

separate pieces of paper? Supposing the brother had made a will leaving his estate to his sister in liferent in the event of her survivance, and the fee to trustees, and that his sister in her separate will had left her estate to her brother in liferent, and after his death to trustees, for the same purposes as in her brother's will, there would have been two deeds independent of each other, and I think they would have been in the same position as this one deed, supposing it to be carried into execution. The two deeds would have left each party in the ordinary position of a testator before his death, with full command over his estate, and under no control. So it is here, by express reservation. The will of each is ambulatory as much as if on separate papers, without reference to each other. Therefore I cannot hold the one will to be the consideration of the other, for this supposes that if one fails the will made in respect of it is lost. Therefore I think that, though Catherine's failed from any cause whatever, the will of James stands as a substantive and operative testament.

Agent for Pursuer—A. K. Morison, S.S.C.

Agent for Defenders—J. Webster, S.S.C.

*Tuesday, July 20.*

**BELL (MINISTER OF PERSIE) v. PRESBYTERY OF MEIGLE.**

*Church—Presentee—Oath to Government—31 and 32 Vict., c. 72.* A presentee is not now required to take the Oath of Allegiance and Abjuration, or subscribe the Assurance, or make any declaration in lieu thereof.

This was a special case presented by the Rev. Herbert Bell, presentee to the parish of Persie, in the Presbytery of Meigle, and by the Presbytery. By the Statute 5th George I., cap. 29, entitled "An Act for making more effectual the laws appointing the oaths for security of the Government to be taken by ministers and preachers in churches and meeting-houses in Scotland," it is enacted, "That all and every person who has obtained license, and been admitted to preach by any Presbytery in Scotland, and has not taken the oaths to the Government, or who, on or after the 1st day of June 1719, shall present himself to be tried as to his qualifications to be licensed or admitted to preach, or to be ordained a minister of the Church of Scotland, shall, before the said day, or his obtaining such license to preach, or being admitted or ordained to be minister, take and subscribe, before and in the Court of the Lords of Session, or the Court of Justiciary, or the Court of Exchequer in Scotland, or before the Justices of the Peace at their Quarter Sessions, held for any shire, stewartry, city, or borough in Scotland, or before Sheriffs or Stewards, or their deputies, in open Court held for their shire or stewartry, within which shire, stewartry, city, or borough respectively such person has residence, or within which the Presbytery to which he shall present himself, in order to enter upon his trials for obtaining a license or being ordained shall be held, the following oath,"—(*Follows the Oath*)—"Which Courts respectively shall from time to time administer the said oath to such persons as shall tender themselves to take the same; and the clerks of such courts respectively, where such oaths shall be taken, shall grant certificates bearing the day and date of taking such oaths, and names of the Commissioners of the Peace present,

and the name and description of every person who shall take such oaths; for which certificate there shall be no more paid than two shillings."

By the said statute it is further enacted (sect 7), "That all and every person who now is or shall hereafter be ordained or admitted a minister of the Church of Scotland (excepting such who have taken and subscribed the oaths and declarations appointed by the last-mentioned statute (1 Geo. I., cap. 13) shall, on or before the 1st day of June One thousand seven hundred and nineteen, or before their being ordained or admitted minister of any congregation in Scotland, take and subscribe the Oath of Allegiance and the Assurance, as in the said Act is mentioned, and also the Oath of Abjuration hereinbefore directed to be taken and subscribed in lieu of the Oath of Abjuration formerly required by law; and that in such manner, before such judges, in such courts, and to be certified as therein or herein is before mentioned, and under such penalties and disabilities as in and by the said Act, made in the first year of his Majesty's reign, and in and by the said Acts generally therein mentioned, is directed with respect to the oaths and declarations contained in the said Act; and all and every minister who shall, in pursuance of this Act, take, or who has, in pursuance of any former Act of Parliament, taken the said oaths, shall cause a certificate thereof to be entered in the books of the Sheriff or Stewart Courts, within the bounds or jurisdictions of which lies the parish of which he is minister; and the clerks of the said courts are hereby required to enter such certificate, and grant extracts thereof to such as shall require the same, without any fee or reward, other than two shillings for every such certificate or extract."

By the statute referred to in the last recited section of the Acts 5 Geo. I., cap. 29, 1 Geo. I., cap. 13. it is enacted (sect. 3) "That all and every person or persons, as well Peers as Commoners, who, by virtue of any Act or Acts made since the Union of the two Kingdoms, were bound to take and subscribe the Oath of Allegiance, subscribe the Assurance, and to take and sign the Oath of Abjuration for or on account of any office, civil or military, or any other cause or occasion within Scotland, shall, on or before the 1st day of December One thousand seven hundred and sixteen, take and subscribe the Oath of Abjuration above mentioned, and shall take and subscribe the said Oath of Allegiance, and subscribe the Assurance, in the words following, viz."—(*Follows the terms of the Oath of Allegiance and of the Assurance*), "and that in such courts, and within such times, limited, before such judges, and in such manner, and to be certified as in and by the several Acts generally above-mentioned as directed."

By the Statute 6 Geo. III., cap. 53, certain alterations were made in the form of the Oath of Abjuration and the Assurance.

By the Statute 21 and 22 Vict., cap. 48, it was provided (sect. 1) that, instead of the Oaths of Allegiance, Supremacy and Abjuration, where the same are now by law required to be taken, and taken and subscribed respectively, the oath thereby provided shall be taken and subscribed. The said statute contains no provision relative to the Assurance.

By the Statute 30 and 31 Vict., cap. 75 (sect 5), it is provided as follows: "in all cases in which it is provided that any oath which has been substituted for the Oaths of Allegiance, Supremacy, and Abjuration is now required to be taken, or taken

and subscribed, as a qualification for the exercise or enjoyment of any office, franchise, or civil right, the following oath shall be taken, or taken and subscribed, as the case may be, in lieu and instead of such substituted oath"—(*Follows form of Oath*).

Under these statutes, persons applying to be admitted or ordained as ministers in the Church of Scotland have been in use, before presenting themselves to be tried as to their qualifications to be admitted or ordained as ministers, to take and subscribe the said Oaths of Allegiance and Abjuration, or oath substituted therefor, and subscribe the Assurance, and to receive and transmit to the presbytery of the bounds within which they seek to be admitted, along with their presentations, a certificate of their having done so, to be considered and sustained by the said Presbytery before proceeding to induction. Presbyteries also have been in use, on the occasion of presentations being laid before them, with a view to the admission and ordination of any presentee, to require, before sustaining the presentation and proceeding towards the settlement of the presentee, that there shall be laid before them a sufficient certificate instructing that the presentee has duly qualified to Government.

By an Act of the General Assembly of the Church of Scotland, 1856, No. 12, "respecting the Induction of Ministers," it is, with the consent of a majority of the Presbyteries, enacted and ordained, *inter alia*, that at a meeting of Presbytery for the purpose, the Presbytery "shall deliberately consider the said presentation, with relative documents, and shall see that these are accompanied by a letter of acceptance from the person so presented or nominated; that he has qualified by taking the usual oaths to Government; and that he is a minister or licentiate of the Church of Scotland, &c. . . . and if satisfied on these points, shall pronounce a judgment sustaining the same, and resolving to proceed towards the settlement of the presentee."

The statute 31 and 32 Vict., c. 72, provides that the Oath of Allegiance, and the official and judicial oath, shall be in the form therein set forth, and farther provides (sec. 9) that "No person shall be required or authorized to take the Oaths of Allegiance Supremacy, and Abjuration, or any of such oaths, or any oath substituted for such oaths, or any of them, or to make any declaration to the like effect of such oaths, or any of them, except the persons required to take the Oath of Allegiance by this Act and the Clerical Subscription Act 1865, and the Parliamentary Oaths Act 1866, or one of such Acts, any Act of Parliament, Charter, or Custom to the contrary notwithstanding; and no person shall be required or authorised to take the Oath of Assurance in Scotland." Section 12 provides, *inter alia*, that "Where in any case not otherwise provided for by this Act, or included within the saving clauses thereof, an oath is required to be taken by any person on or as a condition of his accepting any employment or office, a declaration shall be substituted for such oath to the like effect in all respects as such oath."

The Rev. Herbert Bell was elected minister of the *quoad sacra* parish of Persie in the Presbytery of Meigle, and was desirous of presenting himself to the Presbytery to be tried as to his qualifications to be ordained a minister of the Church of Scotland; and to that effect he desired to lay before the Presbytery, in proper form, along with his presentation, the other necessary documents, in order that the Presbytery might sustain the same, and

proceed to his induction and ordination in common form. With this view, he presented himself to the Sheriff-court of Edinburgh, and requested that the necessary oath or oaths, declaration or declarations, should be administered to him, and a certificate to that effect granted. But the acting Sheriff declined to administer any oath or declaration, stating that under the said last recited Act none was either necessary or lawful. The Rev. Herbert Bell, therefore (though quite willing to take the oaths previously in use to be taken, or a declaration to the like effect, if lawful so to do), maintained that he could not be required or authorised to take any of the said oaths or any declaration to the like effect.

The Presbytery of Meigle disputed that they were bound or entitled to sustain the presentation and proceed to the admission and ordination of the said Rev. Herbert Bell without having produced to them a certificate instructing that he has duly qualified to Government. They maintained that by the foresaid Statute of the 5th Geo. I., c. 29; 6 Geo. III., cap. 53; 21 and 22 Vict., cap. 48; and 30 and 31 Vict., cap. 75, the presentee is required, before presenting himself to be tried as aforesaid, to take and subscribe the oath provided by the Act 30 and 31 Vict., cap. 75; and also to subscribe the declaration known as the Assurance; and that, under the said Act of 31 and 32 Vict., cap. 72, a declaration must be substituted for such oath to the like effect in all respects as such oath; and also that he is still bound to subscribe the Assurance. This case was accordingly presented for opinion of the Court.

I. Whether, under the said statutes, or any of them, the said Herbert Bell is, in the circumstances stated, required to take and subscribe any, and if any what, oaths or oath or any declarations or declaration substituted for such oaths or oath?

II. Whether, under the said statutes, or any of them, the said Herbert Bell is, in the circumstances stated, required to subscribe the Assurance?

AND

III. Whether the said Presbytery can legally admit and ordain the said Herbert Bell as a minister of the Church of Scotland without his taking or subscribing any oath or declaration, and without his subscribing the Assurance?

LEE, for the Presbytery, contended that, assuming the presentee was not now required to take the Oath of Allegiance and Abjuration, or subscribe the Assurance, in virtue of section 9 of 31 and 32 Vict., c. 72, he was, in terms of the 4th head of section 12, to make a declaration in lieu thereof.

DUNCAN, for the presentee, in reply, contended that the provisions of section 9 prohibited all persons except those referred to in the section, among whom presentees were not included, from taking these oaths; and the declaration referred to in section 12 came in place of certain oaths, with which presentees never had any concern.

The Court unanimously adopted the contention of the presentee.

Agents for Presentee—W. & J. Cook, W.S.

Agents for Presbytery—Menzies & Coventry, W.S.