

LORD PRESIDENT—The Lord Ordinary seems to have acted in the interest of all parties by deciding on the effect of the agreement at this stage of the case, and it has not been shown that at any later stage he would have had more material for forming his judgment. The Messrs Stewart indeed virtually challenge judgment on the terms of the letter of 20th April 1893, for they say on record that their appointment “was embodied in” it.

I think that the conclusion which the Lord Ordinary has arrived at is substantially right. The right conferred is simply a licence to make patent machines on payment of a royalty on each machine, and the licence is not the less a licence because it confers a monopoly. Messrs Stewart were not bound to make any machines at all, and accordingly if their present contention is right, and is logically applied, Mr Rendall's patent might remain unused during the whole of its existence, and he not receive sixpence out of it. The natural safeguard against this is that he should be at liberty to make other arrangements as soon as he thought that the existing one did not answer. There is in the letter of appointment absolutely nothing pointing in the opposite direction — no lump sum paid down, nor any arrangements indicating a less elastic and more permanent relation.

Accordingly I hold that the agreement was terminable at pleasure, by which I mean that Mr Rendall might by notice terminate the agreement as from the date of the delivery of the notice. It is of course implied in this that Mr Rendall would be bound by all engagements entered into before the date of the delivered notice; but I hold that he would not be bound by anything done after notice — except the necessary working out of what had already been done. I rather think that this is really the view of the Lord Ordinary, but it is not quite accurately expressed by the words that the agreement is terminable “on reasonable notice.” I do not think that the Messrs Stewart were entitled to any interval between the notice and its coming into effect. Mr Rendall might terminate the relation between them to-day as from to-day, and Messrs Stewarts would from that date cease to be entitled to act under that letter. Only Mr Rendall would be bound to respect what they had done up to that time, and they would be entitled to complete what they had so done.

I am for adhering in each case to the Lord Ordinary's interlocutor, substituting, in each case, the words “at pleasure” for the words “on reasonable notice.”

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced the following interlocutor in both of the cases:—

“Refuse the reclaiming-note: Adhere to the said interlocutor with the variation that the words ‘at his pleasure’ are hereby substituted for the words

‘on reasonable notice’ therein, and decern.”

Counsel for Reclaimers—Guthrie, Q.C.—J. Wilson. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for Respondent—Sol.-Gen. Dickson, Q.C. — Aitken. Agents — Webster, Will, & Company, S.S.C.

Tuesday, June 27.

## FIRST DIVISION.

[Lord Kincairney, Ordinary.]

### GIBSON'S TRUSTEES v. GIBSON.

*Expenses—Reclaiming-Note—Expenses of Unsuccessful Party—Construction of Deed.*

An action of multiplepinding was raised for the purpose of construing a deed of which the Lord Ordinary in his judgment stated that “the deed is in my opinion exceedingly ill formed, and it is very difficult to arrive at its true construction.” The Lord Ordinary allowed all the parties in the case their expenses out of the fund *in medio*. An unsuccessful party reclaimed against the Lord Ordinary's interlocutor on the merits of the case, and the First Division adhered to the interlocutor reclaimed against. On a motion for expenses, the Court (while indicating that it must not be supposed that as a general rule an unsuccessful party who had been allowed his expenses in the Outer House would receive the same allowance in the Inner House), in view of the exceptional nature of the case (*diss.* Lord M'Laren) granted the unsuccessful claimer his expenses out of the fund *in medio*.

An action of multiplepinding was raised at the instance of the trustees of the late William Gibson for declarator that the pursuers were only liable in once and single payment of the means and estate belonging to William Gibson, which had been conveyed to the pursuers as trustees under his trust-disposition and settlement dated 11th October 1867; and for the exoneration and discharge of the pursuers.

The following account of the nature of the action and of the clauses of the trust-deed to be construed is taken from the opinion of the Lord Ordinary:—“This is a multiplepinding brought by the trustees of William Gibson, who died in 1868, survived by his widow, who died in 1897. She liferented the whole estate, and on her death it became necessary to divide the estate; and this multiplepinding has been brought for the determination of the questions which have arisen in regard to the construction of his disposition and settlement.

“The third purpose of the trust-deed relates to the widow's liferent, and is not material to the questions now to be decided. These depend upon the fourth and fifth

purposes, which are quoted in full in the record. By the fourth purpose the trustees are directed to hold the estate and pay the income of it to the truster's two daughters, Elizabeth, afterwards Mrs Wilson, and Margaret, 'equally until the youngest of them reaches the age of fifty years complete, on which event' the truster directed his trustees to 'convey to them equally in fee, and to the heir of the last survivor of them my whole heritable estate above disposed as their own absolute property.' These provisions were declared to be in satisfaction of legitim.

"The fifth purpose of the trust is as follows:—'In the event of the failure of the said Elizabeth Gibson and Margaret Gibson, or the issue of their bodies, my said trustees are hereby directed to assign, dispoise, convey, and make over the whole estate, both heritable and moveable, above conveyed, to and in favour of the said James Gibson, accountant, Clydesdale Bank, Muirkirk, and Mrs Baird or Vass, spouse of Andrew Vass, miner, Lugar, and the issue of their respective bodies equally *per stirpes*.'

"What has happened is that the truster's two daughters survived him, but neither attained the age of fifty. Margaret died in 1872 unmarried. Elizabeth, who became Mrs Wilson, died in July 1883 intestate. She was survived by one child, who died in infancy in September 1883, being his mother's heir. James Wilson, her husband, survived his son and was his heir, and died in December 1883. James Gibson, mentioned in the fifth purpose, died on 11th November 1896, thus predeceasing the widow. Mrs Vass is dead, but I do not think the exact date of her death is mentioned. She has been survived by two children, John Vass and Mrs Macdougall, who are claimants.

"The claimants are (1) the heir and next-of-kin of James Wilson, husband of Elizabeth Gibson, daughter of the truster. They represent him and say that he represented his wife through her son; (2) James Gibson's trustees; and (3) John Vass and Mrs Macdougall.

"Wilson's representatives, *i.e.*, the representatives of Elizabeth Gibson, maintain that the estate vested in her and her sister *a morte testatoris*, and in her as the survivor of the two; or otherwise they claim under the destination to Elizabeth Gibson's heirs. As a third alternative they claim that if these claims be rejected that part of the estate destined to James Gibson has fallen into intestacy.

"Gibson's trustees maintain that the vesting took place on the death of the survivor of the two daughters.

"John Vass and Mrs Macdougall maintain that there was no vesting until the death of the widow."

The Lord Ordinary on the 26th July 1898 pronounced an interlocutor whereby he, *inter alia*, repelled the claims of Mr Thomas Wilson and Miss Elizabeth Wilson (heir and next-of-kin of Mr James Wilson), and found "that the expenses fall to be paid out of the fund *in medio*."

His Lordship in the course of his opinion said—"The deed is, in my opinion, exceedingly ill framed, and it is very difficult to arrive at its true construction."

Mr Thomas Wilson reclaimed, and the First Division on 27th June 1899 adhered to the interlocutor of the Lord Ordinary.

Counsel for the reclamer moved for expenses out of the fund *in medio*, on the ground that owing to the obscurity of the trust-deed he was justified in subjecting to review the decision of the Lord Ordinary.

LORD ADAM—I hope it will not be considered in ordinary cases that a party who had been found entitled to expenses in the Outer House incurred in the construction of a deed will also be granted these as a matter of course in the Inner House. I think, however, that this is a very exceptional case owing to the confused nature of the deed, the construction of which the Lord Ordinary says he has found to be very difficult. I am of opinion therefore that we should treat it as an exceptional case, and allow the reclamer his expenses out of the fund.

LORD M'LAREN—I am unable to see that the reclaimers are entitled to expenses out of the estate. I do not think that the Lord Ordinary's observation as to the difficulty of the case was intended to suggest that it was a proper case for review in the Inner House. The difficulty pointed out by the Lord Ordinary was in determining what is the true construction of an obscurely-worded deed which raises no question of legal principle proper for discussion in the Inner House. I may add that the value of the cause is not such as to make it suitable for review. It is, I think, a case where the parties should have been content with the decision of a judge who has bestowed great care on its consideration, and has fortified his opinion by citation of all the authorities bearing on the point in dispute.

LORD KINNEAR—I agree that in general it ought not to be supposed that if an unsuccessful party has been allowed his expenses in the Outer House it follows that there will be the same allowance in the Inner House. I assent entirely to Lord M'Laren's view that in an ordinary case it might be expected that a reasonable litigant should accept the judgment of the Lord Ordinary or carry the case further at his own expense. But I agree with Lord Adam that this is an exceptional case, inasmuch as the Lord Ordinary has not only stated that he found it very difficult to arrive at the true construction of the deed, but has shown by an elaborate argument that the construction which on the whole he preferred was at least open to question. In such circumstances the general rule is that where expense is occasioned by the fault of a testator in failing to express his intentions with reasonable clearness, his estate should bear the burden. In the present case, because of the difficulty which has embarrassed the Lord Ordinary, I think

we should allow the parties their expenses out of the fund.

The LORD PRESIDENT was absent.

The Court adhered, and allowed all parties their expenses out of the fund *in medio*.

Counsel for Reclaimers—J. Reid—A. O. Deas. Agents — Macpherson & Mackay, S.S.C.

Counsel for Respondents Gibson's Trustees—G. Watt—Macmillan. Agent—John Macmillan, S.S.C.

Counsel for Respondent Macdougall — M'Lennan — A. J. Robertson. Agents — Dalgleish & Dobbie, S.S.C.

Tuesday, June 27.

FIRST DIVISION.

STUART-GORDON'S TRUSTEES *v.*  
STUART-GORDON.

*Succession—Will—Revocation—Conditio si testator sine liberis decesserit.*

The presumption of law that the birth of a child operates the revocation of a settlement previously executed by the parent, which makes no provision for children *nascituri*, may be rebutted by evidence of the testator's intention that the will should subsist.

A lady who had been married three years without having any children executed a trust-disposition and settlement, whereby she bequeathed certain specific legacies, including various personal jewels and ornaments, and left the residue of her estate to her husband, no provision being made for children *nascituri*. The amount thus disposed by her was £8000. Previous to the execution of this will there had been settled on the lady in *liferent* and the children of the marriage in *fee* sums amounting to £14,000. Nearly two years after she had made the will the lady became aware that she was pregnant. During her pregnancy she on several occasions expressed anxiety as to the result to herself of her confinement. Within two months of the birth of her child she appended to her settlement a docquet containing a list of the jewels bequeathed by her, but made no other change in or addition to her settlement. She died two days after the birth of her child.

*Held* that the will was not revoked by the subsequent birth of a child, the operation of the presumption in favour of revocation being excluded by the facts that the child was amply provided for in the knowledge of her mother, and that the mother, in the expectation of the birth of a child, and in knowledge of the existence of her will, had allowed it to stand unaltered.

Mr and Mrs Stuart-Gordon were married on 22nd June 1892.

By the will of Mrs Stuart-Gordon's aunt, dated 6th June 1888, a sum of £10,000 was set apart for payment of the income thereof to Mrs Stuart-Gordon during her lifetime, and on her death for payment of the capital to her children as she might appoint, and failing such appointment, to her children equally. It was declared that the children's provisions should not vest in them till the period of payment, which, in the case of sons was to be on their attaining majority, and of daughters at majority or marriage. Till those dates, the trustees — after Mrs Stuart-Gordon's death — were empowered to apply the income of each child's share for its maintenance.

Mrs Stuart-Gordon was entitled under the will of her father to a sum of £4000, which sum, by deed of trust dated 10th June 1892, she settled in *liferent* to herself and her husband and in *fee* to her children in such proportions as she might appoint. It was declared that no vesting should take place in the child or children till majority. No provision was made for the case of a child dying before attaining majority.

On 9th November 1895 Mrs Stuart-Gordon executed a trust-disposition and settlement by which she conveyed her whole estate — which amounted to £8000 — to trustees. She bequeathed various pecuniary legacies, amounting to £1013, and certain legacies of personal jewels and ornaments. The whole of the residue of her estate she bequeathed to her husband.

There were no children of the marriage at this date, and there was no reference made in the settlement to the contingency of the birth of a child. In May 1897 Mrs Stuart-Gordon became aware that she was pregnant, and she wrote to a friend, Mrs Ferrier, the following letter announcing this fact:—"How much I wish you were near me, so much we might talk over. I am feeling better, but pretty seedy now and then, and suffering pain. I cannot make out what it can be, but shall likely know on Wednesday when the doctor comes back. It is either change of life or a baby, I think now, but I shall let you know. If it is that, I may as well make all my plans sure, and make my will. I should not survive it I am sure."

Thereafter she wrote several letters to Mrs Ferrier on the subject, in which she expressed her anxiety as to the result to herself of her confinement.

On 2nd September 1897 Mrs Stuart-Gordon wrote to Mr M'Kinnon, her law-agent, that she wished him to call upon her "on some matters of business." Her object in doing so was to make a list of the jewels bequeathed in her settlement. This was done, and on 14th September a docquet was signed by Mrs Stuart-Gordon containing a list of these jewels, and was sent by her to Mr M'Kinnon.

On 15th November Mrs Stuart-Gordon was confined prematurely, giving birth to a daughter, and on 17th November she died.