

whose estate the defender (appellant) is judicial factor, in the book or ledger No. 7/1 of process, in his own handwriting, as sums due by him to the pursuer (respondent): Find that the letter No 7/2 of process, addressed by the pursuer to the deceased James Thomson, was delivered to him of its date, and was retained by him, and found in his repositories after his death, and is thus, taken in connection with the said entries in his book and the bond after mentioned, equivalent to the writs of the deceased: Find it proved by the said letter and other writs that the said three sums were to be held and retained by the deceased free of interest, until he was relieved of every obligation under the bond aftermentioned: Find it proved by the bond No. 8/1 of process that the said deceased James Thomson became security for payment to the creditors of the bankrupt firm of M. C. Thomson & Co., of which the pursuer was a partner, of a composition amounting to a much larger sum than the total of the said three sums, which were received and held by the said deceased as a collateral security in case he should be called on to make payment under the said bond: But find that the said deceased was not called on to pay any part of the composition for which he had become cautioner under the said bond, the whole being paid by the bankrupts themselves: And find, in these circumstances, that the said three sums are still resting-owing to the pursuer, with interest from the date of citation: Therefore refuse the appeal, and decern: Find the appellant liable in expenses; allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for Appellant—Solicitor-General (Clark) and Balfour. Agents—Rhind & Lindsay, W.S.

Counsel for Respondent—Watson and Johnstone. Agent—T. J. Gordon, W.S.

M., Clerk.

Friday, October 31.

FIRST DIVISION.

SPECIAL CASE—SANDERSON AND OTHERS AND GODDEN OR WARDROPE AND OTHERS.

Trust-Deed—Vesting of Provisions—Effect of Terms of Codicil.

Where a trustor by a trust-deed left the fee of the residue of his estate on the death of the liferentrix to A, whom failing, to the children of B; but in a codicil provided (with respect to one portion of said residue) that it should be given to the said children of B *nominatim*, with no clause of survivorship, and (with respect to another portion) that it should be given to C on the ground of special favour,—*Held*, that the terms of these provisions had the effect of altering the trust-deed, so as to change the period of vesting of the several portions of the estate dealt with by them from the date of distribution to that of the death of the trustor.

Mr Alexander Macdonald, principal keeper of the Register of Deeds, residing in Regent Terrace, Edinburgh, and Mrs Elizabeth Ewart or Macdonald,

his wife, executed a mutual trust-disposition and settlement, dated 5th July 1837, whereby, on the narrative that they had entered into no contract of marriage, and were resolved to settle their affairs in such a manner as to prevent all disputes after their deaths, they gave, granted, assigned, and disposed to certain trustees their whole heritable and moveable property of every description in trust for the purposes therein expressed. The trustees also appointed the trustees to be their executors. By that deed the liferent of the trust-funds, with the exception of the sum contained in a policy of assurance on Mr Macdonald's life, is provided to the survivor, and in the event of there being no issue of the marriage alive at the death of the survivor, the residue of Mr Macdonald's estate, both heritable and moveable, was directed to be made over to the children of the marriage of Mr and Mrs Sanderson, share and share alike, unless otherwise provided by a writing under Mr Macdonald's hand. By a holograph testamentary writing or codicil executed by the said Alexander Macdonald alone, dated 18th June 1845, he declared that certain assets were the property of his wife, Mrs Macdonald, and directed his trustees to make them over to her, and he made several specific legacies of various articles to friends. That codicil then proceeds:—"I further direct my said trustees to transfer my five shares of Commercial Bank stock to the five sons of Henry Sanderson, surgeon, one to each—John Thom, Alexander Macdonald, Henry, Leslie Moodie, and William Andrew." After some other legacies, the codicil proceeds:—"The rest of my moveable property, including money in the banks and all debts due to me, household furniture of every description, books, paintings, and engravings, Water Company stock, and fifteen shares of the Scottish Union Insurance Company, to be sold by my said trustees as soon as convenient after my death, and the proceeds to be equally divided among the children of the said Henry Sanderson." By a second codicil or memorandum of bequests, dated 27th March 1847, Mr Macdonald bequeathed certain other articles to various individuals, and amongst others, "to John T. Sanderson, M.D., now in the Bombay Presidency, I leave and bequeath my two shares of stock of the British Linen Company, lately purchased by me, so much gratified with his conduct to his brother Henry of late, and failing him by death, to Alexander M. Sanderson and Henry Sanderson his brothers." Mr Macdonald died on the 23d day of December 1850, survived by his widow, there never having been any issue of the marriage. At the period of Mr Macdonald's death the following children of the marriage between Mr Henry Sanderson and his wife were alive, viz.—John Thom Sanderson, Alexander Macdonald Sanderson, Henry Sanderson junior, Leslie Moodie Sanderson, William Andrew Sanderson, and Mrs Mary Sanderson or Paterson. Mrs Macdonald was paid by the trustees the whole annual produce of the estate, except the interest of the sum due under the policy of assurance before mentioned, from the date of Mr Macdonald's death till her own death, which took place on the 23d May 1871. Two of Mr and Mrs Henry Sanderson's children predeceased Mrs Macdonald, viz.—Dr John Thom Sanderson, who died in the East Indies on 15th February 1864, having left a will dated the day of his death, in favour of his wife Mrs Ann Godden or Sanderson, now Wardrope; and William Andrew Sanderson, who died on the 1st day of January

1869, leaving a will in favour of his father, Mr Henry Sanderson. The trustees being about to proceed to divide the whole trust funds, were prevented from doing so by certain questions which arose as to the vesting of the residuary bequests to the children of Mr and Mrs Henry Sanderson, and as to the right to the bank shares specifically bequeathed as aforesaid.

The first parties to the case were the four surviving children of Mr and Mrs Sanderson, who maintained that the residue of the trustor's estate, heritable and moveable, did not vest until the death of Mrs Macdonald, the liferentrix, on 23d May 1871, and that the said first parties, as surviving legatees at that date, were entitled to that residue.

The second parties were Mrs Wardrop, widow of Dr John Thom Sanderson, and her husband, and their marriage-contract trustees, who made no claim to the residue of the heritable estate, but maintained that the residue of the moveable estate vested at the death of Mr Macdonald on 23d Dec. 1850, and that Mrs Wardrop, as executrix of her deceased husband, who was a surviving legatee at that date, was entitled to a share of that residue.

Similar pleas as to the period of vesting were maintained by the first and second parties respectively, with reference to the bank shares, which were the subject of the first and second questions. In these circumstances, the parties submitted this Special Case, and desired the opinion and judgment of the Court on the following questions of law:—

“(1) Did the bequest of one share of the Commercial Bank stock to each of the five sons *nominatim* of Mr and Mrs Henry Sanderson, vest these shares in the said sons respectively at the death of Mr Alexander Macdonald, the trustor, or did this bequest not vest until the death of Mrs Macdonald, the liferentrix? And in the latter case, did the bequest of one share each to the two sons (John Thom Sanderson and William Andrew Sanderson), who predeceased Mrs Macdonald, lapse and become part of the residue? (2) Did the bequest to John Thom Sanderson of the two shares of the British Linen Company's Bank stock vest these shares in him at the death of the trustor, Mr Macdonald, or did the said bequest not vest till the death of the liferentrix, and in the latter case are Alexander Macdonald Sanderson and Henry Sanderson junior now entitled to the said two shares as conditional institutes? (3) Did the residue of the moveable estate which belonged to Mr Macdonald vest in the children of Mr and Mrs Henry Sanderson alive at the death of Mr Macdonald, or did the said residue vest only in the children alive at the death of Mrs Macdonald, the survivor of the trustors?”

At advising—

LORD PRESIDENT—The late Mr Alexander Macdonald and his wife made a mutual settlement on 5th July 1837, by which it was provided that the estate of both spouses should be managed by trustees, and the entire yearly produce paid to the survivor. There was also a settlement in favour of the children of the marriage, (of whom, however, there were none), whom failing, by purpose 5th, the trustees were, on the death of the survivor, “to pay, or make over the whole property, real and personal, which may have belonged to me, the said Alexander Macdonald, at my death, in such way and manner as I may direct by any writing under my hand, however indirect,” and failing such writing, there is a certain annuity provided for his

niece. Finally he disposes of the residue in these terms:—“The rest of my moveable property, including money in the banks, and all debts due to me, household furniture of every description, books, paintings, engravings, Water Company stock, and fifteen shares of the Scottish Union Insurance Company, to be sold by my said trustees as soon as convenient after my death, and the proceeds to be equally divided among the children of the said Henry Sanderson.” Now I apprehend that if this disposal of the entire residue had remained unchanged, there would have been no vesting till the period of payment, but it must be observed that Mr Macdonald in thus dealing with his own estate reserved power to alter or revoke by any writing under his hand, and though there follows a clause to a certain extent limiting that power, I do not think that it affects the result. It is clear that the liferent provided for the survivor could not be affected by the writing of one spouse, but as far as concerns Mr Macdonald's nephews and nieces there is no restriction of his power. He accordingly made two codicils, by which he altered the disposal of part of what was residue under the original deed, viz., his shares of the Commercial Bank and the British Linen Company's Bank. As regards the first of these, he says, “I further direct my said trustees to transfer my five shares of Commercial Bank stock to the five sons of Henry Sanderson, surgeon, one to each, John Thom, Alexander Macdonald, Henry, Leslie Moodie, and William Andrew.” Now, if this be read without reference to the previous deed it would seem to amount to a transfer immediately on the death of Mr M'Laren. But he had not the power to do that because there was the liferent. So this clause must be read as meaning that there was to be a transfer, but always subject to liferent of widow—or to be held for the widow, but the fee to be in the five sons *nominatim*.

With regard to the British Linen Stock, the terms of the codicil are—“To John T. Sanderson, M.D., now in the Bombay Presidency, I leave and bequeath my two shares of stock of the British Linen Company, lately purchased by me, so much gratified with his conduct to his brother Henry of late, and failing him by death, to Alexander M. Sanderson and Henry Sanderson, his brothers.” There is a provision beyond the immediate legacy. The question is, has this the same effect as the clause of survivorship had in the original deed. He gave this as a special legacy to John Sanderson, and it is very difficult to hold that such a legacy as that was not meant to vest during the life of the liferenter merely because of the expression “and failing him by death.” That expression is quite explicable by the supposition that John being in India, and, as anything might happen to him if he did not survive the date of the deed coming into operation, viz.—the death of the testator; and I am of opinion, therefore, that this legacy vested at that date in like manner as the Commercial Bank Stock.

LORD DEAS—I am clearly of opinion with your Lordship that in making these codicils the testator had no intention of altering the original deed. First, with regard to the residue, that is given to the children of Henry Sanderson, subject to the liferent of his widow, and I am of opinion that that did not vest till the expiry of the liferentrix.

As to the Commercial Bank stock, it was to be

subject to a liferent, but there is nothing to prevent it vesting immediately.

With respect to the British Linen Company stock, the term "failing" means by death of the legatee either before me or before liferentrix. I think it must be held to mean death before the testator. I think it indicates personal favour towards John, and it was he who was to be favoured if possible.

LORD ARDMILLAN—On the first of the questions which we are called on to answer I have no difficulty.

The bequest of the Commercial Bank shares is very clearly and simply expressed; and there is no room for doubt. Subject to the widow's liferent, the fee of five shares of the bank stock are bequeathed to five persons, the sons of Henry Sanderson,—“one to each.” These five persons are all named in the will. There is no clause of survivorship, and no destination over. The bequest is not to a class, but to individuals named. I know of no authority, and am unable to perceive any principle, to support the plea that vesting is postponed under these circumstances. I am of opinion that this bequest of Commercial Bank stock vested in each of the sons of Mr and Mrs Henry Sanderson at the date of the truster's death.

I am also of opinion, on the second question, that the bequest of shares of the British Linen Company's stock vested in John Thom Sanderson at the date of the truster's death. This is a direct bequest of shares of bank stock, taken out from the estate, and separated from the residue; and it is given to John T. Sanderson, M.D.—one reason for the bequest being, that the testator approved of, and was gratified by the legatee's kind conduct to his brother Henry. "Failing him" (John T. Sanderson) "by death," the bequest is to his brothers, Alexander and Henry.

I am of opinion that the time of vesting of this bequest is also the date of the truster's death. Postponement of the vesting of this bequest can only be supported by an unnatural and unreasonable construction. The widow's liferent is of course not affected. This, like the other bequest, is subject to that liferent.

In the last place, I am of opinion that the residue mentioned in the third question did not vest till the death of the liferentrix.

LORD JERVISWOODE concurred.

Counsel for First Parties—The Solicitor-General (Clark) and Balfour. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Second Parties—J. M. Laren. Agents—Horne, Horne, & Lyell, W.S.

Friday, October 31.

FIRST DIVISION.

FERGUSON *v.* LESLIE.

Appeal—Bankrupt—Expenses.

A Sheriff-Substitute granted interdict against a party, and his interlocutor was recalled by the Sheriff-Depute. The complainer appealed to the Court of Session, and pending the appeal, the respondent became bankrupt.

Intimation was made to the trustee in the sequestration, but he did not sist himself, or appear in the action. The appellants craved that the appeal be sustained, or the respondent ordained to find caution for the expenses. *Held* that he could not be called on to find caution, as he had been brought into Court at the instance of the appellants, and was bound to defend himself.

Counsel for Appellants—J. G. Maitland. Agents—H. & A. Inglis, W.S.

Counsel for Respondent—J. A. Reid. Agents—Philip, Laing, & Munro, W.S.

Friday, October 31.

SECOND DIVISION.

[Lord Shand, Ordinary

GARRIOCK *v.* WALKER.

Affreightment—Shipmaster—Recompense—Demurrage.

Where the master of a vessel laden with whale blubber and heads, going from Shetland to Peterhead, was detained at an intermediate port by stress of weather, and, from the nature of the cargo, was obliged to incur expense in landing, preparing, and reshipping it at that port, after communication with the owner of the cargo, who refused to take any responsibility; and where the voyage was ultimately successfully prosecuted, and the cargo landed, and sold at the port of delivery;

Held, that the shipmaster exercised a sound discretion for the purpose of preserving the cargo, and that the shipowners were entitled in the circumstances to (1) the freight; (2) repayment of the expenses incurred on the cargo at the port of detention; and (3) a sum in respect of the detention.

These were cross-suits at the instance of the owners of the smack "Petrel" of Lerwick against the owner of the cargo, and *vice versa*. The cargo which consisted of whale blubber and heads, was shipped in bulk at Shetland to be conveyed to Peterhead at a slump freight. The voyage was unusually prolonged owing to stress of weather, and the captain landed the cargo at Lerwick, where it was washed and cleaned, and taken on board in casks, and so the whole cargo was conveyed to Peterhead, with the exception of a portion which was sent on by another conveyance, owing to want of room.

The shipowners sued for (1) freight of £50; (2) a sum of £113 disbursed at Lerwick; (3) £50 in respect of detention of the vessel during the operations on the cargo. The owner of the cargo claimed damages in respect of the operations performed on the cargo, and opposed the claims of the shipowners, except for freight.

The facts of the cases are fully set forth in the following interlocutor of the Lord Ordinary:—

"*Edinburgh, 10th April 1873.*—The Lord Ordinary having considered the conjoined causes (1st) in the action at the instance of the pursuers, Peter Garriock and Others; Finds, that while the pursuers' vessel the 'Petrel,' in the course of the voyage between Uyea Sound and Peterhead, in the fulfillment of the charter-party entered into between the pursuers and the defender on 23d December 1871, was