

section 24. I have accordingly no doubt that the Sheriff-Substitute was entitled to find the appellant guilty of the crime of reset by receiving from the soldier his kilt and paying for it in the knowledge that it was part of his uniform and not his property.

LORD MACKENZIE—I am of the same opinion. The question which we have had most argued is that raised under the second question put by the Sheriff-Substitute. That question is not, strictly speaking, in form, because it asks—Was I right in holding that Private Murray committed the crime of theft? It ought to be—Was I entitled to hold on the facts stated in the case that Private Murray committed the crime of theft? I think the answer to it should be in the affirmative. The facts set out in the Stated Case are that Murray, who was a private in the Argyll and Sutherland Highlanders, went into a second-hand clothier's shop and offered his kilt for sale to the occupant (who is the appellant in this case) and that she paid him six shillings for it. The position of Murray in regard to the kilt is set out by the Sheriff-Substitute thus—“The kilt in question was part of Murray's uniform as a soldier, not his property but given into his custody for the limited purpose of being worn by him as a member of His Majesty's Forces, and only so long as he so remained.” Upon these facts I think the Sheriff-Substitute was entitled to hold that the crime was the crime of theft. For my part I am content to adopt the definition of theft which is given by Alison in his Principles of the Criminal Law of Scotland published so long ago as 1832. At page 250 he says—“1. Theft consists in the secret and felonious abstraction of the property of another for the sake of lucre without his consent . . . 2. It is not the less theft that the owner has entrusted the property to the thief, provided that was done for a temporary and transient purpose, and not with the intention of transferring the real rights, or subjecting the depositary to a mere action for account. It happens continually in the business of life, that the possession of property is for temporary purposes entrusted to others without any intention either of transferring the right of custody, or of calling the custodian to account merely by an action of account . . . In all of them, accordingly, the abstraction of the articles by the person entrusted is theft.” At page 263—“It is not the less theft that the owner has put the article stolen in the prisoner's way, or given it into his custody for a short period.” Everything that is necessary to satisfy that legal definition is to be found in the facts of the present case, and I am accordingly of opinion that the second question should be answered as proposed by your Lordship.

I do not desire to add anything in regard to the argument addressed to us upon the Army Act to what has been said by your Lordship. I think that the question what particular tribunal has jurisdiction to try an offence does not in any way affect the nature and quality of the act which has

been committed. If that is so, then I think it necessarily follows that the Sheriff-Substitute was entitled to find that the appellant was guilty of reset.

LORD CULLEN—I am of the same opinion. On an application of the more modern authorities cited to us, and in particular the cases of *George Brown* (1839) 2 Swin. 394, and *Anderson*, 3 Irv. 65, and *Martin*, 2 Coup. 501, I am of opinion that the act of the soldier in feloniously parting with his kilt by selling it was an act of theft at common law. I am further of opinion that the remedies specially provided by the Army Act do not in any way destroy or alter the common law quality of the act, and that accordingly the Sheriff-Substitute was entitled to convict the appellant upon the charge of reset.

The Court answered the second question in the case in the affirmative, found in answer to the third question that the Sheriff-Substitute was entitled to hold the appellant guilty of reset of theft in the manner stated in the question, answered the fourth question in the negative, and found it unnecessary to answer the remaining question.

Counsel for the Appellant—Gentles, K.C. —Burns. Agents—W. G. Leechman & Company, Solicitors.

Counsel for the Respondent—Solicitor-General (Constable, K.C.)—Fenton, A.-D. Agent—John Prosser, W.S., Crown Agent.

COURT OF SESSION.

Wednesday, May 24.

FIRST DIVISION.

HOWAT'S TRUSTEES v. HOWAT AND OTHERS.

Succession—Vesting—Direction to Pay Residue on Legatee Attaining Majority—Gift-over in the Event of Legatee Dying “before Receiving Payment of his Share”—Death of Legatee after Attaining Majority but before Receiving Payment.

Trust—Denuding—Alimentary Annuity—Fee Acquired by Annuitant.

A testator having provided for the payment to his wife “for her alimentary use alienarily” of an annuity for her maintenance and that of his son and any other children of the marriage, directed that the residue of his estate was to be held by his trustees, subject to the payment of the annuity, for behoof of his son and any other children born to him, or the survivors, equally among them, or their issue, and was subject to such part being retained as might be necessary to pay the annuity, to be payable to the children on their respectively attaining majority. There was a destination-over in the event of all the children dying “before receiving payment of their shares” without leaving issue. Both the wife and the

son, who was the only child, survived the testator. The son after attaining majority died unmarried, leaving a general disposition and settlement in favour of his mother. No payment of residue had been made to him. *Held* (1) that the residue vested in the son on his attaining majority, and (2) that the wife was not entitled to immediate payment of the residue, the trustees being bound to retain it to meet her annuity.

Allan Stevenson and another, trustees of the late John Howat, Ayr, acting under his trust-disposition and settlement dated 11th September 1897, *first parties*; Mrs Rachel Bonpain or Howat, widow of the said John Howat, *second party*; and the Ayr Branch of the Society for the Prevention of Cruelty to Children for itself and as representing the branches of said Society formerly known as the Ayrshire Branch, the Executive Committee of said Ayr Branch, and the General Secretary of the said Society, *third parties*, presented a Special Case for the opinion and judgment of the Court as to the rights of the second and third parties in the residue of the trustor's estate.

The trust-disposition and settlement provided—"In the fourth place, should I be survived by my wife, the said Rachel Bonpain or Howat, I direct and appoint my trustees to pay to her an annuity of £150, terminable as after mentioned, for the maintenance in comfort of herself and my child Douglas Eusebe Howat, and any other children that may be born of our marriage . . . and which annuity shall be for her alimentary use alienarily, unaffordable by her debts or deeds, and unattachable by the diligence of her creditors. . . . In the fifth place, subject to payment of the foresaid annuity, I direct and appoint my trustees to hold the whole residue of my means and estate, heritable and moveable, for behoof of my child, the said Douglas Eusebe Howat, and any other children that may be born to me or the survivors equally among them or their issue *per stirpes*, and which residue, subject to such part of my estate being retained as may be necessary to meet the foresaid annuity, shall be payable to my children as they respectively attain majority, with power to my trustees to pay or apply the whole or part of the income of my estate towards the maintenance, education, and upbringing of my children in such way as to them shall seem most expedient, and also to make advances to any of them out of the capital of my estate for such purposes as my trustees may approve of; and in the event of my child the said Douglas Eusebe Howat and any other children that may be born to me all dying before receiving payment of their shares of my estate without leaving issue, I direct and appoint my trustees to hold the said residue and pay or convey the same, failing my giving any other directions by any codicil hereto or separate writing, to the Ayrshire Branch of the Society for the Prevention of Cruelty to Children, the receipt of whose secretary or treasurer shall be a sufficient discharge to my trustees, and failing such branch of said society, then to such charitable insti-

tution or institutions in the town or county of Ayr as my trustees in their sole discretion may select to receive the same."

The testator, who died on 25th July 1898, was survived by his widow, the second party, and by his only child Douglas Eusebe Howat, who attained majority on 23rd June 1917 and died unmarried on 5th August 1918, leaving a general disposition and settlement in favour of his mother dated 1st June 1917.

The Case stated—"5. . . . On attaining majority the said Douglas Eusebe Howat, by codicil dated 8th July 1917, confirmed and homologated the said general disposition and settlement. As it was necessary that the residue should be held for the purpose of meeting the second party's annuity, it was not possible for the first parties to pay or make over the same to the said Douglas Eusebe Howat. 6. A question has arisen between the parties as to whether the residue of the trustor's estate vested in the said Douglas Eusebe Howat upon his attaining majority, or whether, he having died without receiving payment of said residue, it falls to be paid to the third parties in terms of the destination-over. In the event of its being held that the said residue vested in the said Douglas Eusebe Howat, a further question arises as to whether the second party, the said Mrs Rachel Bonpain or Howat, is entitled to payment of the fee of said residue notwithstanding the alimentary declaration contained in the trustor's settlement. 7. The second party maintains that on a sound construction of the trust-disposition and settlement of the trustor the residue vested in the said Douglas Eusebe Howat upon his attaining majority, although he died before receiving payment of the same; that the fee of said residue is carried to the second party by the general disposition and settlement of the said Douglas Eusebe Howat in her favour; that the alimentary declaration in the trustor's settlement does not affect or limit her right to the full enjoyment of the fee, and that she is accordingly entitled to immediate payment thereof. 8. The third parties maintain that the said Douglas Eusebe Howat did not acquire a vested interest in the residue of the trustor's estate in respect that he died before receiving payment of the said residue, and that accordingly the same falls to be held for their behoof and to be paid or made over to them on the termination of the second party's annuity in terms of the direction contained in the fifth purpose of the trustor's trust-disposition and settlement. 9. The first parties as trustees put forward no contention as to whether the said Douglas Eusebe Howat acquired a vested interest in the residue of the trust estate. In the event, however, of that question being decided in the affirmative, the first parties maintain that in view of the declaration in the trustor's settlement that the annuity payable to the second party was for her alimentary use alienarily they are bound, until her death or second marriage, to retain in their hands the said residue or so much thereof as is necessary to secure payment of the said annuity."

The questions of law were—"1. Did the residue of the trustor's estate vest in the said Douglas Eusebe Howat on his attaining majority? or 2. Does the residue of the trustor's estate fall to be held for behoof of the third parties and to be paid or conveyed to them on the termination of the second party's annuity in terms of the direction contained in the fifth purpose of the trustor's trust-disposition and settlement? 3. In the event of the first question being answered in the affirmative and the second question in the negative, is the second party entitled to immediate payment of the fee of the residue?"

Argued for the second parties—1. The residue vested in the testator's son on his attaining majority. It was then "payable" to him. "Before receiving payment" meant "before the shares became payable"—*Chalmers' Trustees v. Chalmers*, 1882, 9 R. 743, 19 S.L.R. 493; *Yuill's Trustees v. Yuill*, 1901, 8 S.L.T. 324. To suspend vesting until actual payment might result in vesting at several periods. The presumption was against this, particularly where the testator had treated the residue as a single *corpus*. There was no power given to the trustees to postpone payment, and the interposition of an annuity did not prevent vesting. In *Howat's Trustees v. Howat*, 1869, 8 Macph. 337, 7 S.L.R. 157, there was no express term of payment, and the vesting depended upon when the trustees could realise and divide. 2. If the fee of the residue had vested in the son it was carried by his general settlement to the second party, and the third parties could have no right to it. Further, the second party was entitled to immediate payment of the residue. An alimentary annuity was not a separate legal estate like an alimentary liferent, but was merely a burden on the estate of a series of annual payments which merged in it on the annuitant becoming fiar—*Colquhoun's Trustees v. Colquhoun*, 1912 S.C. 32, 59 S.L.R. 40; *Kinmond's Trustees v. Kinmond*, 1873, 11 Macph. 381, per Lord President Inglis at p. 383, 10 S.L.R. 244; *Knox's Trustees v. Knox*, 1869, 7 Macph. 873, 6 S.L.R. 557; *Duthie's Trustees v. Kinloch*, 1878, 5 R. 858, 15 S.L.R. 586. When the purpose of the annuity was served the fiar was entitled to payment—*Dunsmuir's Trustees v. Dunsmuir*, 1920 S.C. 147, 57 S.L.R. 142; *Martin v. Bannatyne*, 1861, 23 D. 705. Here the purpose of the testator had been to provide maintenance for his wife and children secured from creditors. So far as the children were concerned the purpose had ceased, and there was no reason, the second party having become fiar, for continuing the annuity for her benefit. It was a question of the intention of the testator—*Montgomery's Trustees v. Montgomery*, 1888, 15 R. 369, per Lord President at p. 372, 25 S.L.R. 278; *Main's Trustees v. Main*, 1917 S.C. 660, 44 S.L.R. 532.

Argued for the third parties—The case was similar to *Howat's Trustees v. Howat* (cit.). The testator had made vesting in the son dependent on two conditions—his attaining majority and his receiving payment, the latter of which had not been fulfilled. In

Chalmers' Trustees the condition as to payment was not so clear as it was here, and in *Yuill's Trustees* not only was payment impossible owing to a cause extrinsic of the will, but there was also a direct gift of the legacy. Here payment was impossible owing to the testator's directions. *Howat's Trustees* had been approved in *Macdougall v. M'Farlane's Trustees*, 1890, 17 R. 761, 27 S.L.R. 638. There was therefore no vesting of the fee in the son, and the estate fell to be held for behoof of the third parties and conveyed to them on the termination of the annuity.

Argued for the first parties—The testator had created a trust for the protection of an alimentary annuity for his wife. She could not have defeated this in conjunction with the fiar, nor could she do so by herself becoming fiar. The fact that the deed created an alimentary annuity instead of a liferent made no difference—*Elliot's Trustees v. Elliot*, 1894, 21 R. 975, per Lord Rutherford Clark at p. 985, 986, 31 S.L.R. 851; *Duthie's Trustees v. Kinloch*, cit.

LORD PRESIDENT—The first question in this case depends for its solution upon the terms of the gift-over in the fifth purpose of the trust-disposition and settlement—in the event of all the testator's children dying "before receiving payment of their shares" of residue, then such residue is to be held by the trustees and paid or conveyed by them to the Society for the Prevention of Cruelty to Children. Under the earlier clauses of the fifth purpose the residue is bequeathed—subject always to retention of such part as may be necessary to meet an annuity provided to the testator's widow—to the testator's children or the survivors, equally among them, or their issue *per stirpes*. The residue so bequeathed is to be "payable to my children as they respectively attain majority." There was only one child of the testator's marriage, a son, who survived his father and attained majority. But it so happened that the widow's annuity more than exhausted the income of the residue, and accordingly no payment was actually made to the son notwithstanding his attainment of majority. He died while that state of things still continued. Now the question that arises is whether the words of the gift-over—"before receiving payment of his share"—are to be construed according to their strict literal meaning so as to prevent the vesting of the residue in the son at his majority when the same became payable to him (subject to his mother's annuity), or whether those words really refer to the period when payment (subject to the annuity) was directed to be made whether the residue actually changed hands or not. If the latter is the true construction the residue vested in the son on the attainment of majority and the fee of the residue passed to his mother under his will.

There are settlements, such as that with which the case of *Howat's Trustees* (1869) 8 Macph. 337 was concerned, in which the testator unequivocally limits his bounty to those of his children who survive to receive

actual payment of their shares. When a testator prescribes such a scheme as that it is the duty of the Court to give effect to it. But where the testator merely uses some such phrase as the "receipt of payment" or the "time of payment" with reference to a payment directed to be made at a definite period such as majority, and there is nothing else in the settlement to indicate any intention to postpone vesting, it is only reasonable to conclude that the mention of the "receipt" or "time" of payment refers to the same period as that at which payment is directed to be made. In the present case that period was the attainment by the son of full age. I do not regard it as material that the payment was to be "subject to retention" in whole or in part for his mother's annuity; the direction was none the less a direction for payment at majority. There is therefore no reason for following a somewhat special case like *Howat's Trustees* in preference to precedents of wider application such as *Chalmers' Trustees*, (1882) 9 R. 743. On the construction of this particular settlement I do not feel any doubt whatever as to its meaning, and accordingly I propose that we should answer the first question in the affirmative and the second question in the negative.

There remains only a question with regard to the suggested merger of the widow's alimentary annuity with the right of fee in the estate which she acquired under her son's will. There is nothing in the terms of this settlement, or in the law relating to trusts for the preservation of an alimentary annuity, which would entitle the widow, having acquired—as she has—the fee of the residue, to present a demand on the trustees to denude of the residue in her favour. All that she is entitled to under her son's will is the residue of the estate as given to him by his father's settlement—that is to say, the residue of the estate subject to the trust for payment of an alimentary annuity to her, and the trustees are just as much bound notwithstanding her acquisition of the fee—to make provision for the payment of that alimentary annuity as they were before. I propose therefore that the third question should be answered in the negative.

LORD MACKENZIE—I agree that the sound construction to be put upon the fifth purpose of this settlement is that the words "dying before receiving payment" mean "before the term of payment." The son attained majority and therefore survived the term of payment. Accordingly he was free to dispose of the residue destined to him but subject to the express provision of the fourth purpose of the settlement. I am quite unable to see how the trustees could be absolved from the duty put upon them by the fourth purpose in regard to the payment to the widow of the annuity of £150 a year which is declared to be "for her alimentary use alienably, unaffordable by her debts or deeds and unattachable by the diligence of her creditors."

LORD SKERRINGTON—The will which we have to interpret has been drafted carelessly and apparently in ignorance of the

fact that the language selected had repeatedly led to trouble and litigation. It is unfortunate that conveyancers should repeat the blunders of their predecessors without learning anything from judicial decisions. I agree with your Lordships as to the construction which ought to be placed upon the words "before receiving payment of their shares of my estate" as used by the testator. Further, I think it clear that the widow's alimentary annuity must continue to be protected by the trustees.

LORD CULLEN—On the terms of this will it appears to me to be clear that the testator contemplated one term of vesting only, and did not contemplate the possibility of an indefinite series of terms of vesting such as the third parties' argument involves in treating the word "payment" as equivalent to actual payment. That being so, I think the testator must have intended the single term of vesting contemplated by him to be the arrival of the period of payment which he prescribes in the words "shall be payable to my children as they respectively attain majority."

On the second question I think that on authority there is here a well-constituted alimentary annuity in favour of the widow, and further that all she has received under the bequest by her son is the reversionary interest in the fee of the estate subject to the due fulfilment of the testator's directions as to the payment of the annuity and the protection of its alimentary character through the keeping up of the trust created for that purpose.

The Court answered the first question in the affirmative, and the second and third questions in the negative.

Counsel for the First Parties—Fisher. Agents—John Macmillan & Son, S.S.C.

Counsel for the Second Parties—Irvine, K.C. — Aitcheson. Agents — John Macmillan & Son, S.S.C.

Counsel for the Third Parties—Henderson, K.C. — Taylor. Agents — Cowan & Dalmahoy, W.S.

Thursday, June 1.

FIRST DIVISION.

[Sheriff Court at Perth.]

STRONG v. JOHN WRIGHT & COMPANY.

Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (1)—"Arising out of and in the Course of the Employment"—*Workman Descending from Moving Lorry to Pick up his Jacket.*

A workman whose duty it was to accompany the driver of a motor lorry and to assist him in the work of loading and unloading, was sitting beside the driver waiting to assist at the next stoppage. When near their destination the workman took off his jacket and