

distinction can be drawn between the funds set free by the widow's renunciation and any other part of the trust funds. The view which I have thus expressed would lead to the 1st, 2nd, 4th, and 5th questions being negatived. The 3rd question should be answered to the effect that the first parties are bound to retain the fiars' shares of the capital of the trust-estate until the youngest child of the truster has attained the age of twenty five, subject to the trustees' right to make advances as authorised by the settlement.

In regard to the 6th question, I have no doubt that the trustees are entitled, under the express direction of the testator, to apply the revenue of the testator's estate towards the maintenance, upbringing, and education of the third parties to such extent as they (the trustees) think proper. But they are the judges of how much of the revenue should be so applied. Subject to what I have already said, I think the 7th question should be answered in the affirmative. The 8th question I would answer in the negative. The testator directed £1300 a-year to be paid to his widow. If she renounces her right to this or any part of it the amount so set free just remains in the testator's estate. It has not to be paid out—that is all—and as part of his estate falls to be dealt with according to his directions for the disposal of that estate.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF—1. Although the deed contains many directions postponing the payment of the provisions in certain circumstances, I find nothing in it sufficient to infer postponement of vesting.

2. It follows from the decision in *Miller's Trustees* and the recent judgment of the Whole Court in *Yvill's Trustees*, May 29, 1902, 39 S.L.R. 668, which are binding on us, that the direction to withhold payment of the shares till the death of the truster's widow and until the beneficiaries attain the age of 25 may be disregarded, and that payment may be made (at least to such as are majors) provided the widow's reduced annuity is sufficiently secured.

I would answer the questions accordingly.

The Court pronounced this interlocutor—

“ Answer the first, second, fifth, and eighth questions of law in the negative: Answer the fourth question also in the negative, except in so far as it is dealt with in the answer to the sixth question: Answer the third question by declaring that the first parties are bound (1) to set aside until the death of the fourth party such portion of the capital of the trust estate as shall be sufficient to secure the annuity of £200 to her; and (2) after so providing for the said annuity, to retain the fiars' shares of the capital of the trust estate until the youngest child of the truster has attained the age of

twenty-five, subject to the right of the trustees to make advances and payments to beneficiaries as authorised by the trust-disposition and settlement: Answer the sixth question by declaring that the trustees are entitled, in terms of the directions of the truster, to apply the revenue of the truster's estate, under deduction always of the said annuity of £200 to the fourth party, towards the maintenance, upbringing, and education of the whole children of truster to such an extent as the trustees may think proper; and subject to such application of the revenue, Answer the seventh question in the affirmative: Find and declare accordingly, and decern,” &c.

Counsel for the First Parties—Macfarlane. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Second and Third Parties—Hunter. Agents—Horsburgh & Bryden, S.S.C.

Counsel for the Fourth Party—Pearson. Agents—Cameron & Orr, S.S.C.

Wednesday, May 21

FIRST DIVISION.

[Lord Kincairney,
Ordinary.]

MITCHELL v. BAIRD

Trust—Liability of Trustee—Expenses of Litigation—Reduction of Trust Deed—Expenses.

An action for the reduction of a trust-disposition and settlement was directed against the trustee appointed thereunder, as trustee and as an individual, and against certain other individual defenders. The action so far as laid against the trustee as an individual was dismissed, but he remained a party to the action and conducted the defence till the end. The trust-disposition having been reduced, *held* that the pursuer was entitled to expenses against all the defenders including the trustee.

Mrs Agnes Pyle or Mitchell brought an action against Mr John Baird, solicitor, Edinburgh, as trustee and executor under a trust-disposition and settlement executed by the late Andrew Millar Mitchell, and as an individual, and also against the whole next-of-kin of Mr Mitchell, concluding for reduction of the said trust-disposition and settlement.

Defences were lodged by Mr Baird, and the other defenders lodged a minute in which they adopted these defences.

The defender pleaded, *inter alia*, “(1) No relevant case, at all events so far as the action is directed against the defender John Baird personally.”

On 28th January 1902 the Lord Ordinary (KINCAIRNEY) dismissed the action so far as laid against the defender John Baird as an

individual, finding him entitled to modified expenses, and approved of the following issue for the trial of the cause:—"Whether the will or trust-disposition and settlement and relative codicil thereto, dated respectively the 7th day of January and the 2nd day of March 1898, of which reduction is sought, are not the deeds of the deceased Andrew Millar Mitchell."

Mr John Baird remained a party to the action after it had been dismissed so far as laid against him as an individual, and conducted the defence to the end.

The case was tried before a jury, who found for the pursuer.

On the pursuer moving the Court to apply the verdict, and to find her entitled to expenses against the defenders, the defender John Baird maintained that as the action against him individually had been dismissed he should not be found liable in expenses except in the capacity of trustee.

He founded upon the cases of *Crichton v. Henderson's Trustees*, October 26, 1898, 1 F. 24, 36 S.L.R. 22; *Munro v. Strain* June 18, 1874, 1 R. 1039, 11 S.L.R. 583; *Watson v. Watson's Trustees*, January 20, 1875, 2 R. 344, 12 S.L.R. 266.

LORD PRESIDENT—There is undoubtedly in this case a great peculiarity which I do not recollect to have seen in any previous case. Mr Baird was called in the action of reduction both as trustee and executor nominated and appointed under the trust-disposition and settlement challenged and also as an individual. He was at that time undoubtedly claiming the position of a trustee, and holding out that he held a valid appointment with all the rights and powers incident to that office. I do not quite understand how he comes to be assoilzied as an individual, but we must, of course, accept the fact that he was assoilzied in that capacity. If he had not truly had position as a trustee under a valid appointment he should have disappeared from the case, and left the litigation to be conducted by any of the individual defenders who desired to do so. But that was not the course he took. He remained a party to the case and contested it to the last. Under these circumstances it appears to me that, although he had been assoilzied as an individual, he by remaining in the case representing that he truly held the status of a trustee became bound either to make that representation good or to take the consequences of failing to do so. He was unsuccessful, and it seems to me that it would be a great injustice to the successful pursuers if they could get no expenses from anyone, as he failed to make his representation good. I am of opinion that he should be found liable as an individual.

LORD KINNEAR—I agree in so far as this motion raises the ordinary question as to the liability of a person nominated as a trustee by a testament which turns out to be invalid.

So far as the question depends on matters of conduct with reference to the administration of the trust and the

litigation I should accept the opinion of the Judge who tried the case. But there is a very special peculiarity in this case, and that is the way in which the summons has been framed, and the way in which the case has been dealt with by the Court. The pursuer has distinguished in his summons between two separate characters in the case of one of the defenders. He distinguishes between his character as a trustee and his character as an individual, and in the course of the proceedings the Lord Ordinary, by a judgment which is now final, has assoilzied the defender in his character as an individual, and found him entitled to expenses up to that date. From that time, the defender being assoilzied as an individual, was out of the case altogether except in so far as he was entitled to remain in the case as a trustee. The pursuer has now succeeded in establishing that the defender was not, and never had the character of, a trustee, and that his position throughout this action was never anything else than that of an individual. Now, I think that raises what looks like a serious difficulty in the way of the pursuer's claim that a defender, against whom he admits that he has no claim as an individual but only as a trustee, is to be made liable for expenses. As an individual he is out of the case, and as a trustee it is established that there is no trust estate. But that presents at most a logical puzzle. The defender, who has been assoilzied, did not leave the action to proceed as between the other parties who were named in it, but he continued to be the active litigant. As I understand the statement made to us he was really the defender who conducted the defence throughout the trial, though there might be a difficulty in finding any specific conclusion of the summons which will enable the pursuer to obtain a decree against him. I think there is such a difficulty, and I think it is a difficulty the pursuer is responsible for making. But then the rule which Mr Wilson founded upon is perfectly clear, that in order to dispose of the expenses of litigation it is not necessary either that there should be any express conclusion for expenses, or even that there should be any express conclusion against a party at all, to entitle the Court to subject him in expenses. The Court is absolute master of the question of expenses. When it turns out that the expense of litigation has been caused by a party before the Court—whether he is named in the conclusions of the summons or not—he may be found liable in the expenses he has caused. Upon that ground I agree with your Lordship that this defender must be still considered a litigant, and therefore subject to the ordinary liabilities for expenses.

LORD ADAM and LORD M'LAREN concurred.

The Court pronounced this interlocutor:—
". . . Find the defenders liable to the pursuer in expenses, and remit, &c."

Counsel for the Pursuer—Wilson, K.C.—D. Anderson. Agents—Adamson, Gulland, & Stuart, S.S.C.

Counsel for the Defenders—Jameson, K.C.—Hunter. Agents—Tait & Crichton, W.S.

Thursday, June 19.

FIRST DIVISION.

[Sheriff-Substitute at Dunfermline.

FLEMING v. LOCHGELLY IRON AND COAL COMPANY, LIMITED.

Reparation—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), First Schedule 1 (b)—Amount of Compensation—Average Weekly Earnings—Trade Week.

In the computation of the "average weekly earnings" of a workman totally or partially incapacitated, under section 1 (b) of the First Schedule of the Workmen's Compensation Act 1897, the week which is to form the unit of division is not the calendar week but the trade week, *i.e.*, the week for which, by the custom of the particular mine, factory, or other employment, the workmen are usually paid.

A miner entered the employment of a colliery company on Saturday, 20th October, and worked regularly until Wednesday, 13th November, when he was injured. By the custom of the colliery the miners were paid every second Saturday the amount due for the work done by them up to the previous Wednesday night. *Held* that the miner's average weekly earnings must be computed by taking the week as the period commencing on Thursday morning and ending on the following Wednesday night, and accordingly that he had worked during three weeks, and that his average weekly earnings were one-third of the total amount he had earned.

Section 1 of Schedule I. of the Workmen's Compensation Act 1897 enacts—"The amount of compensation under this Act shall be . . . (b) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

This was a case stated for appeal by the Sheriff-Substitute at Dunfermline (GILLESPIE) in the matter of an arbitration under the Workmen's Compensation Act 1897 between Shanks Fleming, wheeler, Dundas Street, Lochgelly, claimant and appellant, and the Lochgelly Iron and Coal Company, Limited, respondents.

The case set forth the following facts as admitted—"The appellant entered the employment of David M'Lean, a contractor with the respondents, in their Jenny Gray pit on Saturday, 26th October 1901, and continued in M'Lean's employment until Wednesday, 13th November following, when he was injured by an accident arising out of and in the course of his employment. The appellant has been, and still is, totally incapacitated for work as the result of said injury. Said 'Jenny Gray' pit is a 'mine,' and the respondents are the 'undertakers' in connection therewith in the sense of the Workmen's Compensation Act 1897. The appellant was engaged under the general regulations and conditions of employment in force at the respondents' colliery, which provide, as at all other collieries in Fife, that all workmen are bound to work eleven lawful days each fortnight, and give fourteen days' written notice, lodged at the respondents' office, before terminating their employment. At the respondents' colliery, and throughout Fife and other districts, with a view of facilitating the making up of the wages, the workmen are paid every second Saturday for the work done by them up to the previous Wednesday night. The appellant's employment from Saturday 26th October 1901 until Wednesday, 13th November following, including Sundays, embraces a period of nineteen days, and in that time the appellant worked fourteen and a-half shifts, being a shift every lawful day except Wednesday, 6th November, when the appellant did not work, and Monday, 11th November, when the appellant worked only half a shift. The appellant's wages were 5s. 6d. per shift, and he earned a total sum of £3, 19s. 9d. during the said period of his employment."

On these facts the Sheriff stated his judgment in the following terms—"Upon these facts I was prepared as arbiter to hold, and would have so held, that the average weekly earnings of the pursuer were fairly stated at £1, 9s. 4d. per week, and I was accordingly prepared to award, and would have awarded, one-half of that sum weekly as the compensation due to him, but I considered myself precluded from so doing in consequence of the judgment of the Second Division in *Niddrie and Benhar Coal Company, Limited v. Peacock*, on 21st January 1902, and following that decision I awarded only the sum of ten shillings weekly, representing one-half of the average weekly wage of the appellant as distributed over the four calendar weeks in which he was employed."

To his interlocutor in the arbitration the Sheriff appended the following note:—"Apart from authority I should have agreed with the pursuer's view that his average weekly earnings while in M'Lean's employment were fairly stated at £1, 9s. 4d., and consequently that he was entitled to half that sum weekly as compensation."

"In reckoning average weekly earnings there is nothing in the statute in my humble opinion to show that the weeks to