

Tuesday, June 28.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

TURNBULL *v.* TURNBULL, GRANT, & JACK.

Partnership—Retirement of Partner—Compensation.

This was an action of count and reckoning raised by John Turnbull against the firm of Turnbull, Grant, & Jack, engineers and ironfounders, Canal Basin, Glasgow, of which he was formerly a partner. The circumstances which gave rise to the action were these—The pursuer had contracted intemperate habits, and on 16th July 1866 he agreed with his copartners that he would take the pledge of total abstinence, and in the event of his breaking that pledge he consented to cease *ipso facto* to be a member of the firm, he receiving his share of its funds “as provided for by the contract of copartnery.” In August 1877 he broke his pledge, and by letter to his copartners acknowledged this; but on his requesting another opportunity of recovering himself the firm gave him the indulgence craved. In December 1877 he, however, again broke his pledge, and the firm thereon made certain proposals to him as to his remaining in the concern, which he rejected, with the result that he ceased to be a partner of the firm as at the 13th of December 1877. He thereafter raised this action for count and reckoning, or otherwise for payment of £15,000 as the value of his interest in the business at this date. The defenders contended that the action was excluded by an article in the contract of copartnery providing for arbitration “in case of any dispute or difference between the parties in relation to the business thereby agreed to be carried on.” The Lord Ordinary (CURRIEHILL) found that the arbitration clause did not apply to the questions raised in the action, and pronounced a number of findings to the effect that the pursuer had bound himself to leave the firm on breaking the pledge which he agreed to take; and further, that on a sound construction of the correspondence between the parties the share to which the pursuer was entitled ought to be ascertained according to article 11 of the contract of copartnery, which provided that any partner contravening any of the articles of the contract should not only cease to be a partner of the firm, but should be only entitled to draw his share of the capital, stock, and interest in the concern as the same stood at the balancing of the books immediately preceding the contravention, *i.e.*, 31st July 1877.

The pursuer reclaimed, and maintained, 1st, that he had not contravened the contract of copartnery, but had voluntarily ceased to be a partner of the firm, and was entitled to receive his share of the company funds in the manner provided for in the case of a deceasing or insolvent partner; and 2d, that in any event he was not bound by the balance-sheet immediately preceding the date when he ceased to be a partner, as it had never been signed or approved of by him. Their Lordships of the Second Division on 12th June 1879 remitted to Professor Robertson, Glasgow, to inquire into and report on the value

of the property belonging to the firm as at 31st July, the date of the last balance, and at 13th December 1877, the date when the pursuer ceased to be a partner, and that both on the the footing of the business being a going one and on the footing of it being wound up, and also specially to report to what extent the result would be affected by the adoption of either principle. Professor Robertson reported that the balance due to the reclamer at the immediately preceding balance in the books of the firm on 31st July 1877 was £4801, 8s. 1d., and that this sum had been duly paid to him, and the result of his examination showed that up to that date the reclamer had been duly credited with the salary, profits, and interest due to him under the contract of copartnery. Upon a re-valuation of the ground, buildings, tools, and work in progress belonging to the firm as at 31st July and 13th December 1877, on the footing of the business being a going one, Professor Robertson was of opinion that the value of these items as standing in the firm's books as at the date of the last balance must be increased.

The Court being of opinion that the reclamer was to be dealt with on the footing of his having voluntarily ceased to be a member of the firm, and that he was entitled to receive his share in the business as a going one, held that he was entitled to be paid out as at 13th December 1877, and was entitled to a share of the increased values brought out by Professor Robertson, to salary from 31st July to 13th December 1877, and to be credited with his share of any profit made between these dates, or debited with his share of the loss, if any, together with interest upon the sums due to him at five per cent.; and applying the figures brought out by Professor Robertson in his report, the Court pronounced this interlocutor:—

“Recal the interlocutor reclaimed against: Find that the balance still due to the pursuer in respect of his having ceased to be a partner of the firm of Turnbull, Grant, & Jack on 13th December 1877 amounts to £1529, 10s. 9d. sterling; Ordain the defenders to make payment to the pursuer of the said sum of £1529, 10s. 9d., and decern: Find the pursuer entitled to expenses,” &c.

Counsel for Reclamer—D.-F. Kinnear, Q.C.
—Rhind. Agents—Smith & Mason, S.S.C.

Counsel for Respondents—Asher—Pearson.
Agents—Campbell & Smith, S.S.C.

Wednesday, June 29.

FIRST DIVISION.

[Lord Fraser, Ordinary

ROGERSON AND OTHERS (ROGERSON'S

TRUSTEES) *v.* ROGERSON.

Succession—Marriage-Contract—Vesting—Power of Appointment—Acquiescence.

A husband in his marriage-contract directed his trustees to hold the estate conveyed to them for the benefit of his children, subject to such conditions and in such shares as either he or his wife might

appoint by any deed or instrument. The husband, who survived his wife, executed a trust-disposition in which he directed his trustees to pay the only child of the marriage the income of the marriage-contract estate till he reached the age of thirty, and then pay him the capital, and if he failed to reach the age of thirty, and died without issue, then to pay the capital to certain legatees. *Held* that the estate vested in the child at his father's death, and that his claim thereto was not barred by acceptance of the income provided by his father's trust-settlement for several years.

This was a reclaiming-note against an interlocutor by Lord Fraser in an action of multiple-poining. The fund *in medio* consisted of the personal estate left by the late John Rogerson, Kirkburn, Dumfries, amounting to about £7245, and the competition for preference arose between the trustees acting under his trust-settlement and the executor-nominate of his son, the late Samuel David Rogerson, farmer, Wamphray. The executor claimed on the ground that the right to the fund had vested in the son Samuel Rogerson, who was the only child of the marriage under and in terms of the antenuptial contract between his father and mother, which conveyed the trust-estate to trustees for behoof of his wife, to whom the annual produce of the trust-moneys was directed to be paid during her life, and after the death of both spouses, "then in trust and for the benefit of all and every the children of the said John Rogerson and Mary, his intended wife, in such shares and proportions, and subject to such conditions and provisions, as they, the said John Rogerson and Mary, his intended wife, or the survivor of them, shall by any deed or instrument, or last will and testament, duly executed and attested, direct and appoint." The trustees claimed in virtue of a trust-deed and settlement by John Rogerson, which he executed after his wife's death in terms of the above clause in his marriage-contract. In this he directed his trustees to pay the income of his estate to his only child Samuel till he attained the age of thirty, and then to convey over to him the capital, and failing Samuel attaining the said age and dying without issue, he appointed his estate to be divided amongst a number of other relations. They pleaded (1) that the fund had not vested in Samuel David Rogerson, as he had died before the age of thirty years complete; and (2) that he had homologated his father's settlement by taking payment of the income and not claiming the capital after his father's death.

The Lord Ordinary sustained the claim of Samuel David Rogerson's executor, adding this note:—"The indenture or contract of marriage between John Rogerson and Mary Dobie was executed in England, and is couched in the phraseology of English conveyancing law. It is not pleaded that it ought to be construed according to the law of England, or that any different rules of construction should be applied to it than those rules which would govern a marriage-contract executed in Scotland. Therefore, dealing with this document as if it had been a Scotch marriage-contract, the question to be determined is, Whether the estate of the father John Rogerson vested in his son Samuel at the father's death?"

"The Lord Ordinary is of opinion that it did. By the marriage-contract John Rogerson assigned, covenanted, promised, and agreed that on and immediately after his death the trustees therein named should enter upon and take possession of his whole personal property, and hold the same for the purposes set forth in the deed; and further, that he should immediately after the marriage make his last will, bequeathing his personal property to these trustees as his executors, and should not alter or revoke the same. The trust so created was for behoof of Mary Dobie, the wife, to whom the annual produce of the trust moneys was directed to be paid during her life, and after the death of both spouses, 'then in trust and for the benefit of all and every the children of the said John Rogerson and Mary, his intended wife, in such shares and proportions, and subject to such conditions and provisions, as they, the said John Rogerson and Mary, his intended wife, or the survivor of them, shall by any deed or instrument, or last will and testament, duly executed and attested, direct and appoint.'

"John Rogerson did not immediately after the marriage execute a last will and testament, as contemplated by the contract, and it was only after his wife's death that he executed the trust-disposition and settlement referred to upon the record, by which he directed his trustees to pay the income of his estate to his only child Samuel till he attained the age of thirty, and then to convey over to him the capital, and failing Samuel attaining the age of thirty, and dying without issue, John Rogerson appointed his estate to be divided amongst a number of other relations.

"The idea in the mind of the truster seems to have been that he had full power to do with his estate, notwithstanding the marriage-contract, whatever he pleased. This, however, was a mistake. He was bound to leave the property to the children of the marriage, having power, no doubt, of apportionment or division among them if there were several children; and apparently it was in the exercise of this power that he made the disposal of the estate in the way he did by his trust-disposition and settlement. Now, as there was only one child, there was no necessity for apportionment or division, because any division could only be between that child and himself, or his legatees, which would be a fraud upon the contract (*Brodie's Trustees v. Mowbray's Trustees*, 12th November 1840, 3 D. 31). Whether he had power to postpone the payment of the capital to the only child of the marriage, and give to him only the income till he attained the age of thirty, it is not necessary to determine. The parties assumed at the debate that under the clause authorising John Rogerson to impose 'conditions' he had power to postpone the payment. But this point has no bearing upon the main point, as to whether the right of Samuel, the son, became a vested right at his father's death which he could convey by his last will.

"The marriage-contract directs the trustees to hold the funds for the widow, paying her the income while she lived, and then for behoof of the children of the marriage. There is nothing in this deed of the nature of a destination-over or a clause of survivorship to prevent vesting im-