

Friday, December 19.

FIRST DIVISION.

[Lord Trayner, Ordinary.]

RENNEY v. THE MAGISTRATES AND  
COUNCIL OF THE BURGH OF  
KIRKCUDBRIGHT.

*Process—Expenses—Negligence—Reparation—Contributory Negligence.*

The master of the vessel "Janets and Ann" when approaching the harbour of Kirkcudbright, and at the time subject to the orders of the harbour-master, received orders from the latter which resulted in the vessel running aground and suffering damage. In an action of damages at the instance of James Renney, the owner of the "Janets and Ann," against the Magistrates and Council of the burgh of Kirkcudbright, the original fault of the harbour-master, who was the defenders' servant, was proved; but the plea of "contributory negligence" having been taken by the defenders, it was also proved that those in charge of the vessel were well acquainted with the place, and might have avoided the damage if they had navigated their ship with prudence after the orders were received. This plea being sustained, the defenders were assolvied, and on a motion for expenses, *held*, that though guilty of negligence, they were entitled to expenses without modification in accordance with the general rule.

Counsel for the Pursuer—Asher, Q.C.—Younger. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—Jameson—Crole. Agent—John Bell, W.S.

Friday, December 19.

SECOND DIVISION.

KENNEDY AND OTHERS (HUGHES'  
TRUSTEES).

*Succession—Testate Succession—Heritable Security—Heritable or Moveable—Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), sec. 117.*

A testator left his whole estate, heritable and moveable, to trustees, with directions to dispose of the heritable portion in one way and the moveable portion in another way. The estate consisted, *inter alia*, of a bond of annuity and disposition in security, and of two bonds and dispositions in security. *Held* that regard must be had to the provisions of the 117th section of the Titles to Land Consolidation (Scotland) Act 1868, and that all these bonds fell to be disposed of as moveable estate. The Titles to Land Consolidation (Scot-

land) Act 1868 (31 and 32 Vict. cap. 101) provides by section 117 that "From and after the commencement of this Act no heritable security granted or obtained either before or after that date shall, in whatever terms the same may be conceived, except in the cases hereinafter provided, be heritable as regards the succession of the creditor in such security, and the same, except as hereinafter provided, shall be moveable as regards the succession of such creditor, and shall belong after the death of such creditor to his executors or representatives *in mobilibus*, in the same manner and to the same extent and effect as such security would under the law and practice now in force have belonged to the heirs of such creditor: Provided always, that where any heritable security is or shall be conceived expressly in favour of such creditor and his heirs or assignees or successors, excluding executors, the same shall be heritable as regards the succession of such creditor, and shall after the death of such creditor belong to his heirs in the same manner and to the same extent and effect as is the case under the existing law and practice in regard to heritable securities." . . .

Mrs Helen Mitchell Whyte or Hughes, widow of the late James Hughes, sometime contractor, Dundee, died upon 27th February 1890, leaving a trust-disposition and settlement, dated 23rd August 1889, and registered 26th March 1890, by which she assigned and disposed her whole means and estate, heritable and moveable, to John Kennedy and others in trust for certain purposes.

By the third purpose of the trust she directed the trustees how to deal with her moveable estate, and by the fourth purpose she provided for the disposal of her heritable estate.

She died possessed, *inter alia*, of a bond of annuity and disposition in security for £76, 1s. 6d. for ever, and of two bonds and dispositions in security for £750 and £400 respectively, and a question having arisen as to whether these bonds were to be regarded as heritable or as moveable estate of the truster, a special case was presented for the opinion and judgment of the Court by the said trustees of the first part, and by the beneficiaries of the second, third, fourth, fifth, sixth, seventh, and eighth parts.

The questions of law were—"Whether the said bond of annuity and disposition in security, as also the said two bonds and dispositions in security for £750 and £400 respectively, or any and which of them, fall to be disposed of by the first party under and in terms of the third purpose of the said trust-disposition and settlement? Or, Whether the same, or any and which of them, fall to be disposed of by the trustees under and in terms of the fourth purpose of the said trust-disposition and settlement?"

Argued for second and third parties—By the 117th section of the Titles to Land Consolidation (Scotland) Act (31 and 32 Vict. cap. 101) heritable securities, which by the

interpretation clause included bonds and dispositions in security and bonds of annuity, were moveable as regarded the succession of the creditor. Accordingly the bonds in question were part of the trustor's moveable estate, and fell to be disposed of under the third purpose of the trust-deed. The trustor must be taken as having known that section, and having invoked it to determine what part of her estate was heritable and what moveable. The case was ruled by that of *Guthrie*, October 23, 1880, 8 R. 34. The *dicta* in the case of *Hare*, November 25, 1889, 17 R. 105, relied upon by the other side, and which had created the difficulty here, were *obiter*, and that case materially differed from the present.

Argued for the fourth, fifth, sixth, seventh, and eighth parties—The 117th section of the Act of 1868 referred to applied only to the case of intestate succession. That had been recognised by the Judges in the case of *Hare, supra*. By leaving a trust-disposition and settlement the trustor had kept her estate out of the operation of that section, and what was heritable and what moveable was to be determined apart from that section and according to the law before the passing of the Act of 1868. The bonds were therefore heritable, and fell to be disposed of under the fourth purpose of the trust.

At advising—

LORD JUSTICE-CLERK—In this case the question before us relates to whether certain sums of money, one of which is contained in a bond of annuity and the others in two bonds and dispositions in security, fall to be disposed of under the one or under the other of two purposes of the will of the late Mrs Hughes. The third and further purposes of that will relate, the one to what is to be done with the moveable and the other to what is to be done with the heritable estate, and the question here is, whether these sums fall to be disposed of under the one purpose as moveable, or under the other as heritable estate?

This case is very much the same as a recent case we had before us, and depends for its solution upon whether by Act of Parliament the sums before us are to be dealt with as heritable or moveable in the question of succession. The difficulty we have had in the case has arisen on account of the case of *Hare*, in which it was observed that the 117th section of the Act of 1868 related only to the case of intestate succession. But it appears to me that the declaration of that Act, although relating to intestacy, puts a general direction by any person as to what is to be done with his heritable estate and what with his moveable, in the same position, so far as determining what is heritable estate and what moveable, as if that person had died intestate. However the heritable and the moveable estate are to be distributed, we must look to the Act of Parliament to tell us what is heritable and what moveable; and that being so, I think the sums in these bonds fall to be dealt with under the third purpose of the deed.

I am therefore for answering the first question in the affirmative and the second in the negative.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK—The trustor disposed of her moveable estate in favour of certain legatees, and we have now to determine whether a bond of annuity and two bonds and dispositions in security are included in that estate or are to be considered as heritable estate. I am of opinion that they are moveable.

What is moveable estate and what is heritable estate can only be settled by the law. There is no other standard. For in disposing of her moveable estate the trustor disposed of that part of her estate which in the eye of the law is moveable, or, in other words, of that part of her estate which would by law descend to her executors and not to her heirs.

It is admitted that the bond of annuity and bonds and dispositions in security by force of the recent statute would descend to executors. They are therefore moveable estate, and must pass to the legatees of the moveable estate. In determining this question we must refer to the whole law as it stands at the death of the trustor—whether common law or statutory—and not to a part of it.

The only difficulty which I have felt was from the recent decision in the case of *Hare*. But I have conferred with the Judges who took part in that decision, and they are satisfied that our judgment does not in any way conflict with it. Of course the right of succession in testacy is settled by the will of the testator and not by the statute. But the statute must not be less be taken into account in determining what is moveable and what is heritable.

LORD TRAYNER—I am of the same opinion.

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

Counsel for the First Party—Vary Campbell. Agents—J. & J. Galletly, S.S.C.

Counsel for the Second and Third Parties—Sol.-Gen. Sir Charles Pearson, Q.C.—H. Johnston. Agents—Watt & Anderson, S.S.C.

Counsel for the Other Parties—D.-F. Balfour, Q.C.—Dickson. Agent—J. Smith Clark, S.S.C.