dates does not affect my view of the transaction regarded as a whole. And here the essential consideration is that the will of 29th was not a new and different testamentary act from the assumed will of 27th. It was the republication on 29th of the assumed testamentary act of the 27th, none the less testamentary from the testator's point of view, that we may seriously doubt whether it would have been effectual, or even be satisfied that it would have been ineffectual. What Mr Tait did between the evening of 27th and the afternoon of 29th October 1909 was truly one act of testamentary disposition, and I am unable to hold that in using the phrase "of even date" in the document No. 8 of process he was binding himself to the particular twenty-four hours from midnight of 27th to midnight of 28th October, and did not mean merely *unico contextu*. I am satisfied that he relied on the document No. 8 of process as an effectual expression of his testamentary intention in relation to the will which he was in course of executing, sufficient to tide over the interval until he brought himself to reduce it to the form which had been prepared for him, or on reconsideration to substitute some other expression of his will. Like many another busy man, once having brought himself to attend to his own private affairs, he put off till too late recurring to the matter he had had in hand. But he had effectually provided for the contingency.

For the reasons stated I concur with the Lord Ordinary on the main question at issue, and hold that the document No. 8 of process, so far as not fenced off by the line of demarcation drawn by Mr Tait, is a valid and subsisting testamentary document, and must be taken, along with the settlement of 29th October 1909, as constituting Mr Tait's last will and settlement.

LORD SKERRINGTON—I concur with your Lordship.

LORDS KINNEAR and MACKENZIE were not present.

The Court recalled the interlocutor of the Lord Ordinary in so far as it found that the claimant Miss Isobella Lyon was entitled to the annuity claimed in her claim, repelled the said claim, and *quoad ultra* adhered to the said interlocutor.

Counsel for the Claimants Mrs Alice Bisset or Leishman and Others—Macphail, K.C.—Macmillan. Agents—Mackenzie & Kermack, W.S.

Counsel for the Claimant Miss Isobella Lyon—Constable, K.C.—Crurie Stewart. Agents—Mackenzie & Kermack, W.S.

Counsel for the Claimant William Elgin, *curator bonis* for Miss Janet Tait—Horne, K.C.—Jameson. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Claimant and Reclaimer Hall Campbell Chiene — Clyde, K.C. — Watson — Mair. Agents — Davidson & Syme, W.S.

Counsel for the Pursuers and Real Raisers and Claimants William Brown Dunlop and Others (Mr Tait's Trustees)— D.-F. Scott Dickson, K.C. — Chree. Agents — Fraser, Stodart, & Ballingall, W.S.

---

*Thursday, March* 16.

## FIRST DIVISION.

[Lord Skerrington, Ordinary.

## TRAIN *v.* SCOTT AND ANOTHER. TRAIN *v.* LITTLE.

*Process — Mandatary — Failure to Sist a Mandatary—Decree.*

Where a pursuer fails to obtemper the order of the Court, and to sist a sufficient mandatory within the time ordered, the defender is entitled to decree of *absolvitor*.

These two actions, raising the same point, were heard together.

On 5th May 1910, Richard Train, residing at 430 West Twenty-Fifth Street, New York, *pursuer*, "and Neil Sinclair, clothier and outfitter, residing at 24 Battlefield Road, Langside, Glasgow, his mandatary, conform to mandate in his favour dated 11th April 1910," raised an action against John Scott, Barrhead, and another, *defenders*.

On 21st June 1910 the record was closed. Thereafter a minute was lodged for the defenders objecting to the sufficiency of the mandatary on the ground, *inter alia*, that he was insolvent, and had recently offered a composition to his creditors, and on 4th November 1910 the Lord Ordinary (SKERRINGTON) pronounced this interlocutor—". . . On the motion of counsel for pursuer, and of consent of counsel for defenders, appoints the pursuer (Richard Train) to sist a mandatary in place of the mandatary mentioned in the summons within four weeks."

Another mandatary was tendered to whom objection was taken on the ground that there was a decree of expenses in an action outstanding against him.

On 13th December 1910, the Lord Ordinary pronounced this interlocutor—". . . On the motion of counsel for defenders, and in respect the pursuer (Richard Train) has failed to sist a sufficient mandatary in terms of interlocutor of 4th ulto., assoilzies the defenders from the conclusions of the summons, and decerns. . . ."

On 9th September 1910, the same pursuer, putting forward the same mandatary, raised an action against Andrew Little, writer, Glasgow, *defender*. On 1st November 1910 the Lord Ordinary (CULLEN) remitted the process to Lord Skerrington to depend before him *ob contingentiam* of the above action.

On 15th November 1910 the Lord Ordinary (SKERRINGTON) "continued the adjustment of record until Tuesday, 6th December next, and ordained the pursuer to sist a mandatary before that date." On 6th

December the Lord Ordinary, "on cause shown, continued the adjustment of record until Tuesday, 13th inst."

On 13th December the Lord Ordinary pronounced this interlocutor—". . . On the motion of counsel for defender, and in respect the pursuer has failed to sist a sufficient mandatary in terms of interlocutor of 15th ulto., assoilzies the defender from the conclusions of the summons, and decerns."

In both actions the pursuer reclaimed, and argued—(1) He should be given another opportunity of sisting a mandatary. (2) In any case the interlocutor should be only dismissal and not absolvitor.

Argued for the defenders—(1) No further opportunity should be given to the pursuer of sisting a mandatary. (2) The proper decree was absolvitor—Mackay's Manual of Practice, pp. 239 and 310; *Gordon* v. *Gordon*, December 17, 1822, 2 S. 86 (93); *Gray* v. *Ireland*, July 18, 1884, 11 R. 1104, 21 S.L.R. 766.

At advising—

LORD PRESIDENT—In this case the Lord Ordinary has assoilzied the defender from the conclusions of the summons "in respect the pursuer has failed to sist a sufficient mandatary" in terms of an interlocutor referred to.

I am satisfied that ample opportunity was given to the pursuer, on more than one occasion, to obtemper the order of the Court, and I do not think this is a case in which there is any reason to give more time. My only doubt after the discussion was whether the Lord Ordinary's interlocutor should have been one of dismissal instead of absolvitor. On looking into the authorities and inquiring into the practice of the Court I am satisfied that decree of absolvitor is properly granted. The principle that has governed the practice requires that persons who sue before the Court must do so under the recognised rules of the Court, and if they are not prepared to comply with these rules the party whom they sue is entitled to have done with the action altogether.

I am therefore of opinion that the interlocutor reclaimed against should be adhered to.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

The Court adhered to the Lord Ordinary's interlocutor, dated 13th December.

Counsel for the Pursuer and Reclaimer—A. M. Stuart. Agent—C. Strang Watson, Solicitor.

Counsel for the Defenders and Respondents—D. P. Fleming. Agent—W. B. Rankin, W.S.

---

*Thursday, March 16.*

## FIRST DIVISION.

[Sheriff Court at Glasgow.

## NORTH BRITISH RAILWAY COMPANY *v.* WILSON.

*Contract—Arbitration—Decree-Arbitral—Objections—Reference to Man of Skill—Parties Coming before Arbiter Prematurely.*

A contract between a railway company and a quarrymaster for the construction of a siding provided that the company should form the permanent way of the siding and execute certain other work connected therewith, and that on completion of the work the quarrymaster should pay to the company the cost of the labour incurred and interest on the cost of the permanent way, &c., as the amount of such cost, and interest should be determined by the company's engineer. The railway company brought an action against the quarrymaster for payment of (1) the balance of a lump sum certified by the engineer as the amount expended on wages, and (2) interest on a lump sum certified by him as the value of the materials. The defender maintained that the sums certified were excessive; that no details were ever furnished to him; and that he never was afforded an opportunity of being heard.

*Held* that the company had failed to make a proper demand under the contract in respect that while the engineer was no doubt made the final judge of the amount if the parties failed to agree, that did not absolve the company from furnishing to the defender a properly detailed account, and action dismissed as premature.

On 12th January 1910 the North British Railway Company, *pursuers*, brought an action against William Wilson, quarrymaster and contractor, Glasgow, *defender*, in which they sought payment of the balance which they alleged to be due on an account for work done and wages expended in connection with the construction of a siding at Croy Station.

The following narrative of the *facts* is taken from the opinion of the Lord President:—"Now the matter arises out of a contract, and the contract between the parties had to do with the construction of certain works at Croy Station. These works were divided into two portions—the works shown coloured green and the works shown coloured red on a plan; and the fourth article of the contract is—'The first party' [that is, the North British Railway Company] 'shall thereupon construct the permanent way of the said siding and connection coloured red on the said plan and execute the other works shown coloured red on the said plan so far as not executed by the second party; and on the completion thereof the second party shall pay to