

the form of a summary petition, and it was not thought to require extraordinary despatch to conclude for payment of a balance due; and accordingly there was introduced a provision that you might conclude for a sum of money. Under this Act of Sederunt, I think sequestration was a cause. But while that is so, the material question is, whether it is a cause in the sense of the Statute? It is only necessary to read the other provisions of the Statute to see whether the petition for sequestration is to be dealt with as a cause; and I cannot doubt that it is. The 7th section of the Act provides, that "in all applications before the Sheriff which are at present commenced by petition, and are not otherwise regulated by this Act, the petition shall be as nearly as possible in the form of schedule (E) annexed to this Act"—including undoubtedly all proceedings for sequestration—"and thereafter the procedure under such petition shall, as nearly as may be, be the same as hereinbefore provided in regard to ordinary action." [His Lordship then read sections 13, 16, 17, 18, 22, 26, and 27, and continued] All these provisions are made by Statute expressly applicable to sequestrations for rent. They are all dealing with causes or actions, and I think it is impossible to hold that a process of sequestration is not an action in the sense of the Statute. My only doubt is that expressed by your Lordship,—viz., assuming this to be a cause, whether there may not be a stage at which it is impossible to do anything, and to which it may be said this provision cannot be applied. That is a different case from the present; and I think it is safer to give no opinion on it. It is certainly quite competent to come to Court and apply for an interlocutor that has no meaning except to keep the cause alive. As to the case of a landlord applying for sequestration simply, without applying for any warrant of sale, that is a question on which I give no opinion.

LORD ARDMILLAN—The right of a landlord to sequester *currente termino* is well recognised in our law, but it is a right the exercise of which the law views with jealousy, for in the exercise of that right a wrong may be done. In the present case there is no ground for supposing that any wrong was done, and our duty is simply to try the question of the application of the 15th section of the Sheriff-court Act to a case like the present. I make this observation, because, in cases of sequestration *currente termino*, there is frequently a question of the kind I have indicated; but there is no such question here.

This is a question of construction, and I agree with your Lordship in the chair as to the impossibility of considering these proceedings as anything but a cause. In judging whether the proceedings constitute a cause, I think we must consider not merely the state of the proceedings when the question arises, but the original nature of the prayer of the petition. In many different classes of cases the Court have recognised the principle that the character of an action must be judged of by the summons and conclusions, and therefore the petition and its conclusions are what we must look at to see if it is a cause. There is here a prayer for sequestration [reads], and there is a prayer for sale [reads to end of prayer]. Taking the whole petition together, I have little doubt that it is a cause in the meaning of the Act. It is a demand for sequestration and sale and ultimate payment. It is a proceeding for constituting a *nexus* on the tenant's effects in security, and enforcing payment

of the rent due or becoming due; and, looking at the petition in that aspect, can it be said that the Act does not apply?

The next question is, supposing this is a cause, and that the section applies, what is the effect of awarding sequestration? Does it so tie up the hands of the landlord as to relieve him from the necessity of taking any steps to prevent the operation of the Statute? On this point I think the argument of Mr Crawford was not only ingenious, but, to a certain extent, sound. I agree that the true theory is, that the hand of the law holds the sequestrated effects from the date of the sequestration. But then I think that the hand of the law opened at the term of Martinmas, which was within three months from the date of the sequestration, and that then the landlord had the right and power of taking proceedings under this cause by applying for warrant of sale or otherwise, and if he did not do that, he did not avail himself of his opportunity of keeping the cause alive. Suppose a case was sisted by the Sheriff for more than six months to await the arrival of some one from abroad, or the birth of an expected heir, or to wait the issue of an appeal, what will be the result of his so tying up the case? I give no opinion on that. Perhaps it might have the effect of preventing the parties from so taking any step as to save the case from the operation of the section, but that could only be so long as there was no step which the parties could take, and when the hand of the law opened so as to let the parties take a step in the cause, that step must be taken, else the Statute will apply. I agree with your Lordship that this is not like an arrestment, but an arrestment and forthcoming; and, on the whole matter, I am also of opinion that the proceedings before us fall under the operation of the 15th section of the Act.

LORD DEAS—I may say that I concur with Lord Ardmillan in thinking that there was no wrong done in this case—I mean no wrong so as to ground an action of damages.

Agents for Reclaimer—Dundas & Wilson, C.S.
Agent for Respondent—Wm. Officer, S.S.C.

Thursday, February 20.

SECOND DIVISION.

DALGLISH (FERGUS' EXECUTOR) v.

DENNISTOUN, *et e contra*.

Contract of Copartnership—Relative Deed of Agreement—Right of deceased Partner—Count and Reckoning. Circumstances in which held that the rights of the representatives of a deceased partner under a contract of copartnership were ruled by the terms of the contract itself, and a relative deed of agreement, and were not affected by an agreement subsequently entered into by the partners with the manager of the firm.

These were conjoined actions, the one at the instance of Mr DalGLISH, Fergus' executor, calling on the defender to count and reckon with him as to the profits and proceeds of a copartnership between him and Mr Fergus, or to hold £20,000 as the sum due by the defender in respect of said copartnership; the other at the instance of Mr Dennistoun, claiming a sum of £1974, 19s. 10d. as the issue of the same contract of copartnership.

The pursuer makes the following statements, which are admitted:—

“John Fergus, Esq., of Prinlaws, died on 23d January 1865, leaving a trust-disposition and settlement dated 9th November 1864, by which he appointed the pursuer and Andrew Wylie, flax-spinner at Prinlaws, Fife, and David Gibson, writer in Kirkcaldy, to be his trustees and executors. An extract of the trust-deed has been produced. The pursuer alone has accepted of the trust, and the estate of Mr Fergus is now under his administration. The right or interest held by Mr Fergus in the said firm of Alexander Fletcher & Company is a part of that estate.

“The said company was first formed in 1843, when Mr Alexander Fletcher, merchant in Glasgow, the defender Mr Dennistoun, and the said John Fergus, entered into a copartnership for the purpose of carrying on the business of flax-spinning and thread-making at St Rollox, near Glasgow, under the firm of Alexander Fletcher and Company. This company was dissolved by the death of Mr Fletcher in 1845, and thereupon the said defender and the said John Fergus formed a new partnership under the old firm. The contract between them is dated 22d and 30th December 1845; a copy of it has been produced.

“By the said contract it was, *inter alia*, provided (1) that the business should be carried on for twenty-one years from 30th June 1845; (2) that the said partners should share equally in the profits and losses of the concern; (3) that the books of the company should be brought to a regular balance at least once every year upon the 30th day of June during the subsistence of the contract, by which balance the value of the company's property, stock of goods, and outstanding debts should be fixed and ascertained, and after deducting therefrom the debts due by the company, the salaries payable to the clerks and others, and all incidental charges attending the management of the business, interest at the rate of five per centum per annum on the capital advanced by the partners, and a suitable sum for deterioration of property and for bad and doubtful debts, the net profits of the preceding year, or for any shorter period embraced in such balance, should be fixed and ascertained, and carried in just proportions to the credit of the partners' accounts in the books of the company; it being declared that after the balance was thus completed and the result thereof carried to the accounts of the respective partners, the same should be probative in all questions between the partners, their heirs, and representatives, although the balance should not be docketed by them, and although no minute should be entered or subscribed in the sederunt-book of the company relative thereto, provided such balance was regularly made up in the manner above specified, and the same was authenticated by the handwriting or subscription of the manager or managers for the time being; and (4) that on the death, bankruptcy, or declared insolvency of any of the partners, the surviving or solvent partner should pay to the representatives of such deceasing or insolvent partner his share and interest in the trade, stock, and estate of the company, as the same stood at the last balance preceding such death, bankruptcy, or declared insolvency, as in full of all which they could claim from the remaining partner.”

The pursuer then says:—“The defender, Mr Dennistoun, and the said John Fergus, executed a supplementary agreement, dated 1st and 7th Decem-

ber 1859, by which, on the narrative that by the seventh article of their said contract of copartnership it was provided that in the event of the death, bankruptcy, or declared insolvency of either of them during the period of the copartnership, the surviving or solvent partner should pay the representatives of such deceasing bankrupt or insolvent partner his share and interest in the trade, stock, and estate of the company, as the same stood at the last balance preceding such death, bankruptcy, or declared insolvency, as in full of all they could claim from the remaining partner; and that the said parties had resolved to alter the said contract to the extent after specified. Therefore they agreed that in case of any of the events above specified happening during the currency of said contract, the surviving or solvent partner of said firm might take the interest of the deceasing or insolvent partner in the trade, stock, and estate of said company, in the manner above pointed out, under the provision that the works of the company, that is to say, the whole heritage, machinery, and utensils employed in the business of the company, should be valued in the balance at the sum of £20,000 sterling, or, in the option of the surviving or solvent partner, the copartnership business should be wound up, and the whole estate of the company disposed of in manner pointed out in article ninth of said contract, whereby it was provided that if none of the partners should become the purchasers of the whole heritable property, machinery, stock, and estate of the company, these should either be sold privately by agreement of all the parties, or, failing such agreement, should be exposed to sale in one lot, at such upset price as might be agreed on by them; and should they not agree, then the upset price to be the value standing in the books at the last balance preceding such sale, and if no sale could thus be effected, the whole heritable property, machinery, stock, and estate of the company should, after due advertisement, be sold by public roup or private bargain, at such reduced price or prices, and in whole or in such detached lots, as would suit intending purchasers. With reference to the statement in the answer for the defender, Mr Dalglish, the pursuer, further avers—(1) that the said defender possessed no such option as he is here said to have exercised; (2) that there was not, as at 30th June 1864, nor for years before, a balance of the affairs of the company made out and completed in the manner provided for by the contract of copartnership, or so prepared and completed as to be conclusive of the extent of the rights and obligations *inter se* of the partners in the concern; (3) that the balance, such as it was, said to have been prepared on 30th June 1864 was not the last balance brought out in the lifetime of Mr Fergus; (4) that the works, &c., were not valued in any balance of the company's affairs, and particularly in a balance prepared and completed as at 30th June 1864, at the sum of £20,000; on the contrary, these always appeared at a higher figure in such balances as were framed; (5) farther, the minute of 1859, by which the option said to have been exercised by the defender is assumed to have been conferred, was not operative in 1865, the year in which Mr Fergus died, having been superseded permanently, or at any rate for that year, or for a longer period, by the agreement of December 1864, betwixt the company and the defender, George Anderson, which is set forth in the next article of the condescendence. The provisions of that agreement were inconsistent with the provisions of the

said minute, as well as provisions in the original contract, particularly those relating to the dissolution of the company through the death of a partner, and the emerging rights and obligations both of the deceasing and of the surviving partner. With reference to the last of the defender's counter-statements, the pursuer admits that a small balance of the debts due by Mr Fergus to the Union Bank is still unpaid. *Quoad ultra*, the explanations and counter-statements in his answer, so far as inconsistent with the pursuer's averments, are denied."

The defender, in answer to the above condescendence, says:—"The agreement and contract are referred to for their terms; and it is explained that Mr Fergus died during the currency of the contract, and that the defender thereupon duly exercised the option of taking over the concern upon the footing of the works being valued on the 30th June 1864 balance at £20,000, instead of availing himself of the option of winding up the concern. In regard to the averments introduced by the pursuer into his revised condescendence with reference to the statements in this answer, it is admitted that the works were not valued at £20,000 in the balance of the books of the company, 30th 1864, or in the other balances thereof; and it is explained that, it was just because the works were greatly overvalued in these books and balances, that the agreement of 1859 (which merely followed up a similar previous agreement) was thought necessary. *Quoad ultra*, the pursuer's averments in this article are denied; and it is explained, that the system on which, from the commencement till the close of the concern, its books were kept and balanced, and its profit and loss account and individual partners' accounts were dealt with, was wholly planned and arranged by the late Mr Fergus, as the managing partner, and the only partner practically acquainted with the business. Explained farther, that, during the period of his active management, he took the entire charge and superintendence of the books and balances of the company and of its affairs generally, and his exclusive charge and superintendence ceased only a few years before his death, upon the occurrence of his insolvency, when the Union Bank of Scotland, who were his principal, if not only creditors, became the parties with whom the defender chiefly advised as to the management of the concern. The debt due by the late Mr Fergus to the Union Bank has not been fully paid, and they have the only substantial interest in this action."

In 1864 the firm entered into an agreement with their manager, Mr Anderson, by which they bound themselves not to sell their mills or wind up the concern for a year, during which Mr Anderson was to continue manager. By the second agreement, Mr Anderson's salary was to be £600, and it was *inter alia* agreed that, with a view to the ascertainment of the net profits, of which Mr Anderson was to be paid one-third, the mills were to be valued at the commencement and end of the year at £28,000, and the book debts and stock-in-trade at such sums as should be agreed upon by both parties, or fixed by an arbiter.

The Lord Ordinary (BARCAPLE) pronounced the following interlocutor:—

"*Edinburgh, 15th June 1867.*—The Lord Ordinary having heard counsel for the parties, and considered the closed record, productions, and whole process: Finds that the deceased John Fergus having died on 23d January 1865, before the expiry of the term of copartnery fixed by the contract of co-

partnery between the defender and pursuer, John Dennistoun, and the said John Fergus, as the sole partners of the firm of Alexander Fletcher & Co., dated 22d and 30th December 1845, No. 20 of process, the share and interest of the representatives of the said John Fergus in the trade, stock, and estate of the company, and the relative rights and interests of his said representatives, and the said John Dennistoun, as surviving partner, are regulated and fall to be ascertained by and according to the provisions of the said contract of copartnery, as the same are modified by the deed of agreement between the said John Dennistoun and John Fergus, dated 1st and 7th December 1859, No. 24 of process: Finds that the provisions of the said contract of copartnery and deed of agreement for regulating the relative rights and interests of the representatives of the said John Fergus, as predeceasing partner, and of the said John Dennistoun, as surviving partner, *inter se*, in the trade, stock, and estate of the company, and the mode of ascertaining the same, and especially the provisions therein contained, as to the right of the surviving partner to take the interest of the deceasing partner, under the provisions that the works of the company shall be valued in the balance at the sum of £20,000, or in his option to have the copartnery business wound up, and the whole estate of the company disposed of, are not set aside or altered by the memorandum of agreement between the said firm of Alexander Fletcher & Co. and George Anderson, dated 5th and 6th December 1864, No. 25 of process: Appoints the cause to be enrolled for further procedure, and reserves all questions of expenses.

"*Note.*—The only question discussed at the debate was, Whether the provisions for settling the relative rights of the representatives of a deceasing partner and the surviving partner, contained in the original contract of copartnery between Mr Dennistoun and Mr Fergus in 1845, and relative deed of agreement between them in 1859, were set aside or altered by the memorandum of agreement between the company and Mr Anderson, their manager, in 1864? The Lord Ordinary is of opinion that the agreement with Mr Anderson was not intended, and cannot be held to affect the rights in that matter of the partners, *inter se*, as they were regulated by the contract of copartnery and relative deed of 1859.

"The original contract contains a very precise provision for the event of the death or bankruptcy of either of the partners. The surviving or solvent partner was to pay to his representatives 'his share and interest in the trade, stock, and estate of the company, as the same stood at the last balance.' The immediately preceding head of the contract provides that the books shall be brought to a regular balance, at least once every year, upon 30th June, by which balance the value of the company's property, stock of goods, and outstanding debts shall be fixed and ascertained. By the deed of agreement between the partners in 1859, the provisions for taking over the interest of a deceasing or bankrupt partner is so far altered. An option is given to the surviving or solvent partner, either to take the interest of the deceasing or insolvent partner, or to have the business wound up, and the estate disposed of and divided. In the event of his taking the interest of the deceasing or insolvent partner, it is provided that the works, being the heritage, machinery and utensils employed in the business shall be valued in the balance at the sum

of £20,000. It is upon this last provision, which the defender Mr Dennistoun maintains to have been subsisting and operative at the death of Mr Fergus, that the dispute between the parties turns.

"In December 1864, while there was still eighteen months of the original term of partnership to run, the firm entered into an agreement with Mr Anderson, their manager. It sets forth that the firm had been desirous in 1862 to sell their mills, and wind up their concern, but that, at the request of Mr Anderson, they had agreed to carry them on for one year, which had been afterwards extended to 31st December 1864, and that the parties were desirous to carry them on for another year from that time. The firm accordingly bind themselves not to sell their mills, or wind up their concern for a year, and Mr Anderson agrees to continue to be their manager for that time.

"The object of the remaining heads of the agreement is to provide for the remuneration of Mr Anderson as manager, which was to be partly by a fixed salary of £600, and partly by his receiving one-third of the net profits. With a view to the ascertainment of the net profits for this purpose, the mills were to be valued at the commencement and end of the year at £28,000, and the book-debts and stock-in-trade at such sums as should be agreed on by both parties, or as should be fixed by an arbiter. The Lord Ordinary is of opinion that these and the other provisions of the agreement were only made as between the firm and Mr Anderson, and for the purpose of giving effect to the engagement entered into with him; and that it was not intended that they should in any way affect the rights of the partners *inter se*. Mr Anderson was not to be liable for losses, and was not made a partner in any sense. The valuing of the mills at £28,000 is expressly said to be for the purpose of ascertaining the net profits, of which Mr Anderson was to be paid one-third. There is nothing in this arrangement for Mr Anderson's remuneration incompatible with giving effect to the provisions of the contract and the deed of 1859 as to the interest of a predeceasing partner in the concern. It cannot be inferred, and it is not contended, that the partners, Messrs Dennistoun and Fergus, agreed that, as between them in settling the interest of a predeceasing partner, the mills should be valued at £28,000, in place of £20,000 as fixed by the deed of 1859. It would be quite as compatible with the agreement made with Mr Anderson to take the works at the value of £20,000, fixed by the deed of 1859, as at any other valuation that could now be put upon them. The arrangements for fixing and settling Mr Anderson's remuneration are of a complicated kind, but the Lord Ordinary does not think that any of them are inconsistent with the previously subsisting provisions for the event of a partner dying. A more serious question, as it appears to him, is, whether the obligation undertaken by Mr Anderson to carry on the business for a year has not made the provision for the surviving partner, in his option taking over the interest of the deceasing partner, altogether inapplicable, and incapable of receiving effect in the event, which has happened, of a partner dying in the course of the year. The defender's counsel endeavoured to meet this view of the case by maintaining that the obligation to carry on the business for a year must be held to have been conditional on the survivance of both partners, and the subsistence of the company. The Lord Ordinary is not prepared to put that construction upon the obligation. It is in these

terms:—'First, The first parties agree and bind themselves and their representatives not to sell off their mills or wind up their concern for another year from the said 31st day of December in this present year 1864.'

"The Lord Ordinary is disposed to think that this is an obligation intended to bind both the company and the representatives of a deceasing partner that in no event (except as provided for in the twelfth head of the agreement, which does not effect this question) should the mills be sold or the concern wound up before 31st December 1865. It was quite possible to fulfil such an obligation notwithstanding the death of a partner, and that whether his interest should be taken over by the survivor, or the concern carried on for behoof of all concerned. Reference was made to the opinion of the First Division of the Court in the recent case *Hoey v. M'Ewan and Auld*, not yet reported.

"But there was there no obligation such as that undertaken to Mr Anderson in the present case, in which the Lord Ordinary inclines to hold that there continued to be a subsisting and operative obligation to Mr Anderson, notwithstanding the death of Mr Fergus, and consequent dissolution of the company.

"Upon a full consideration, however, of the import of the obligation, the Lord Ordinary does not think that it is inconsistent with effect being given to the provisions as to the interest of a deceasing partner, even in the event of the death taking place during the year.

"These provisions gave to the survivor an option to take over the interest of the deceasing partner. It was quite possible for him to do so, subject to the obligation, binding on the company and both partners, that the works should not be sold off, or the concern wound up, before 31st December 1865. And the Lord Ordinary does not think that the right to exercise this privilege could be refused to him upon the ground that the representatives of the deceasing partner were under an obligation that the concern should not be wound up during the year. That, as well as all the other obligations of the company, would necessarily be taken over by the surviving partner, along with the interest of deceasing partner; and it does not appear that the representatives of the latter could be entitled to insist upon continuing an interest in the business in respect of that, more than of any other obligation of the company involving a tract of time.

"On the other hand, the surviving partner was entitled, in his option, to require that the business should be wound up, and the estate disposed of. As the option was entirely with the survivor, the difficulty arising from any supposed impracticability of given effect to this latter alternative seems to be got quit of by the fact that he has selected to take over the concern. But apart from that, the Lord Ordinary thinks that due effect would have been given to the right of the survivor to have the business wound up, and the estate sold, by carrying out the provisions of the contract of copartnership on that subject at the expiry of the engagement with Mr Anderson, the business being carried on in the meantime for the behoof of all concerned. Many circumstances might have existed, independently of the obligation to Mr Anderson, to make an immediate winding up impossible—all that either partner could require, if the concern was to be wound up, being, that it should be done as soon as the obligations of the company might permit.

"Upon the whole, the Lord Ordinary is of opinion that the option conferred upon the surviving partner by the deed of agreement of 1859 is still applicable, and capable of receiving effect, and that the accounting between the parties must be subject to the provisions of that deed, including the provision as to the sum at which the works were to be valued."

Mr Dalglish reclaimed.

SOLICITOR-GENERAL and WATSON for him.

CLARK and A. MONCREIFF in answer.

The Court adhered to the interlocutor of the Lord Ordinary.

Agents for Reclaimers—Murray, Beith, & Murray, W.S.

Agents for Respondent—Hamilton & Kinnear, W.S.

Friday, February 21.

HAMILTON v. RATTRAY AND OTHERS.

Vesting—Legacy—Lapse—Postponed Payment. Circumstances in which held that certain legacies, the payment of which was postponed till six months after the death of the trustor, or his widow if she survived him, vested *a morte testatoris*, and were not defeated by the previous right of the legatees.

This was an action of declarator brought for determining the rights of parties under the settlement of the late Lieutenant-Colonel William Rattray of Downie Park, in the county of Forfar. The leading question was whether the legacies, given under the sixth purpose of said settlement, vested in the legatees *a morte testatoris*, or not till the death of Colonel Rattray's widow, whom he constituted life-rentrix of his estate.

By Colonel Rattray's settlement he disposed of his whole estate, real and personal, except his lands of Downie Park (of which he executed a separate deed of entail), to certain parties named as trustees. He bestowed on his surviving wife the life-rent of his whole estate, including the lands of Downie Park, and, by the sixth purpose, he made the following appointments with reference to the legacies now in question:—"I appoint my said trustees to make payment of the legacies following at the first term of Whitsunday or Martinmas that shall happen six months after the death of the said Mrs Janet Henrietta Rankine, my spouse, or me, in case she shall happen to survive me." The question was whether, looking to the postponed period of payment, and reading the clause in the light of the other provisions of the deed, vesting was postponed till the period of payment, which took place *a morte testatoris*.

The Lord Ordinary (KINLOCH) pronounced the following interlocutor:—

"*Edinburgh, 1st June 1867.*—The Lord Ordinary, having heard parties' procurators, and made avizandum, and considered the process—Finds that, according to the sound construction of the trust-disposition and settlement of the deceased Lieutenant-Colonel William Rattray, dated 9th December 1815, and codicil thereto, the legacies bestowed under the sixth purpose of the said trust-disposition did not vest till the death of Mrs Janet Henrietta Rankine or Rattray, his surviving wife; and that no right thereto now arises to the assignees, or legal representatives, of those legatees who predeceased the said date: Finds that the late Captain

James Rattray, having been an accepting trustee of the deceased, and having survived the death of the widow, became thereby entitled to the legacy of £19, 19s. given to the accepting trustees by the settlement; and that the same is payable to those now claiming in his room: And appoints the cause to be enrolled, in order that judgment may be pronounced therein, in accordance with the preceding findings.

W. PENNEY.

"*Note.*—The leading question in the present case is, whether the legacies given under the sixth purpose of the late Colonel Rattray's settlement vested in the legatees *a morte testatoris*, or not till the death of his widow, whom he constituted life-rentrix of his estate.

"By Colonel Rattray's settlement he disposed his whole estate, real and personal, except his lands of Downie Park (of which he executed a separate deed of entail), to certain parties specifically named as trustees. These comprised Mrs Janet Henrietta Rankine, his wife, afterwards his widow, and nine gentlemen, some of whom were resident in Scotland and some in England; and the conveyance was made to these 'as trustees, with the powers, and for the uses and purposes after mentioned, and to the survivors or survivor of them residing in Scotland for the time, who shall accept, any three of them to be a quorum, while that number of accepting trustees survive.'

"Colonel Rattray, by this settlement, bestowed on his surviving wife the life-rent of his whole estate, including the lands of Downie Park. He appointed various legacies to be paid, the term of payment of most of which was the term succeeding the death of his wife, if she survived him; and with regard to the residue, the following is his declaration: 'In case there shall be any residue or reversion of the trust-funds and subjects hereinbefore conveyed, I appoint my said trustees to make over the said residue and reversion, as soon after the death of the survivor of my said wife and me as this trust can be closed, to the heir of my body, or other heir or substitute called to the succession of my tailzied lands and estate; and upon such payment the said heir shall be bound to settle the accounts of my said trustees, and to discharge them of this trust.'

"The question now arises as to the legacies bestowed under the sixth purpose of the trust; and, as said above, is, Whether these vested *a morte testatoris* or not till the widow's death? The question is convertible with this other, Whether the testator intended a personal bequest to the parties named, provided they should survive his widow, or whether he intended the bequest to go to their assignees or legal representatives if they should die in the interval between his own death and his wife's? The question must, like all other questions of vesting under a settlement of moveables, be determined by a sound consideration of the testator's intentions, as these are expressed in the settlement.

"The Lord Ordinary has come to the conclusion that the testator intended these legacies to vest at the death of his widow, and not sooner.

"The first consideration to be attended to, is that the time of payment of the legacies is the death of the widow. The sixth purpose begins thus:—'I appoint my said trustees to make payment of the legacies following at the first term of Whitsunday or Martinmas that shall happen six months after the death of the said Mrs Janet Henrietta Rankine, my spouse, or me, in case she might