

of section 1. But the third section, as to the construction of which I agree with your Lordship, is quite sufficient for the disposal of the case in so far as it depends upon the statute; and I am satisfied, for the reasons your Lordship has stated, that this petition should be refused.

**LORD DUNDAS**—The excellent and careful report of Sheriff Maconochie satisfied me that, having regard to the welfare of the child and the whole circumstances of the case, and to the language of the Statute of 1891, this is a petition which the Court ought not to grant but to refuse.

**LORD ADAM** and **LORD M'LAREN** were absent.

The Court refused the petition.

Counsel for the Petitioner—Dewar, K.C.  
—Jas. Macdonald. Agents—Paterson & Salmon, Solicitors.

Counsel for the Respondent—A. M. Anderson. Agent—John Veitch, Solicitor.

Tuesday, March 14.

## SECOND DIVISION.

### NEILSON v. STEWART'S TRUSTEES.

*Trust—Petition for Removal of Co-Trustees—Trust Administration—Auctor in rem suam—Expenses.*

A petition by one of a body of trustees for the removal of his co-trustees and the appointment of a judicial factor on the trust estate on grounds of maladministration was opposed by the other trustees. A settlement was arrived at extra-judicially, on the terms that the other trustees should repay certain sums to the trust estate, and that the administration of the trust should be placed under the superintendence of the Accountant of Court. *Held* that the petitioning trustee was entitled to his expenses, as between agent and client, out of the trust estate, and that the other trustees were not entitled to charge the trust estate with any of the expenses incurred by them in opposing the petition.

Charles Stewart, wine and spirit merchant, Glasgow, died in November 1893, survived by his wife and two pupil children, and leaving a trust-disposition and settlement by which he conveyed his whole estate to Thomas Y. Paterson, Andrew Martin, Lewis Cook, and Mrs Stewart as trustees for certain trust purposes. All accepted office, but Mr Cook resigned in 1898, and in October 1903 Mrs Stewart died and William Neilson, the present petitioner, was assumed as a trustee. The trustees, it was declared, were to have all the powers, privileges, and immunities conferred upon gratuitous trustees by the Trusts Acts 1861 to 1891, and, without prejudice thereto, power to enter into possession of and intromit generally

with the trust estate; power to appoint factors, of their own number or otherwise, and allow them suitable remuneration; certain powers to compromise and enter into arbitrations regarding claims and questions with third parties affecting the estate; and a power of sale of all or any parts of the estate, either by public roup or private bargain.

On October 15, 1904, William Neilson presented a petition to the Court of Session praying the Court, *inter alia*, "to sequester the said trust estate, and to remove the said Thomas Y. Paterson and Andrew Martin from the office of trustees, . . . and to allow the petitioner to resign the office of trustee, and to appoint Robert Reid C.A., or such other person or persons as their Lordships might think proper, to be the judicial factor on the said estate."

The petitioner averred that there had been and still were at the date of the petition serious irregularities in the administration of the trust, and in particular, *inter alia*, that the trustees had continued and still continue to carry on the wine and spirit business which was being conducted by the testator at the time of his death, and had never made any attempt whatever to dispose thereof. The licence was first transferred to the name of the testator's widow, and upon the assumption of the petitioner as a trustee at her death it was transferred to his name. The petitioner had been advised that the said business was not a proper trust-investment. It was not authorised by the trust-deed, which, on the contrary, conferred the most ample powers of sale upon the trustees. Further, liquors for the said business had all along been supplied at a profit, at first by the firm of Oswald, Paterson, & Company, of which the said Thomas Y. Paterson was sole partner, and thereafter by T. Y. Paterson & Company, Limited, of which the said Thomas Y. Paterson was managing director and principal shareholder. The supply of the said liquor to the trust business at a profit by a trustee was also a breach of trust. Further, the trustees employed one of their own number, viz., the said Mrs Stewart, to manage the business, and paid her for doing so a salary of £2 a-week. There was so paid her in all upwards of £400. The payment of such a salary to a trustee for work done for the trust was also illegal. At any rate its legality was very doubtful.

In these circumstances the petitioner maintained that it was necessary for the protection of the trust estate that the existing trustees should be removed from office and a judicial factor appointed to administer the trust. The petitioner was desirous of resigning the office of trustee, but deemed it to be his duty, and to be necessary both for his own safety and for the security of the trust, to first place the whole matter before the Court.

The petition was opposed by Mr Paterson and Mr Martin.

Counsel were heard in the Summar Roll on 23rd November 1904, and thereafter a minute was lodged on behalf of the respon-

dents, in which they undertook to use all reasonable means to sell the business, and the petition was continued to give them an opportunity of so doing.

The business was sold, but on 8th March 1905 the case was again enrolled on the motion of the petitioner, who moved for the removal of the trustees on the remaining grounds stated in the petition. The respondents opposed the motion, but subsequently lodged a minute, by which they undertook to repay to the trust estate the amount paid to Mrs Stewart for her services as manager, and the profit made by Mr Paterson by the sale of liquors to the business, and further agreed to apply for an order placing the administration of the trust under the superintendence of the Accountant of Court in terms of section 18 of the Factors Act 1889.

In respect of this minute the Court ordered the administration of the trust to be placed under the superintendence of the Accountant of Court, and dismissed the petition.

The Court further found the petitioner entitled to his expenses out of the trust funds as between agent and client. The respondents moved for their expenses out of the trust funds, and the petitioner opposed the motion. The Court refused the motion.

LORD JUSTICE-CLERK—I do not think the respondents are entitled to any expenses out of the trust funds.

LORD KYLLACHY—I agree. I think the petitioner is entitled to expenses as between agent and client out of the trust estate. As to the respondents, I do not doubt that they acted in perfect good faith, and in accordance with advice from their then law-agent upon which they were perhaps entitled to rely, but I do not think they are entitled to their expenses out of the trust estate.

LORD KINCAIRNEY concurred.

LORD YOUNG was absent.

Counsel for Petitioner—Solicitor-General (Salvesen, K.C.)—Constable. Agents—Oliphant & Murray, W.S.

Counsel for Respondents—Wilson, K.C.—Findlay. Agents—Gill & Pringle, W.S.

Tuesday, March 14.

## SECOND DIVISION.

### BOYD'S TRUSTEES v. BOYD.

*Marriage Contract—Construction—Assignment of Acquirenda—Estate Acquired by Wife after Dissolution of Marriage.*

By antenuptial contract of marriage a wife conveyed to trustees "her whole means and estate which she might acquire or succeed to." Held that estate succeeded to by her after the dissolution of the marriage did not fall

under the clause of assignation of *acquirenda*.

*Wardlaw v. Wardlaw's Trustees*, July 7, 1880, 7 R. 1066, 17 S.L.R. 725, followed.

### *Succession—Marriage-Contract—Vesting.*

By antenuptial contract of marriage a husband conveyed to trustees £5000 as an alimentary fund for behoof of the family establishment of the spouses, with power to the trustees to pay over the free income to either of the spouses, and to continue such payments until the death or re-marriage of the survivor; declaring that on the death or re-marriage of the survivor the principal sum should belong and be made over in equal sums to and among the children of the marriage, which provisions in favour of children were declared to be in full satisfaction of all their legal rights on the death of their father. It was further provided that the shares of any children who might be minors at the time should be held by the trustees for their behoof until their majority, and that, in the event of the predecease of any of them before majority, their shares should belong to their lawful issue, and, failing issue, should accrete to their surviving brothers and sisters. Held that a proportionate share of the estate vested in a son who survived the dissolution of the marriage and attained majority but predeceased the survivor of the spouses.

By antenuptial contract of marriage dated 30th May 1860, entered into between Adam Boyd Boyd and Elizabeth Curry Hogue, Mr Boyd bound himself to pay to trustees £5000 for the following purposes—“(First) That the said trustees shall receive, hold, and administer the said sum of Five thousand pounds in their own names, and pay or apply the full annual income or proceeds thereof as an alimentary fund to or for behoof of the family establishment to be created by the said spouses, excluding always the *jus mariti* or right of administration of the said Adam Boyd Boyd in or over both the said principal sum and the annual income or proceeds thereof, which rights or claims he hereby specially renounces, and also excluding the claims of any creditors of the said spouses, or either of them, and declaring that the said principal and interest thereof shall not be assignable by them or either of them to the prejudice of this trust: And further, the said trustees and their foresaids shall have power, and are hereby empowered, either themselves to expend or apply, or else to pay over, the said free income or proceeds thereof to either of the spouses they may from time to time prefer, whose sole and separate receipt shall be their sufficient discharge. . . . (Second) That the said trustees and their foresaids shall continue to make such annual payments to or for the said spouses during the subsistence of the marriage, and to or for the survivor so long as he or she remains unmarried, but not longer: And upon the death or remarriage of the said survivor, the said principal