

employment, I do not think that the precise nature of the fault is of any importance. No such distinction has, so far as I know, ever been taken, and I do not think that any solid ground for such a distinction exists. My opinion therefore is that this claim also falls to be dismissed.

The third claim of the pursuer is for damages on account of the alleged failure of the master to make provision for his maintenance at, and return from, Colombo, and to give him a discharge.

The first of these grounds does not seem to have been maintained before the Lord Ordinary, but it was so before us, and must be disposed of. The statutory enactment upon which the pursuer founds is the 34th section of the Merchant Shipping Act 1906. By that section it is provided that if a seaman "suffers from illness (not being venereal disease, or an illness due to his own wilful act or default, or his own misbehaviour), the expenses of his maintenance until he is cured or returned to his proper port, and of his conveyance to the port, shall be defrayed by the owner of the ship without any deduction from his wages."

Here again the pursuer's averments are of the most meagre description. He only says—"No arrangement had been made" (when the ship left Colombo) "for the maintenance of the pursuer and for his return to the United Kingdom." Now the pursuer's own statement is that on the 2nd December he was taken from the ship to the hospital, that he remained in the hospital until the 9th December, and that on the 10th December he sailed for London in the "Moldavia" as a distressed seaman. He does not say that he was charged anything for maintenance and medical attendance in the hospital or for his voyage home, and it is certain that no deduction was made from his wages on account of these matters. Further, there is very good reason to believe that the pursuer's illness was due to his own misbehaviour. It therefore seems to me to be clear that the pursuer has made no relevant averment of failure to comply with the statutory provisions in regard to maintenance.

In regard to the claim in respect of the alleged failure of the master to give the pursuer a certificate of discharge, I take the same view as the Lord Ordinary. The duty of giving a certificate of discharge to a seaman discharged at any place out of the United Kingdom is, by the 31st section of the Merchant Shipping Act 1906, laid upon the master. A similar provision is made in regard to a seaman discharged in the United Kingdom, by the 128th section of Merchant Shipping Act 1894. The only substantial difference between the two enactments is that in the latter case failure to give the certificate renders the master liable to a fine not exceeding £10. I do not know why a similar penalty was not attached to the master's failure to give a certificate to a seaman discharged out of the United Kingdom, when it is even more impossible than in the case of a discharge in the United Kingdom for the owners to see that the duty is performed. I think,

however, that it is sufficiently plain that the duty of giving a certificate of discharge is in both cases laid upon the master alone, and that he alone is responsible for failure to perform the duty.

I am therefore of opinion that the action was rightly dismissed by the Lord Ordinary.

The LORD JUSTICE-CLERK and LORD ARDWALL concurred.

LORD DUNDAS was absent.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Pursuer (Reclaimer)—Mac-Robert—Gentles. Agent—T. M. Pole, Solicitor.

Counsel for Defenders (Respondents)—Spens—Paton. Agent—Campbell Fail, S.S.O.

Thursday, May 26.

SECOND DIVISION.

[Lord Cullen, Ordinary.]

TURNBULL v. TURNBULL.

Revenue—Estate Duty—Property Passing on Death—Cesser of Liferent—Payment of Duty by Second Liferenter—Right of Liferenter to Charge Fee where Fiar Avers Liability to Account—Form of Charge—Finance Act 1894 (57 and 58 Vict. cap. 30), secs. 1, 2 (1) (b), 9 (5), 23 (18).

A disposed an estate to himself in liferent and after his death to B in liferent and to C in fee. On A's death B paid estate duty and presented a petition for an order on C to grant a bond and disposition in security over the estate in her (B's) favour for the amount of the duty.

Held (1) that the subject chargeable with the duty was the fee of the estate and not merely the liferent, and that B was entitled to have the duty charged on the estate by way of bond and disposition in security, and was not bound to charge it by way of a terminable charge; and (2) that B was entitled to an order on C to grant the bond notwithstanding an averment by C that B had in her hands the proceeds of sales of timber the fee of which belonged to him.

The Finance Act 1894 enacts—section 1—that in the case of every person dying after the commencement of the Act, estate duty shall be levied on the principal value of all property passing on his death. Section 2 (1)—"Property passing on the death of the deceased shall be deemed to include . . . (b) property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest." Section 9 (5)—"A person authorised or required to pay the estate duty in respect of any property

shall, for the purpose of paying the duty or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty, and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof." Section 23—(Providing for the application of part of the Act to Scotland)—(18)—"Where any person who pays estate duty on any property, and in whom the property is not vested, is by this Act authorised to raise such duty by the sale or mortgage of that property or any part thereof, it shall be competent for such party to apply to the Court of Session (a) for an order of sale of the property or part of it . . . or (b) for an order ordaining the person in whom the property is vested to grant a bond and disposition in security over the property in favour of the person who has paid the estate duty for the amount of the said duty. . . ."

On 24th November 1909 Mrs Annetta Amelia Turnbull, widow of Colonel George Wilmot Maitland Turnbull, presented a petition for authority to raise and charge estate duty under the Finance Act 1894 (57 and 58 Vict. cap. 30).

The petitioner averred that by disposition and settlement dated 12th June 1900 the said Colonel George Turnbull disposed to and in favour of himself in life, and on his death to his wife, the petitioner, in life, and to his brother Colonel Charles Frederick Alexander Turnbull in fee, his one-half share of the lands of Dalladies and others; that Colonel George Turnbull died on 18th June 1907; that in respect of the passing of said lands on the death of Colonel George Turnbull estate duty became exigible in terms of the Finance Act 1894, and was paid by the petitioner. The petitioner, in virtue of sections 9 (5) and 23 (18) of the Finance Act, craved the Court to grant an order on Colonel Charles Turnbull to grant a bond and disposition in security over the said lands in favour of the petitioner or her nominee for the said estate duty and expenses attending the settlement of the same.

Answers were lodged by Colonel Charles Turnbull, in which he averred—"Before presenting the petition the petitioner asked the respondent to grant a bond over the estate in question for the amount which she now wishes charged upon the estate, and was informed by him that he could not agree to do so, in respect that she had in her hands moneys received for timber sold off the estate to the fee of which he was entitled—more than sufficient to pay the death duties. From time to time since the granting of said disposition various sums of money have been received by the petitioner and her deceased husband for timber sold off the estate, the property in which belongs to the respondent, and for which the petitioner's estate will be liable on the termination of the life in her death. . . . When the present question was raised, the respondent, through his agents, obtained from Messrs Macrae, Flett,

& Rennie (the petitioner's agents) estate accounts showing receipts and alleged expenditure of timber money. He has now made up a statement of the payments he objected to, and it is herewith produced and referred to. He avers that the respondent is accountable to him for a sum of over £500. . . . The petitioner is the sole executrix and universal legatory of her late husband. When asked to grant a bond over the estate for the amount of the death duties, the respondent was willing to let the question of the timber money stand over, and informed the petitioner's agents that he would himself pay the estate duty, or consent to the petitioner paying it, and raising the money by means of a terminable charge over the estate. Notwithstanding this the petitioner paid the duty without consulting the respondent, and now seeks to have the amount charged upon the estate. . . . In these circumstances the respondent submits that the prayer of the petition should not be granted (1) in respect that the petitioner is accountable to him as far of the estate for timber money, which is more than sufficient to pay the death duties; (2) that in any event he is entitled to insist on the money being raised by means of a terminable charge over the estate."

On 22nd December 1909 the Lord Ordinary (CULLEN) repelled the answers, remitted to a man of business to inquire and to report, and granted leave to reclaim.

Opinion.—"There must be a remit in this petition, but I think it is proper that I should deal with the answers at this stage in order that the scope of the inquiry under the remit may be defined.

"I am of opinion that the answers are irrelevant. The petitioner has paid estate duty to the Crown in respect of a statutory liability which lay upon her, and it is not disputed that she has a right to a charge upon the estate mentioned in the petition, of which she is life tenant, apart from the two points which are raised at the end of the answers.

"In the first place, the respondent asserts, rather than relevantly avers, that there have been dealings with the timber on the estate over a considerable period of years, as the result of which, he says, he will on the petitioner's death have a claim against her estate for money. This does not, however, seem to me to raise such a consideration as the Court can entertain as an answer to the petitioner's right to a charge for the duty which she has undoubtedly paid. I think the respondent's claim must, if well founded, be made good against the petitioner in some other kind of proceeding.

"In the second place, the respondent contends that *estd* the petitioner is entitled to a charge, that charge should be in the form, not of a mortgage as proposed, but of 'a terminable rent charge.' It appears to me, on a consideration of section 9, sub-section 6, and section 23, sub-section 18, that the respondent is not well founded in this contention, and that in such a case

as this, where a liferenter has paid duty, her right is to a charge in the form of a mortgage. These being my views regarding the answers, I shall repel them, and make the usual remit to a man of business."

The respondent reclaimed, and on 12th February 1910 the Court recalled the interlocutor of the Lord Ordinary *hoc statu* and remitted to a man of business to inquire into the facts set forth in the petition and answers, with the exception of the question regarding timber money.

The reporter (Mr Thomas Ranken, W.S.) lodged his report, in which he stated that in his opinion the prayer of the petition might be granted and an interlocutor pronounced ordaining the respondent to grant a bond and disposition in favour of the petitioner over the said lands for the estate duty and expenses incurred in settling the same.

On the case being again heard in the Division the respondent and claimer argued—(1) What passed on the death of Colonel George Turnbull was only the liferent of the lands, the fee being already vested in the respondent. The duty was therefore chargeable on the liferent—Finance Act 1894 (57 and 58 Vict. cap. 30), sections 1, 2 (1) (b), 9 (5), and 23 (18). (2) Assuming that the duty was chargeable on the fee of the estate, the petitioner could not be entitled to any charge on the estate, so long as she had the proceeds of sales of timber, which formed part of the fee, in her hands. She could only take credit for the estate duty in accounting for the sums received from the sales of timber. At least the respondent was entitled to have the present proceedings sisted pending the decision of the action which had now been raised regarding the timber money—*Ross v. Ross*, March 9, 1895, 22 R. 461, 32 S.L.R. 337. In any event the respondent was entitled to have the money raised by means of a terminable charge instead of a bond and disposition in security.

Argued for the petitioner—The estate on which duty was payable on the death of Colonel George Turnbull was the fee and not the liferent—Finance Act 1894 (57 and 58 Vict. cap. 30), sections 2 (1) (b) and 7 (7); *Lord Advocate v. Maclachlan*, June 13, 1899, 1 F. 917, 36 S.L.R. 727. The petitioner was therefore entitled to charge the fee of the estate with the estate duty paid by her, and the proper method of doing that was by bond and disposition in security—Finance Act 1894, sec. 23 (18); *Laurie*, February 22, 1898, 25 R. 636, 35 S.L.R. 496; *Menzies*, February 18, 1903, 10 S.L.T. 636; *Morris v. Morris' Trustees*, March 21, 1904, 11 S.L.T. 793. Nor was the petitioner bound to pay the duty out of the timber money, even assuming that the respondent's averments regarding the same were well founded. It followed therefore that the petition should not be sisted to await the decision in the action regarding the timber money.

At advising, the opinion of the Court (the LORD JUSTICE-CLERK, LORDS LOW, ARDWALL, and DUNDAS) was delivered by

LORD LOW—The petitioner is the widow of the late Colonel George Turnbull, who died in June 1907. In July 1900 he had executed a disposition of the lands of Dalladies, in Kincardineshire, in favour of himself in liferent, and after his death to the petitioner in liferent and to his brother Colonel Charles Turnbull in fee. Colonel George Turnbull accordingly had, when he died, only the liferent of the estate, the fee being in Colonel Charles Turnbull. The petitioner became liferentrix on the death of her husband, and she paid the death duties due in respect of his death, which amounted to £175 odds.

By section 9 (5) of the Finance Act 1894 it is provided—[*His Lordship quoted the section*].

Then by section 23 (which provides for the application of the Act to Scotland) it is enacted (sub-section 18)—[*His Lordship quoted the sub-section*].

The petitioner accordingly presented the present petition for the purpose of obtaining an order from the Court ordaining Colonel Charles Turnbull to grant in her favour, or in favour of any person whom she might name, a bond and disposition in security over the estate for the amount of the estate duty.

Colonel Charles Turnbull has lodged answers in which he opposes the application upon two grounds, namely, (1) that the petitioner is bound to account to him as far for the price of timber which Colonel George Turnbull cut and sold, and which is more than sufficient to pay the death duties; and (2) that he (the respondent) is at all events entitled to insist that the money shall be raised by means of a terminable charge over the estate, and not by bond and disposition in security.

I shall deal with the first of these objections by-and-by, but as regards the second I may say at once that in my opinion it is untenable. In the first place, in the application of the Act to Scotland (section 23), while the Court are empowered to order a sale of the estate or the granting of a bond and disposition in security, no power is given to authorise a terminable charge. In the second place, even under section 9 (5) of the Act, I do not think that the petitioner could be compelled to charge the amount of the death duties which she has paid by way of a terminable charge and not by bond and disposition in security, because to do so would be to her prejudice. I take it that a terminable charge would involve a yearly payment of such an amount as would meet the interest and also repay the capital within a certain number of years, and the result would be that until that period had expired (which might not occur during the petitioner's lifetime) her liferent would be reduced by a yearly amount much larger than the interest payable under a bond and disposition in security.

There was another view, however, which was urged upon us by the respondent's counsel, although nothing is said about it in the answers. It was argued that the property which passed on the death of the

petitioner's husband was the liferent of the estate, and that therefore it is the liferent and not the fee which is the property upon which the Act authorises the amount of the death duties to be charged.

That argument is rested mainly upon the first section of the Act, which provides that "In the case of any person dying after the commencement of this Act, there shall be levied and paid upon the principal value of all property which passes on the death of such person a duty called estate duty."

Now if that enactment had stood alone there would have been much force in the respondent's argument, but I think that the next section of the Act shows that it is not well founded. By that section 2 (1) (b) it is provided that—[His Lordship quoted the section].

The effect of that enactment seems to me plainly to be that for the purposes of the Act the property which passed on the death of the petitioner's husband was to be deemed to be, not his liferent interest in the property, but the property itself to the extent to which a benefit accrued or arose by the cesser of that life interest. How the value of that benefit is to be calculated is provided for by section 7 (7) (a), which provides that "if the interest extends to the whole income of the property" the value shall be "the principal value of the property."

It therefore seems to me to be clear that the property which the petitioner is entitled to charge in terms of the 9th and 23rd sections of the Act with the death duties, which she has paid, is the property itself and not merely the life interest to which she succeeded.

I now come to the question of the price of the timber alleged to have been cut upon the estate and sold by the petitioner's husband during the period when he was only a liferenter. The respondent's contention is that the death duties which the petitioner has paid should be taken out of that money and not charged upon the estate. That might be a very reasonable arrangement for the parties to make, but I do not know upon what ground it can be held that the respondent can demand as a matter of right that it shall be done. We were not referred to any provision in the statute giving him any such right. The Lord Ordinary's view was that the respondent's statements in regard to the timber money did not amount to a relevant objection to the prayer of the petition. At the same time his Lordship indicated that the respondent's claim that the petitioner had in her hands a sum of money which represented the price of timber might properly be raised in a separate proceeding, and the respondent has accordingly brought an action, which is pending before the Lord Ordinary, in regard to that money. Again, when the reclaiming note first came before this Division, I gather that the same view was taken as that expressed by the Lord Ordinary, because when the usual remit was made to a man of business there was

specially excepted from the remit "the question regarding timber money." The respondent now asks that procedure in the petition should be sisted to await the result of the action which he has raised. I am of opinion that that motion should not be granted. The petitioner has paid the duties which became due in respect of the heritable estate, and her statutory right is to have the amount charged upon that estate. The fact that there may be a sum of money in petitioner's hands which belongs in fee to the respondent, and to the petitioner in liferent only, is not a sufficient ground in my opinion for the postponement of the exercise of the petitioner's right. I suppose that if the respondent is able to prove the existence of a sum of timber money additional duty will require to be paid in respect thereof, and it may be that the amount will be a proper charge against the fund. But that appears to me to have nothing to do with the present application. I am accordingly of opinion that an interlocutor should be pronounced in terms of Mr Ranken's report.

The Court remitted to the Lord Ordinary to pronounce an interlocutor in terms of the report.

Counsel for Petitioner—W. L. Mackenzie. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for Respondent—Pitman. Agents—Tait & Crichton, W.S.

Friday, June 3.

FIRST DIVISION.

(SINGLE BILLS.)

LORD ADVOCATE, PETITIONER.

Administration of Justice—Process—Production of Document from Public Register—Criminal Trial.

On a petition by the Lord Advocate setting forth that an indictment had been served on a certain person charging him with forging a will, the Court granted warrant to the Keeper of the Records to deliver to the Clerk of Justiciary the will in question for the purpose of being used in the ensuing criminal proceedings.

The Lord Advocate presented a petition to the First Division of the Court of Session setting forth—"That an indictment has been served at the instance of the petitioner upon Francis Lamond Lowson, sometime solicitor in Edinburgh, and now a prisoner in the prison of Edinburgh, charging him with the crime of uttering a forged document. The second diet in said trial is fixed to take place in the High Court of Justiciary in Edinburgh on 27th June 1910.

"That the document which is alleged to have been forged purports to be the last will and testament of Jessie Stewart