Wednesday, June 3.

SECOND DIVISION.

SPECIAL CASE—TRUSTEES OF MAJOR GENERAL JOHN ALVES AND ROBERT GRANT.

Succession—Vesting—Dies incertus.

A, on the narrative that to the family of B he had been indebted for bringing him forward in his youth, directed his trustees "to hold my said heritable estate in trust to convey and make over the same to C, the second son of B, upon his attaining the years of majority, his heirs and assigns for ever." A also appointed C to be his residuary legatee, and directed the trustees "upon C attaining the age of twenty-one, to dispone, convey, and make over to him, his heirs and assigns, the whole residue of my means and estate not otherwise specifically disposed of." *Held* that the residue of the estate, both heritable and moveable, vested in C *a morte testatoris*, and that the trustees were bound to pay over the whole annual proceeds to him although he had not attained majority.

The parties of the first part to this Special Case were the trustees and executors of Major General Alves, and the parties to the second part were Robert Grant, second son of the Honourable James Grant, with consent and concurrence of his father. Major General Alves was born in England, and died domiciled in England on 18th September 1862, leaving a trust-disposition and settlement dated 17th July 1860, executed both in the Scotch and English forms. By the trust-settlement he conveyed his whole property to the parties of the first part, who accepted the trust. After directing the trustees to make payment of debts, &c., the trust-deed continued as follows:—"Considering that to the family of the said Honourable James Grant of Grant I have been indebted in bringing me forward in my youth, I direct my trustees to hold my said heritable estate situated in the town and county of Elgin in trust to convey and make over the same to Robert Grant, the second son of the said Honourable James Grant, upon his attaining the years of majority, his heirs and assigns for ever." The following was the clause appointing a residuary legatee:—"I hereby nominate and appoint the said Robert Grant, the second son of the said Honourable James Grant of Grant, my residuary legatee, and direct my trustees, upon his attaining the age of twenty-one, to dispone, convey, and make over to him, his heirs and assigns, the whole residue of my means and estate not otherwise specifically disposed of by these presents."

The trustees stated that with due despatch they executed the whole purposes of the said trust other than that relative to the payment and disposal of the residue, both heritable and moveable, of the said estates, the capital of which, along with the accumulations of income not paid as after stated, they still retained, and intended to retain, until Robert Grant, the party of the second part, should attain the age of twenty-one years, which age he will attain on 4th September 1877.

The residue of the moveable estate yields an annual return of about £190 per annum, and the residue of the heritable estate yields an annual return of from £40 to £45.

From the year 1863 to the year 1867 the parties of the first part paid to the said Honourable James Grant, as administrator-in-law for his son Robert Grant, the party of the second part, an allowance of £80 a year, and from the year 1867 to the present time the parties of the first part paid to the Honourable James Grant an allowance of £100 a-year out of the annual proceeds of the residue of the said moveable estate, which has been applied towards the maintenance, clothing and education of the said Robert Grant.

Robert Grant, the party of the second part, has called upon the parties of the first part to pay him the whole annual proceeds both of the residue of the said heritable estate and of the said moveable estate. He maintained that the whole residue of both the heritable and moveable estates had already vested in him, and, *separatim*, that even if the residue of both or either of these estates should be held not yet to have vested in him, the parties of the first part are nevertheless entitled and bound to pay over the annual proceeds of the residues of both estates to him for his maintenance,—the whole of the said annual proceeds being, as he alleges, necessary for his maintenance,—he having no other means or estate available therefor. The parties of the first part admitted that the free annual income of the residue of both the said heritable and moveable estates would not exceed a reasonable and proper provision for the said Robert Grant, but they denied that either the capital of the said heritable or the capital of the said moveable estate had vested in the said Robert Grant, or that, even if the said capital had so vested, they would be entitled or bound to pay the whole free annual income thereof to the said Robert Grant.

The questions submitted to the Court were:—(1) Has the residue of the heritable estate of the said deceased Major-General Alves vested in the party of the second part? (2) Has the residue of the moveable estate of the said Major-General Alves vested in the party of the second part? (3) Are the parties of the first part entitled and bound to pay over the whole annual proceeds of the residue of the said heritable estate to the party of the second part, with the consent of the Honourable James Grant as his administrator-in-law? (4) Are the parties of the first part entitled and bound to pay over the whole annual proceeds of the residue of the said moveable estate to the party of the second part, with consent of the Honourable James Grant as his administrator-in-law?

Authorities quoted—Bell's Prin. 1881; *Sempils*, M. 8108; *Torrie*, 10 S. 597; *Omey*, M. 6340; *Wood*, Hume, 271; Williams on Execution, ii. 1214; *Booth*, 4 Vesey, 399; *West*, 4 Giffard, 198; *Donaldson's Trustees*, 22 D. 1535; *Kennedy*, 3 D. 1266; *Ralston*, 4 D. 1496; Menzies Conveyancing, 498.

At advising—

LORD JUSTICE-CLERK—The first two questions in this Special Case which we are now to answer are, Whether the residue of the heritable estate and the residue of the moveable estate of the deceased Major-General Alves vested at the death of the testator in the second party to the case, viz., Robert Grant. The two questions do not entirely depend upon the same considerations, but it is right, for reasons which I shall explain, to consider

them together as well as separately. The substance of the settlement in which these bequests occur is simply this, that after leaving certain legacies and bequests to be paid out of the personal estate, the testator, on the narrative that he had been indebted to the family of the Honourable James Grant of Grant in bringing him forward in his youth, leaves the whole of his heritable and moveable estate to Robert Grant, the son of the Honourable James Grant. No other person is favoured by the settlement, and Robert Grant is to succeed both to the heritable and moveable estate, and is appointed residuary legatee.

The conveyance is taken in the first instance to testamentary trustees, who are directed to make over the heritable estate to Robert Grant, "on his attaining the years of majority, his heirs and assignees, for ever." The bequest of the residuary estate is somewhat differently expressed; for it contains an unconditional nomination of Robert Grant as residuary legatee, and then a direction to the trustees, upon his attaining the age of twenty-one, "to dispone, convey, and make over to him, his heirs and assigns, the whole residue of my means and estate not otherwise specifically disposed of by these presents." The question is, Whether either or both of these bequests will lapse if Robert Grant should not attain the age of twenty-one, according to the brocard, "*Dies incertus in testamentis conditionem facit.*"

This question belongs to a class that has been very largely discussed in the law of Scotland, and one to which it is difficult to lay down any general rule, so much depends on the indication of the testator's intention, as disclosed in his settlement. Unquestionably where an uncertain term,—that is to say, a term which may or may not arrive,—is adjected to a testamentary gift or bequest, the presumption is that the legatee's survivance of that term is a condition of his right. It may be otherwise, but not necessarily otherwise, where the term is in words adjected not to the gift itself, but to the payment or enjoyment of it. In the Roman law this distinction was allowed great weight, and Voet in his Commentary lays the rule down thus:—"*Conditioni similis est dies incertus: nisi tantum solutionis non obligationis morandæ gratia adjectus sit,*" B. 28, t. 8, s. 32. In the earlier cases which were quoted to us from the bar, especially in those of *Omey*, *Sempil*, and *Home*, this distinction was controverted, and perhaps with reason. But still it was clearly laid down in *Sempil's* case, and still more clearly in the subsequent case of *Wood*, reported by Hume, p. 271, that these presumptions must yield to the manifest intention of the testator. Indeed it cannot be doubted that before the uncertain term can operate as a condition of the gift it must be attached or adjected to the gift, and that an uncertain term may be attached to the payment of a gift, while the gift itself is intended to take effect and to vest at the testator's death. An example of this is to be found in the most recent and important of the cases quoted to us, that of *Ralston*, in the 4th vol. of Dunlop. It may perhaps be safely said that one main element in determining how far an uncertain term is adjected as a condition of a legacy, is to consider who is burdened by the legacy, and in whose favour the condition is conceived. An ulterior destination of a specific legacy will go far to solve the question against the legatee; while a bequest of residue to a third party will have a similar, but by no means so conclusive an effect. But if no one but the heir-at-law, or the next of kin, succeeding *ab intestato*, is burdened by the legacy or benefited by the alleged condition, the presumptions will be strongly the other way.

Applying this view to the present case, I have not found the solution of it attended with difficulty on either of its branches. It is true that in the case of the heritable estate the uncertain term is in words adjected to the gift itself. But I am of opinion, notwithstanding, that it was so adjected for the benefit of the legatee alone, and with the object solely of delaying the enjoyment of the gift, which was to take immediate effect. My opinion proceeds on these considerations,—1st, That the cause of granting implies that it was the testator's fixed intention that the family of Grant should benefit by the bequest. 2dly, That in pursuance of that intention the gift is taken to Robert Grant, his heirs and assigns, for ever, the latter words being such as could receive no operative effect on any other construction. 3dly, There is no other person expressed who on any contingency is to benefit by the gift. And lastly, and to my mind quite conclusively, the only general representative contemplated by the deed as the person who would be burdened by the gift and benefited by the condition, is Robert Grant himself. And as it would be absurd to provide a condition in which no one had an interest excepting the party bound by it, I conclude that no such condition was contemplated. Otherwise the condition was one to take effect only in the event of intestacy, which is not to be presumed.

Even, however, if I had more doubts on the first of these questions, I can find no room for doubt on the second. The residuary clause presents a very good example of an absolute gift with an uncertain term attached to the payment of it. The nomination of Robert Grant as residuary legatee is unconditional,—the direction to the trustees to pay is alone limited by the uncertain term. Thus, in this instance both the words and the intention coincide. If there be a condition in the destination of the heritage, it is one in favour of the residuary legatee, who takes everything heritable and moveable not otherwise specifically disposed of; and therefore whatever Robert Grant fails to take under the first clause vested in him *a morte testatoris* under the residuary bequest. As a general rule, the presumptions in question will tell more strongly in favour of, and more feebly against, a residuary legatee than in the case of a specific legacy, seeing that a testator is always presumed to test on the whole of his property; and the character of residuary legatee is in itself inconsistent in some measure with a postponed term of vesting, unless very clearly provided. But this clause hardly requires the aid of this distinction.

Lord Neaves—I concur. In regard to wills generally, the great leading principle is to discover and give effect to the intention of the testator. This is a wide and vague rule, and no doubt the law has adopted certain special rules and presumptions which are supposed to be of use in arriving at that intention. And there is no doubt that the Roman law and our own adopted the view that the adjection of a *dies incertus* is presumably a suspension of the right until the *dies* should arrive, which is then held to be a condition of the gift. But this is merely a presumption, and there may be circum-

stances so strong as to show that the presumption does not afford a true clue to the intention of the testator. I think such circumstances exist here. I think that the first clause of the settlement is capable of meaning that from the time of the testator's death a trust-relation should exist between the beneficiary and the trustees, and that interpretation is corroborated by the residuary clause, in which the beneficiary is without any qualification appointed residuary legatee, and the death of a testator is the commencement of a residuary legatee's right. If the trustees had declined the executorship, this gentleman could have confirmed as executor and true administrator, which shows that from the time of the death of the testator he was the beneficiary. On the words of the settlement, then, I doubt if the maxim of *dies incertus* applies, and looking to the inductive clause and the exclusion of any other interest, my view is strongly confirmed that the decision your Lordship proposes will best carry out what was the true intention of the testator.

Lord Ormidale—I concur. In the present case the question seems to be, 1st, Is there room for the application of the maxim *dies incertus;* and 2dly, If there is, does it apply to the constitution of the gift, or merely to the time of payment? The first point I think is free from doubt. I think there is a *dies incertus*. On the second point, we start with this consideration, that at the time when the settlement was made, including the codicils, Robert Grant was only three or four years old. Now I can quite understand that while the General desired his estate to go to Robert Grant, he so framed his settlement as that a mere child might not come into possession. This, along with other considerations, proves to my mind that the *dies incertus* applied merely to the time of payment. This is quite clear with regard to the disposal of the moveable estate and any heritage not previously disposed of, and if so, it throws light on the disposal of the special heritable subjects. The case of *Park* v. *Allan* also confirms this view. The destination is not to Robert Grant alone, but to heirs and assignees; now assignees could not be held as conditional institutes if there was no vesting. In order to give these words a meaning I must suppose vesting *a morte testatoris*.

Counsel for First Parties—Pearson and Balfour. Agents—Gibson-Craig, Dalziel & Brodies, W.S.

Counsel for Second Parties—Moncreiff and Asher. Agents—Murray, Beith & Murray, W.S.

SPRING CIRCUIT.

April 10.

DUMFRIES.

LORD ADVOCATE *v.* THOMAS SNEDEN.

Crime—Indictment—Relevancy—Concealment of Property on the eve or in Contemplation of Bankruptcy.

The crime libelled in an indictment was "the wicked, fraudulent, and felonious concealment or putting away of property or effects, by a person insolvent or on the eve or in contemplation of bankruptcy, for the purpose of defrauding creditors." It appeared that the accused had never actually been bankrupt, but had executed a trust deed in favour of his creditors.—*Held* that the indictment was bad, and prisoner *dismissed*.

Thomas Sneden, painter, Dumfries, was indicted for the wicked, fraudulent, and felonious concealment or putting away of his property or effects, while insolvent or on the eve or in contemplation of bankruptcy, for the purpose of defrauding his creditors, in so far as (1), on the 9th and 10th days of February 1874 he did conceal or put away the household furniture belonging to him; also, two barrels of white lead; a hamper containing a quantity of wall papers and brushes; a bag containing a quantity of glue; and two cans of varnish, by carrying off the same from the house and shop in Dumfries by railway to Liverpool, and to a house in Violet Street, Toxteth Park, Liverpool, occupied by him, and to the house or premises in or near Berkley Street, Liverpool, occupied by John Robinson, dairyman, and this he did being in insolvent circumstances, or on the eve or in contemplation of bankruptcy, for the purpose of defrauding his lawful creditors; likeas (2), he did, in pursuance of the said fraudulent design, on or about the 9th day of February 1874, conceal or put away six hundred and fifty-eight or thereby pieces of wall paper, by carrying off the same from the house and shop in Dumfries aforesaid, to the house in Queensberry Square, Dumfries, occupied by John Dickson, jeweller.

It appeared, in answer to a question by the Court, that the accused was never actually a bankrupt, but had executed a trust-disposition for behoof of his creditors.

The Advocate-Depute (Montgomery) in support of the indictment, argued that the "concealing or putting away of property or effects on the eve or in contemplation of bankruptcy, for the purpose of defrauding creditors," had long been an indictable offence. A man was on the eve of bankruptcy who went the length of executing a deed in which he said that he was unable to pay his debts and had therefore executed a trust deed for the benefit of his creditors.

Lord Young—A sequestrated bankrupt is under legal obligation to make full disclosure and surrender of his property that it may be distributed among his creditors, and a violation of or failure to perform this obligation may subject him to criminal prosecution. The mere failure to disclose and surrender, if willful, will amount to perjury on the statutory oath: and if it shall appear that the bankrupt has previously (whether before or after bankruptcy is immaterial) secreted the property which he has failed to disclose and surrender, I think it not doubtful that he is guilty of an indictable offence of the nature of embezzlement. Sequestration is the clearest and strongest case, for it operates a transference of the bankrupt's property, and renders criminal the fraudulent retention by him of any part of it, although the steps with a view to render such retention effectual and secret shall have been taken before the sequestration, or even before bankruptcy. But bankruptcy alone, without sequestration, is a *status* which not only changes a man's condition with regard to his property, but to some extent operates retrospectively upon his prior dealings therewith. This is clear and very familiar with respect to civil consequences and remedies, and it may be that after the *status* of bankruptcy has actually attached to a man, his