

Thursday, August 14.

OUTER HOUSE.

[Lord Wellwood.

H. M. ADVOCATE *v.* FINDLAY
(KENNEDY'S FACTOR).

Revenue — Inventory Duty — Additional Inventory — Contingent Interest — Share in Tontine.

A share in a Tontine Society became vested after several transmissions in G. K. After G. K.'s death the property of the Tontine became the property of the judicial factor on his trust-estate by the survival of the nominee of the original member of the society from which G. K. derived his share. On G. K.'s death an inventory had been given up in which his share was included at its actuarial value, but it had not been included in any inventory at any of the previous transmissions.

Held that the judicial factor must give up inventories of the estates of each of the persons through whom the share had been transmitted to G. K., and include the share in these inventories at its present value.

The Hutcheson Street Tontine Society, Glasgow, was formed in or about the year 1797. According to its constitution every subscriber for one or more shares could name a person on whose life the interest of the subscriber for such share or shares should depend. During the life of the nominee the subscriber was entitled to a proportion of the income of the property corresponding to the share or shares held upon the life of the nominee; and on the death of any of the nominees, the interest of the subscriber depending on such life was to be considered at an end from and after the 15th May preceding the death of the nominee. It was further provided that "the member or members of the society whose interest shall depend upon the life of the last liver of the nominees, shall be entitled to the whole property belonging to the society at the time, and the trustee or trustees in whose name the property shall be then vested, and the other persons who shall then have the management of the society's business, shall be obliged to convey the said property to such member or members absolutely and irredeemably." It was also declared that the shares "shall be personal property, and may be bequeathed by will, and shall descend to executors when not settled otherwise."

John Orr, at one time town-clerk, Glasgow, was a subscriber, and had a share of the tontine. He died on 16th December 1803. The nominee on whose life depended the share for which he subscribed was Mrs Janet Orr or Findlay, his natural daughter. By the death on 21st January 1886 of Miss Janet Riddell, daughter of Henry Riddell, merchant, Glasgow, Mrs Janet Orr or Findlay, was the last survivor of the whole nominees in the tontine, and

the property of the tontine then behoved to be made over or paid to the person or persons having right to the said John Orr's share.

John Orr left a last will and testament, dated 30th October 1795. Under it the residue of his estate, including the share of the tontine, fell to his sisters Esther Orr, Martha Orr, and Mrs Janet Orr or Kennedy, in equal shares, and each of them on his death acquired a vested interest in his share to the extent of one-third.

Esther Orr and Martha Orr executed a mutual disposition and settlement, dated 19th November 1807, by which they disposed and made over their whole estate, heritable and moveable, to themselves and the survivor, whom failing to their sister Janet Orr or Kennedy in liferent, and her daughter Mary Kennedy in fee. By another mutual deed, executed on 13th October 1819, by Esther Orr and Martha Orr, the conveyance in favour of Mrs Kennedy and her said daughter was revoked, and Gilbert Kennedy, merchant, Glasgow, son of the said Mrs Kennedy, was substituted as donee in their room, subject to the burden of paying debts and legacies. The precise date of Esther Orr's death is uncertain, but she predeceased Martha Orr, dying sometime between the date of the last-mentioned deed and 29th December 1824, the date of the first of two codicils executed by Martha Orr as survivor. No inventory of Esther Orr's estate was given up. Martha Orr died on 22nd March 1839, and an inventory of her estate was recorded at Glasgow on 13th May 1839. The amount in that inventory, £999, 0s. 11d., to the extent of one-half thereof or thereby, including the value of the residue of the personal estate of Esther Orr. Mrs Janet Orr or Kennedy died on 11th July 1831 survived by two children, the said Mary Kennedy and Gilbert Kennedy, and leaving a will under which her daughter Mary Kennedy was residuary legatee. An inventory of Mrs Kennedy's personal estate was recorded at Glasgow on 22nd December 1831. Mary Kennedy, who was survived by her brother Gilbert Kennedy, died on 8th April 1843, and an inventory of her estate was recorded at Glasgow on 11th May 1843. In none of these inventories was the value of the deceased's interest in the said share of the tontine included.

Martha Orr at her death had a vested interest in two-thirds of the said share, having acquired Esther Orr's one-third as her residuary legatee, and to these two-thirds the said Gilbert Kennedy succeeded in virtue of the said mutual testamentary deeds. The remaining one-third, which belonged to Mrs Orr or Kennedy, passed under her will to Miss Mary Kennedy, her residuary legatee, and ultimately fell to the said Gilbert Kennedy on Mary Kennedy dying intestate.

Gilbert Kennedy died on 4th January 1855. An inventory of his estate was recorded on 15th February 1855. The total amount in it is £11,290, 17s. 4½d. It included item five—"Value of share in Glasgow Hutcheson Street Tontine, depending on

life of Janet Orr, in New York, the nominee, born in September One thousand seven hundred and ninety-three, and her survivorship of other fifty-seven persons—present dividend two pounds per annum—nineteen pounds eight shillings and nine pence.”

The property of the said Tontine Society consisted of a tenement of houses in Hutcheson Street, Glasgow, acquired by the society in 1797, for the price of £2900, and yielding at the time of the death of the last nominee, an annual rental of about £300. This property, along with certain accumulations of rent or income, formed the fund *in medio*, in an action of multipleponding raised on 19th February 1889, at the instance of Mr John Roxburgh Strong, chartered accountant in Glasgow, judicial factor on the society's estates. A claim was lodged in the said action by James Findlay, writer, Glasgow, as judicial factor on the estate of Gilbert Kennedy. The claim was founded on the right which Gilbert Kennedy had acquired to the whole of the share through his aunts Esther and Martha Orr, and his mother and sister, and by interlocutor of Court pronounced on 16th July 1889. The judicial factor was preferred to the fund *in medio* so far as consisting of the whole capital property of Tontine Society, and the rents or proceeds accrued thereon since 21st January 1886, the date when the capital property behaved to have been made over.

The Lord Advocate, for and on behalf of the Board of Inland Revenue, brought this action against James Findlay, as judicial factor on the trust-estate of Gilbert Kennedy, to have him ordained “to exhibit on oath or affirmation, and to record in the proper Sheriff Court in Scotland, full and true inventories or additional inventories of the personal and moveable estates and effects of (first) the deceased Esther Orr, sometime residing in Glasgow, daughter of the deceased William Orr of Barrowfield; (second) the deceased Martha Orr, sometime residing in Regent Street, Glasgow, daughter of the said William Orr; (third) the deceased Mrs Janet Orr or Kennedy widow of James Kennedy of Kailzie, and daughter of the said William Orr; and (fourth) the deceased Mary Kennedy, sometime residing in West Regent Street, Glasgow, daughter of the said Mrs Orr or Kennedy; duly stamped with the inventory duties at the rate imposed by statute, according to the value of such estates, at the dates at which they should respectively be sworn to, including the proceeds accrued thereon down to that time: And further, to make payment of (first) the sum of £100, or such other sum, more or less, as shall in the course of the process to follow hereon be ascertained to be the amount of the legacy duty payable on the clear residue of the personal or moveable estate and effects of the deceased Esther Orr, with interest at the rate of four per centum per annum on the portion of the said amount of duty payable on the part of the said clear residue which was retained, delivered, paid or satisfied at the date of the death of the said Esther Orr

from such date of death, and on the remaining portion of the said amount of duty payable on the remainder of the said clear residue which was retained, delivered, paid, or satisfied by or to the defender on or about the 16th day of July in the year 1889, from such last-mentioned date until payment; (second) the sum of £100, or such other sum, more or less, as shall be ascertained in the course of the process to follow hereon, to be the amount of the further legacy duty payable on the clear residue of the personal or moveable estate and effects of the said deceased Martha Orr, so far as not included in the inventory thereof recorded 13th May 1839, with interest thereon at the rate of 4 per centum annum from the said 16th day of July in the year 1889 till payment; (third) the sum of £50, or such other sum, more or less, as shall be ascertained in the course of the process to follow hereon to be the amount of the further legacy duty payable on the clear residue of the personal or moveable estate and effects of the said deceased Janet Orr or Kennedy, so far as not included in the inventory thereof recorded 22nd December 1831, with interest thereon at the rate of 4 per centum from the said 16th day of July in the year 1889, per annum, until payment; and (fourth) the sum of £50, or such other sum, more or less, as shall be ascertained in the course of the process to follow hereon to be the amount of the further legacy duty payable on the clear residue of the personal or moveable estate and effects of the said deceased Mary Kennedy, so far as not included in the inventory of her estate recorded 11th May 1843, with interest thereon at the rate of 4 per centum per annum from the said 16th day of July in the year 1889 until payment.”

The Acts regulating the exhibition of inventories or additional inventories, and the payment of inventory-duty, are 48 Geo. III. cap. 149; 55 Geo. III. cap. 184, schedule, part 3; 16 and 17 Vict. cap. 59; 21 and 22 Vict. 56; 23 and 24 Vict. cap. 80, sec. 5; 39 and 40 Vict. cap. 70; 43 Vict. cap. 14; and 44 Vict. cap. 12. The Act regulating the payment of legacy-duty is 55 Geo. III. cap. 184, schedule, part 3, and previous Acts, including 36 Geo. III. cap. 52. Interest on arrears of legacy-duty is made payable at 4 per cent. by the Act 31 and 32 Vict. cap. 124, sec. 9.

The pursuer pleaded—“(1) The said Esther Orr, Martha Orr, Mrs Orr or Kennedy, and Mary Kennedy having each had at death a vested interest in the said share of the Tontine Society, the value thereof as at the date of the oath thereto ought to be included in duly stamped inventories or additional inventories of their personal and estates and effects. (2) The defender having succeeded as above set forth to the said share of the Tontine Society, he is liable to exhibit the said inventories or additional inventories, and also to pay legacy-duty under the estate of each defunct in respect of her interest in the said share. (3) In addition to her interest in the tontine property, the other personal property which belonged to Esther Orr at her death

ought to be included in a duly stamped inventory of her estate, to be exhibited by the defender, and legacy-duty ought to be paid on the free amount thereof."

The defender pleaded—"(1) The pursuer's statements are irrelevant and insufficient to support his pleas. (2) In respect that the said Esther Orr, Martha Orr, Mrs Orr or Kennedy, and Mary Kennedy had and transmitted merely a *spes successionis* in connection with the Tontine Society, the pursuer is not entitled to decree as libelled. (3) In any view, the claim for duties is excessive."

The Lord Ordinary (WELLWOOD) upon 14th August 1890 pronounced the following interlocutor:—"Finds that the defender, as judicial factor, is bound to exhibit on oath or affirmation, and to record in the proper Sheriff Court in Scotland, inventories or additional inventories of the personal and moveable estates and effects of (1) Esther Orr, (2) Martha Orr, (3) Mrs Jeanette Orr or Kennedy, and (4) Mary Kennedy, named and designed in the summons, in so far as the said estates and effects have not been hitherto confirmed, duly stamped with the inventory duties at the rate imposed by statute according to the value of such estates at the dates at which they shall be respectively sworn to, including the proceeds accrued thereon down to that time; and in particular, that the defender is bound to so give up and record inventories or additional inventories of the personal estates and effects of the said persons, containing the respective interests held by them in the share in the property of the Hutcheson Street Tontine Society, named on record, purchased by John Orr, of which the said persons died in right: Finds that in valuing the said interests the defender is bound to value them according to the present value of the property of the said Tontine Society received by the defender, and not according to the value of the contingent interests or expectancies in respect of the said share at the times when the said persons died: With those findings appoints the cause to be put to the roll for further procedure, and grants leave to reclaim against this interlocutor.

"*Opinion.*—The Hutcheson Tontine Society, Glasgow, was formed in the year 1797. John Orr had one share in the tontine. He died on the 16th of December 1803. His nominee was his natural daughter, Mrs Jeanette Orr or Findlay. John Orr left the residue of his estate to his three sisters, Esther Orr, Martha Orr, and Mrs Jeanette Orr or Kennedy, in equal shares, and each of them thus on his death acquired an interest in his share in the tontine to the extent of one-third. Esther Orr died prior to 1824. She and her sister Martha Orr had previously executed a mutual settlement, by which they made over their whole estates to themselves and the survivor, whom failing to Gilbert Kennedy, son of Mrs Jeanette Orr or Kennedy. Martha Orr died on the 22nd of March 1839. Mrs Jeanette Orr or Kennedy died on the 11th of July 1831, survived by

two children, Mary Kennedy and the said Gilbert Kennedy, and leaving a will in favour of her daughter Mary Kennedy. Mary Kennedy died on the 8th of April 1843 intestate, survived by her brother Gilbert Kennedy. Right to the whole of the share in the tontine thus vested in Gilbert Kennedy on the death of his sister Mary Kennedy. On the deaths of Esther Orr, Martha Orr, Mrs Jeanette Orr or Kennedy, and Mary Kennedy, their respective interests in the tontine were not given up or confirmed by their respective representatives or executors.

"Gilbert Kennedy died on the 4th of January 1855, and the inventory of his estate given up by his executors included (item 5) 'Value of share in Glasgow Hutcheson Street Tontine depending on the life of Jeanette Orr, in New York, the nominee born in September 1793, and his survivorship of other fifty-seven persons—(present dividend, £2 per annum) £19, 8s. 9d.' The present defender is the judicial factor on the trust-estate of Gilbert Kennedy.

"On the 21st January 1886, on the death of a Miss Jeanette Riddell, one of the nominees in the tontine, survived by John Orr's nominee Mrs Jeanette Orr or Findlay, the property of the society fell to the present defender as in right of John Orr's share. The Crown now claims from the defender inventory-duty and legacy-duty in respect of the property so acquired. As I understand, the Crown do not make any additional claim in respect of Gilbert Kennedy's succession. As I have already mentioned, a value was put upon the share by Gilbert Kennedy's executors in 1855, and it is not maintained by the Crown that it was an inadequate value. It must therefore be taken that so far as Gilbert Kennedy's succession is concerned no further inventory duty is due, and the case must be considered on the footing that everything has been paid that the Crown is entitled to demand in respect of that succession. If everything had been in proper form up to the date of Gilbert Kennedy's death no further demand could have been made on the present defender. But it appears that this item was not given up and confirmed on the deaths of any of the predecessors of Gilbert Kennedy, probably because it was of such small value that the executors of the parties did not think it worth while to include it in the inventories given up. The Crown's contention is that the defender must now give up inventories or additional inventories of the personal estates of Esther and Martha Orr, and of Mrs Jeanette Orr or Kennedy, and of Mary Kennedy, containing their interest in the share in question, and valuing their interest as at the date of the oath—that is to say, that the value to be inserted in each case must be the present value of the property, or the proportion of it effecting to the interest held by the respective parties. The Crown's claim is founded upon the Act 55 Geo. III. cap. 184, sec. 38, and 23 and 24 Vict. cap. 80, sec. 5. By the latter statute it is provided, 'That

the inventories and additional inventories of any person deceased, required to be exhibited and recorded in the proper Commissary Court of Scotland, shall be stamped with duty according to the value of the property contained therein at the time they shall be respectively sworn to, including the proceeds accrued thereon down to that time.'

"I am of opinion that in order to complete his title to the share the defender is bound to connect himself by confirmation with the persons through whom the share was transmitted, and by confirming the interests transmitted as at each devolution—*M'Laren on Wills and Succession*, p. 166, sec. 1700. The question is, Whether in so doing the defender must give up those interests as at each devolution at values which they did not then possess? I have reluctantly come to the conclusion that the pursuer's claim is well founded.

"Each of the persons through whom Gilbert Kennedy took had a contingent interest in the property of the tontine. The property was not reduced to possession during their lifetime, but the contingent interest was, nevertheless, an asset of their estates capable of actuarial valuation, and of being the subject of bequest or sale. In the case of intestacy it devolved upon their next-of-kin. It is in respect of the transmission of that interest that the property of the tontine has now fallen to the defender as representing Gilbert Kennedy.

"I do not understand it to be maintained that the fact that an interest is contingent at the death of the person from whom it is derived exempts it from inventory duty—*Lord v. Colvin*, L.R., 3 Eq. 737. This indeed was recognised by Gilbert Kennedy's executors as regarded his succession when they confirmed his interest in the tontine in 1855. But it is maintained by the defender that as none of Gilbert Kennedy's predecessors received any part of the property the interest in their persons or as forming part of their successions was and is shown to have been nothing but a bare expectancy. He therefore maintains that he is not bound to confirm their interests, or at least that the value to be put on them should be merely that of an expectancy.

"I am unable to assent to this view. 1. In order to complete their title to the share the executors of Gilbert Kennedy should have confirmed not only to Gilbert Kennedy, but to each of those persons through whom he took. They did not do so, however, and therefore their title was not properly made up.

"2. Inventory duty is payable on each devolution—*Attorney General v. Partington*, 3 H. of L. Cases, 193; and *Hanson on Probate Acts* (3d ed.) 164. I can find no authority for holding that this does not apply to contingent interests.

"3. The value in the affidavit must be the value at the time of the oath—that is, the present value—23 and 24 Vict. cap. 80, sec. 5; *Hanson*, 166. I can see no intermediate point between the date of the death and the date of the oath. The defender must swear that the estate of the

deceased is now under a certain sum.

"It seems hard and even inequitable that the present demand should be enforced, while it might have been avoided by the executors of those parties putting a trifling value on the expectancy in the inventories given up. But whatever abatement the Crown may think fit to make, I am not able to avoid the conclusion that the full present value must be put upon the interests to be confirmed."

Counsel for the Pursuer—A. J. Young
 Agent—David Crole, Solicitor of Inland Revenue.

Counsel for the Defender—Ure. Agents—
 Webster, Will, & Ritchie, S.S.C.

HIGH COURT OF JUSTICIARY.

Thursday, March 5.

GLASGOW CIRCUIT.

(Before Lord Wellwood.)

M'NEIL v. M'NEIL.

Justiciary Cases—Sheriff—Process—Small Debt Court—Litis contestatio—Decree in Absence—Sist—Small Debt Act 1837 (1 Vict. cap. 41), sec. 16.

In an action in the Small Debt Court by a wife against her husband concluding, *inter alia*, for the expenses she had incurred in connection with a mutual agreement of separation, the Sheriff at the first diet—both parties being present—remitted to the Auditor to report upon the law and practice as to husband's liability for such expenses. The pursuer having enrolled the case after the report was lodged, failed to appear, and decree of absolvitor was pronounced in respect of her absence. She obtained a warrant for hearing under section 16 of the Small Debt Act, and on the case being heard, decree was pronounced in her favour.

Held that there had been *litis contestatio* at the first diet, and that the decree of absolvitor was a decree by default and not a decree in absence, and that the warrant for hearing was therefore incompetent.

Montgomery v. Loughran, February 2, 1891, 28 S.L.R. 345, distinguished.

Mrs Isabella Gordon or M'Neil brought an action against her husband Daniel M'Neil in the Small Debt Court of Lanarkshire at Glasgow for the sum of £12, 10s. 6d., restricted to £12, consisting of £5, 4s. of aliment, £1, 1s. 6d. of penalty, and £6, 5s. of law-agent's expenses, all alleged to be due under a mutual agreement of separation. The case was called on 14th August 1890, and the Sheriff-Substitute (ERSKINE MURRAY), both parties being present, before answer remitted to the auditor of the