

SECOND DIVISION.

LORD ADVOCATE v. STEVENSON.

Succession Duty Act, 16 & 17 Vict. c. 51. Held (aff Lord Ormisdale) that a devolution by law of a beneficial interest in expectancy, where the expectancy is never realised, and where possession is never attained, is not a succession in the sense of the Succession Duty Act, and therefore that where a person succeeded as her sister's heir to certain house property and died within three months thereafter, without making up any title or drawing any rents, her interest was not chargeable with succession duty.

Counsel for the Pursuer—The Lord Advocate, the Solicitor-General, and Mr Rutherford. Agent—Mr Angus Fletcher.

Counsel for the Defender—Mr Watson. Agents—Messrs Grant & Wallace, W.S.

The following are the facts as to which the parties are agreed, upon which the present question arises for the decision of the Court. On the 5th of June 1862, Miss Janet Rebecca Finlay, of Musselburgh, died intestate, infet in fee simple in a dwelling-house in Edinburgh. She was survived by a younger and only sister, her heir-at-law, Miss Williamina R. Finlay. The heir-in-heritage of both these ladies is the defender. Miss Williamina Rutherford Finlay died on 10th September 1862, without having made up a title to the said dwelling-house. After her death the defender made up a title to the house, as nearest and lawful heir to Miss Janet Rebecca Finlay, in which character he obtained a writ of *clare constat* from the superiors, the magistrates of the City of Edinburgh. The rent of the dwelling-house for the half-year from Whitsunday to Martinmas 1862, during the currency of which both sisters died, was personal property belonging to Janet Rebecca Finlay. The defender entered to the beneficial enjoyment of the house at Martinmas 1862, and at Whitsunday 1863 he received payment of the rent then due for the preceding half-year. After the expiration of a year from that date he lodged in the Inland Revenue Office in Edinburgh the proper schedule for settling the two first half-yearly instalments of duty payable by him as successor to the heritable estate of Miss Janet Rebecca Finlay, and in December 1863 he paid as the amount of the two first instalments £3, 3s. 2d. When, however, the schedule was returned from the office of the Board of Inland Revenue in London, it was accompanied with a claim for duty in respect of the said dwelling-house as having formed part of the heritable succession of Miss Williamina Rutherford Finlay.

The questions upon which the opinion of the Court is desired are—

1. Whether the instalments of succession duty declared payable by the Act 16 and 17, Vict. c. 51, sec. 21, are due to the Crown by the defender in respect of a succession to the said dwelling-house, having, in the sense of the said Act, been conferred on Miss Williamina Rutherford Finlay upon the death of her sister, Miss Janet Rebecca Finlay?

2. Whether, under the Act 16 and 17 Vict. c. 51, succession duty is payable to the Crown by the defender in respect of a succession to the said dwelling-house having in the sense of the said Act been conferred upon him on the death of Miss Williamina Rutherford Finlay?

1. Whether the interest of the defender in the said dwelling-house is, in the sense of the Act 16 and 17 Vict., c. 51, the interest of a succession to the late Miss Janet Rebecca Finlay?

2. Whether, in the event of it being held that the late Williamina Rutherford Finlay had, in the sense of the said Act, an interest in said dwelling-house as successor to the late Janet Rebecca Finlay, the said Williamina Rutherford Finlay was not, at or

prior to her decease, in the sense of said Act, competent to dispose by will of a continuing interest in the said dwelling-house?

The Lord Ordinary (Ormisdale) found, in reference to the first two questions, that succession duty was not due to the Crown by the defender; and in answer to the two last questions (1) that the interest of the defender in the said dwelling-house is, in the sense of said Act, the interest of a succession to the late Miss Janet Rebecca Finlay; and (2) that even supposing the said Miss Williamina Rutherford Finlay had, in the sense of said Act, an interest in the said dwelling-house as successor to the said Janet Rebecca Finlay, the said Williamina Rutherford Finlay was not at, or prior to, her decease in the sense of said Act, competent to dispose by will of a continuing interest in the said dwelling-house. The effect of these findings of the Lord Ordinary is that the defender is not under any liability for duty as the successor of Miss Williamina Rutherford Finlay, but only as the successor of her elder sister, Miss Janet Rebecca Finlay. The Lord Ordinary proceeds on the principle that although the right of the defender to the property in question emerged at the period of Miss Williamina's death, his title is not derived from her, because the property never belonged, and was in no way vested in her. The house remained, after the death of the elder sister, Miss Janet Rebecca Finlay, as part of her *hereditas jacens*, until it was taken up by the defender.

To-day the Court pronounced decree of absolvitor.

The LORD JUSTICE-CLERK, who delivered the judgment of the Court, said—The question on the construction of the statute is new and difficult. The material facts, as ascertained by this special case, are that Janet Finlay, the owner of the house property in question, died on the 5th June 1862, that her only surviving sister, Williamina, was her heir-at-law, and that Janet did not dispose of the property by any *mortis causa* deed; that Williamina died on the 10th of September following, without having made up any title to the property, or having effectually disposed of the same; that she did not derive any benefit by occupation of the property, the same being let on lease to a tenant; that Stevenson, the defender, has made up a title to the property as heir-at-law of Janet Finlay, being however, at the same time, *jure sanguinis* heir-at-law of Williamina. In these circumstances it is conceded in point of law, that the rents of the property payable at Martinmas 1862 belong exclusively to the executors of Janet Finlay, and the rents payable at Whitsunday 1863 and subsequently belong exclusively to Stevenson in virtue of his existing title of property. The only important question is, whether a "succession" to this house property was within the meaning of the Succession Duty Act 1854 conferred on Williamina Finlay. To bring the case within the terms of the second section Williamina's succession must be conferred by a devolution by law to her on the death of her sister of a beneficial interest in this property or the income thereof in possession or expectancy. If Williamina came into immediate and direct possession of a beneficial interest or income, the case is clear, and the duty is chargeable. But it seems impossible, in the state of the facts, to arrive at this conclusion, for she could not derive any income or benefit from the estate unless she survived the term of Martinmas 1862, which she did not. But if her succession was not a beneficial interest in possession, the only other category within which it could fall under the Act would be a beneficial interest in expectancy. But such a beneficial interest is by the 21st section to be considered of the value of an annuity equal to the annual value of the property, payable from the date of her attaining actual possession, or being entitled to the rents for the residue of her life; and the duty is to be paid by instalments, the first of which is not payable till after the expiration of twelve months from the time she became entitled to the beneficial enjoyment. But as Williamina never did attain to the beneficial enjoyment, there are no data for estimating the

value of the annuity, and no terminus from which the times for payment of the instalments are to be calculated. It is not, in my opinion, intended that a devolution by law of a beneficial interest in expectancy, where the expectancy is never realised, and where possession or beneficial enjoyment is never attained, should be considered a succession within the meaning of the Act. I cannot say that I think the present case correctly answers the description of a beneficial interest accruing either in possession or in expectancy. On the contrary, it appears to me that if we are to construe the Act strictly, this is *casus improvisus*, which in a taxing Act would be sufficient for a judgment of absolvitor. But I am rather disposed to construe the Act according to its fair meaning and intention, comparing and combining the language and form of expression throughout the various sections. The Act is framed on the principle of using popular and not technical language, selecting with great discrimination and care words and phrases of comprehensive meaning equally applicable to the several parts of the United Kingdom. It is probably inevitable that such a statute should give rise to difficult questions of construction. But in the present case I am able to reconcile the language with what I conceive to be the principle and general scope of the statute. I do not think that any interest was intended to be taxed as a succession which never came into the actual beneficial possession of the successor; and such was certainly the case with Williamina Finlay, so-called successor to her sister. It was utterly barren, not because the property itself was unfruitful, but because she did not survive long enough to have a legal title to its fruits, or to the smallest part of them. On these grounds I answer the first question stated as arising on the special case in the negative. This also leads me to answer the second question in the negative, and the first alternative or counter-question in the affirmative. The defender Stevenson, is at common law, by virtue of his service and infetment, the successor of Janet Finlay, Williamina having been heir-apparent only, without possession, for about three months; and this state of the title at common law is conformable to my construction of the Succession Duty Act 1854; because there is no beneficial interest vested in Williamina as a successor interposed between Janet and the defender. I am on these grounds prepared to pronounce judgment of absolvitor in so far as regards the first count of the information, and do not find it necessary to answer the second alternative or counter-question.

Wednesday, Jan. 24.

FIRST DIVISION.

KERR v. JAMES AND OTHERS.

Competent and Omitted. Suspension of a final decree *in foro*, on grounds which might have been urged before the decree was pronounced (aff. Lord Mure), refused.

Counsel for Suspender—Mr Gordon and Mr Webster. Agents—Messrs Maclachlan, Ivory, & Rodger, W.S.

Counsel for Chargers—The Lord Advocate and Mr Balfour. Agents—Messrs Gibson-Craig, Dalziel, & Brodies, W.S.

This was a suspension of a charge upon a decree *in foro* pronounced by Lord Barcaple in favour of the respondents for payment of a sum of £6000 out of a fund *in medio* in a process of multiplepounding. The grounds of suspension were—(1), that the decree was pronounced in favour of, and the charge was given by, parties resident in England without a mandatory having been sisted; (2), that the respondents had no sufficient title to grant a discharge to the complainer; (3), that the decree was disconform to, and went beyond the terms of, the judgment

which it was intended to carry out; and (4) that the money being in bank, the complainer was not in safety, and had not the power to make the payment without a special warrant to uplift, which the chargers had failed to obtain.

The Lord Ordinary (Mure) refused the suspension, holding that the objections stated were competent but omitted before the Lord Ordinary when he heard parties on the motion for interim payment; and further, that they could not be pleaded by way of suspension to a charge upon a final decree *in foro*, which the complainer should have reclaimed against (Lumsdaine v. Australian Company, 18th December 1834, 13 S. 215). His Lordship also thought that the objections were ill founded on the merits.

The Court to-day, after hearing Mr Webster for the suspender, adhered.

Thursday, Jan. 25.

FIRST DIVISION.

LAING v. NIXON.

Proof—Examination of Aged Witness—A. S. July 11, 1828, sect. 117. Petition by a pursuer for the examination of the defender as an aged witness allowed after the record was closed, on the pursuer waiving his right of reference to oath.

Reference to Oath. Is it competent to refer to a defender's oath when his examination as a witness has been taken on commission to lie *in re-tentis*, but is not afterwards used as evidence?

Practice. Observation (per Lord Deas) as to proof taken to lie *in re-tentis*.

Counsel for Petitioner—The Solicitor-General, Mr Gordon, and Mr M'Kie. Agents—Messrs Webster & Sprott, S.S.C.

Counsel for Defender—The Lord Advocate, Mr Clark, and Mr Watson. Agents—Messrs Paterson & Romanes, W.S.

The petitioner, who is a manufacturer in Hawick, raised an action of damages on 20th December 1865 against the defender, also a manufacturer there. Before the time had arrived for lodging defences, the petitioner presented an application to the Court for a commission to take Mr Nixon's deposition as a witness on commission to lie *in re-tentis* in regard to the matters set forth in the condescendence. The application was founded upon section 117 of the Act of Sederunt of 11th July 1828, which makes it competent for the Court to grant commission for the examination of witnesses whose evidence, owing to great age (not under seventy years), is in danger of being lost.

The petition was opposed by the defender, on the ground that the action was founded on allegations that he had been guilty of a series of frauds upon the petitioner extending over a period of fourteen years, and that the summons contained no specification of the time or place when the alleged acts of fraud were committed, but merely set forth that the pursuer had suffered damages to the extent of the random sum of £10,000. He also objected that the present application was a mere pretext for obtaining a precognition from him for the petitioner's guidance in the future conduct of the case against him.

The matter was discussed some days ago, when the Court could not see their way to granting the prayer of the petition [in the present state of the record, defences not being yet due. It came up again to-day, the record having been since closed.

An objection was suggested by Lord DEAS, founded on the right of the pursuer to refer his case to the defender's oath, his Lordship observing that if the evidence taken suited his purpose, he might at once refer to the defender's oath. This objection was obviated by the pursuer agreeing to put in a minute waiving his right to refer to oath, but doubts were