he leaves no children is one-half. The legitim in like manner is one-third when there is a surviving widow and one-half when there is not. The other third or half, as it may be, of the moveable succession descends by right of inheritance to the heir or heirs *ab intestato* of the deceased.

The Lords of the First Division have based their judgment in substance upon the ground that the clause declaring the provisions respectively made by him in favour of the respondent and the appellant to be in full of their legal claims has exclusive relation to property passing by *mortis causa* disposition from the testator, and that it has no reference to and does not affect property which he attempted to dispose of by will, and which has fallen into intestacy by reason of the failure of the objects of the bequest. At the hearing of the appeal I entertained doubts whether that conclusion could be justified, but since that time I have had an opportunity of considering the question, and I am satisfied that, whilst the decision of the Court below does not run counter to any authority which

I have been able to find in the law of Scotland, it is in accordance with sound principle.

In a case like the present, where the testator settled upon the members of his family all the property, both heritable and moveable, of which he was possessed, I do not think it can be reasonably assumed, in the absence of any provision to that effect, either express or implied, that he intended to regulate the disposal of any part of his estate which might possibly lapse into intestacy. In my opinion the testator, when he inserted a clause in his settlement barring the legal rights of the appellant and respondent, had no object in view except to protect the settlement by preventing the enforcement of these claims to the disturbance of his will and to the detriment of the beneficiaries whom he had selected. When, accordingly, by the premature decease of his children of the second marriage the residue provided to them by his settlement became intestate, I do not think it can be held that the testator contemplated or intended that the exclusion of the legal rights of his widow and surviving child should any longer remain operative. I have therefore come to the conclusion that, in the events which have occurred, the property destined by the will to the children of the second marriage, whilst still affected to the extent of one-half of its income by the provisions of the will, devolved upon the legal heir of the testator subject to the legal claims of his widow and children which would have been competent if he had died intestate.

It must, I apprehend, in all cases be a question of circumstances how far a testator who has in his settlement excluded the legal claims of his widow and children, intended that exclusion to operate. He may expressly declare, or it may appear by plain implication from the terms of the instrument that he intended the provision to operate, not merely in favour of persons taking under the will, but also in favour of his heirs succeeding in the event of intestacy. There may be, and there frequently is, a general scheme of settlement of a man's whole property which contemplates that some relatives shall upon his decease take the interest which the law gives them as heirs *ab intestato*, and that others shall take the provision which the deceased has made for them. It is unnecessary for the purposes of this case to consider what would be the effect of an express provision to the widow or to one child coupled with an exclusion of their legal claims. The exclusion would certainly operate in favour of all those beneficiaries who took *provisione* of the deceased, and it would also operate in favour of those taking *ab intestato* if it were reasonably apparent that denying effect to it would disturb the scheme which the deceased contemplated.

The learned Judge who delivered the opinion of the Court, by some oversight, made use of the expression, "There are no heirs or personal representatives other than the wife and children." I need hardly explain that the widow is neither the heir

nor the personal representative of her husband. The child, on the other hand, in so far as it has a claim of legitim, is a creditor, and is not the heir of its father, but has besides a right of inheritance. The father may in various ways exclude its claim of legitim, but he cannot take away its right of inheritance except by making an effectual conveyance or bequest of his estate to another. With these observations I concur in the opinion of the learned Judge, and in his conclusion "that the residue, in so far as consisting of personal estate, is subject to the usual threefold division, and that the residue of the heritable estate is subject to terce." Although the questions submitted in the special case do not expressly raise the point, I think the interlocutor ought to contain a declaration that the appellant is entitled to her legitim.

I have not thought it necessary to refer to *Pickering v. E. Stamford*, 3 Vesey 332, *Gurly v. Gurly*, 8 Cl. & F. 743, or to any of the other English cases which were cited by the Lord Advocate in his argument for the respondent. These authorities, although they may have an apparent affinity to, do not directly bear upon the question raised in this appeal, which relates to the sense in which certain expressions were used by a Scottish testator, having due regard to the nature of the rights with which he was dealing as these exist in the law of Scotland. The rights given to an English widow by the Statute of Distributions differ materially from a Scottish widow's claims of terce and *jus relictæ*, and an English child possesses no right analogous to a Scottish child's claim of legitim.

I am of opinion that the interlocutor appealed from ought to be affirmed, with the declaration that the appellant's (Mrs Naismith's) right to have her claim of legitim satisfied out of the fund *in medio* is not barred by the terms of her father's settlement. In terms of the agreement embodied in the special case both parties must have their costs of this appeal out of the funds *in medio*.

LORD SHAND—I also think that the judgment of the Court of Session ought to be affirmed, with the addition proposed by my noble and learned friend Lord Watson in the concluding passage of his opinion.

As pointed out by that noble and learned Lord, the Court has held that no vesting of the estate took place in the children of the second marriage who survived the testator. He contemplated that his whole estate should be given to those children, but he had made a provision that the payment should be made only if they survived majority. They died in minority, and there is no ulterior destination. In these circumstances the Court has held that the testator died intestate in regard to the estate which is now the subject of this appeal.

The sole question is as to the effect of the clause by which the testator provided and declared that "the provisions hereby made for my wife and the children of our present

marriage, and the provisions hereby made for the said Minnie Arthur Hamilton" (the daughter by the first marriage), "to be in full of all that my said wife can claim in name of terce, *jus relictæ*, or otherwise, and of all that my said children can claim in name of legitim, portion natural, bairns' part of gear, or otherwise, in respect of my death." Upon the effect of that clause I agree with what has fallen from your Lordships. It must be observed that the case is not one in which in return for other advantages given to them the widow and the child of the first marriage contracted to give up the rights which they had of *jus relictæ* and legitim respectively. There is no obligation or contract on the part of either the widow or the child such as might occur either by a contract by themselves or as the effect of a contract of marriage. The question is one purely of testamentary intention—that is to say, of the true interpretation and effect of the will which the deceased made.

Suppose the testator had expressly said, in order to benefit the children of my second marriage and leave them the whole estate, I provide that the claims of legitim and *jus relictæ* shall be barred. If he had expressly stated that his purpose was to benefit his children, and it turned out that he died intestate, as the testator has done in this case, I think there can be no question that a clause of that kind, excluding the rights of the widow and children, would have been of no effect. But although that is not expressly said I hold it to be clearly there by implication. The true meaning of the clause, excluding the rights of the widow and children, is to protect the provisions in the settlement, but if those provisions entirely fail it appears to me that by direct implication the declarations in regard to the rights of the widow and the children fail also.

I will only add that it appears to me that the principle to which the House, affirming the decision of the Court below, is now giving effect, is one which is established in the law of England. The Lord Advocate in the able argument which he submitted to the House referred to a case which my noble and learned friend Lord Watson has also already noticed, namely, *Pickering v. Lord Stamford*. I find that it was there decided by the Master of the Rolls in 1797, following a decision by Lord Cowper, that "where a testator had given to his wife that provision which he meant to be a satisfaction for any claim she might have against the other objects of his bounty, if by any accident those objects should be unable to claim the benefit of that exclusion, no other person should set it up against the widow. That seems to me to be exactly the principle to which the House is now giving effect; and I think the passage to which the Lord Advocate also referred in *Williams on Executors*, at page 1360, states the rule with accuracy and great clearness. It is true that in this case the claims to legitim and *jus relictæ* are of a different character from a mere beneficiary right, as my noble and learned friend Lord Watson

has pointed out; but the question is not one as to the nature of the claim, whether it is a right given by common law, a right such as *jus relictæ* or legitim where there is a *jus crediti*, [or a right of succession under the Statute of Distributions or otherwise. In either case the purpose which the testator has in view is to exclude the claims, whatever may be their nature or origin and foundation, in order to benefit others. If the benefit to those others is entirely to fail, it is clear that in conformity with the English decisions, and with sound principle, the exclusion of the right, whatever be its character, also fails, for the exclusion of the right was provided only to protect and enlarge the purpose of the testator in making his testamentary provisions, whereas he died intestate.

LORD DAVEY—I cannot say that I concur in the judgment of your Lordships without hesitation. It is surprising that there is no authority upon the point in Scottish law, but none was cited, and the case must therefore be decided on principle.

My doubt arises upon the particular character of *jus relictæ*, and from a consideration that under the decision appealed from the widow takes both the provision made for her by her husband in bar of her legal right and also her *jus relictæ*. I need not repeat what has been said by my noble and learned friend Lord Watson as to the nature and incidents of the *jus relictæ*. I will only observe that it is totally different from a share of the deceased's estate as one of his heirs *in mobilibus*, and it exists equally whether the deceased has died testate or intestate, and may be asserted equally against testamentary heirs and against statutory heirs *in mobilibus*. For this reason the English case *Pickering v. Earl of Stamford* cited by the Lord Advocate does not seem to me to support his argument. In that case it was held that a widow was not deprived of the share in her husband's intestate estate to which she is entitled under the English Statute of Distributions by a clause of exclusion in his will, the dispositions of which have failed and resulted in an intestacy. That was decided on the ground that a person cannot alter the legal succession to his intestate estate except by giving it to somebody else, which *ex hypothesi* he has not done. Indeed, the case of *Pickering v. Stamford* contains one sentence which is adverse to the argument. The nearest analogy in English law to *jus relictæ* is a widow's right to dower under the old law, which was independent of any question of intestacy, but which might be barred in the same manner and to the same extent as *jus relictæ* by the husband's disposition. Lord Alvanley says—"If a man devises his real estate from his heir after giving his widow a provision in lieu, satisfaction, and bar of dower, and the devisee dies in the lifetime of the devisor, is there any doubt that the heir would take the estate and bar the widow of her dower? That is not doubted." That sentence I believe to express the doctrine of English law.

The real question seems to me to be whether the testator must be presumed to have purchased his widow's *jus relictæ* for the benefit of his particular disponees only or for the benefit of his estate generally, and it appears to me to be one of those questions which may be decided either way without infringing either principle or authority. The testator has made a complete disposition of the capital of his estate in a certain contingency only, and has made no disposition in the event of that contingent gift failing. I do not know why he should not be deemed to have contemplated the failure of the contingency and to have elected in that event to die intestate. I understand, however, that all your Lordships agree in the result with the learned Judges in the Court of Session, and I need scarcely say that in these circumstances the decision is most likely to be in accordance with sound principle and the presumed intention of the testator. I therefore concur in the order proposed.

Appeal *dismissed*, with the declaration that the appellant Mrs Naismith's right to have her claim of legitim satisfied out of the fund *in medio* is not barred by the terms of her father's settlement.

Counsel for the Appellants—J. B. Balfour, Q.C.—P. Balfour. Agents—A. & W. Beveridge, for Carmichael & Miller, W.S.

Counsel for Respondent—The Lord Advocate (Graham Murray, Q.C.)—A. S. D. Thomson. Agents—Grahames, Currey, & Spens, for A. C. D. Vert, S.S.C.

Monday, July 31.

(Before Lord Watson (in the Chair), and Lords Morris and Shand).

THE LORD ADVOCATE *v.* WEMYSS,
et e contra.

(*Ante*, December 11, 1896, vol. xxxiv. p. 216, and 24 R. 216).

Superior and Vassal—Crown—Barony Title—Sea—Submarine Minerals—Prescription.

Held (*aff.* judgment of First Division) that the grant of a barony by the Crown with parts and pertinents, or a grant of a barony with the coal of the barony lands, confers no right, apart from prescriptive possession, to coal lying under the sea *ex adverso* of the barony lands.

Opinion reserved—whether prescription by partial working of minerals under the sea, *ex adverso* of the lands, will give a title to the whole submarine minerals capable of being worked from the barony lands, or whether the rule *tantum prescriptum quantum possessum* will apply.

Superior and Vassal—Barony Title—Grant of Minerals infra fluxum maris.

Held (*aff.* judgment of the First Divi-

sion) that a barony title containing a grant of coal *infra fluxum maris* is a bounding title limiting the grantee's right to coal under the foreshore above low water-mark, and excluding prescription of submarine coal below low water-mark.

Prescription—Superior and Vassal—Estates Held by Different Titles—Disjunction of Barony by Division of Superiority.

By Crown charter of resignation in 1651 the three estates of W, E, and M were united into a single barony. The charter contained separate descriptions of the three estates, and of the grants, privileges, and pertinents attaching to each, and these separate descriptions were repeated in all the subsequent titles. On the restoration of Episcopacy in 1662 the superiority of the barony of M passed to the Archbishop of St Andrews, and a charter was obtained from him by the vassal. The superiority of the estate of M having reverted to the Crown at the Revolution, Crown charters were in 1711 again granted to the vassal of the whole lands of W, E, and M, but these charters did not reunite the three estates into a single barony.

In the case of W there was no grant of the coal of the lands, in the case of E there was an express grant of the coal above low water-mark, and in the case of M a general grant of the coal of the lands of the barony. The vassals under these titles had worked submarine minerals *ex adverso* of the estate of W, but not those of E or M.

Held (*aff.* judgment of First Division) that as prescription of submarine minerals was excluded as regards the intervening estate of E by the terms of the title, and as the sea minerals of W and M were separated in locality by those of E, and the lands held under separate titles, the workings *ex adverso* of W could not be regarded as an act of possession applicable to the submarine minerals of M.

Personal Bar—Homologation—Minor—Compromise by Trustees for Minor.

The curators of a minor, who was heir of entail of certain estates, and for whom his curators held as trustees certain unentailed lands adjoining the entailed lands, entered in 1874 into a transaction during the heir's minority, by which they surrendered to the Crown any right which they as trustees or which the minor might have to the minerals lying under the sea *ex adverso* of the entailed and unentailed lands, on condition that the Crown would forego any claim exigible by it in respect of the minerals already worked, and on condition of receiving a lease of the minerals from the Crown. The title to the unentailed lands was vested in the trustees, and they had by the terms of the trust full powers of "compromise and submission." They subsequently obtained a lease of the minerals under