

There is nothing incompetent, nor even unusual or anomalous, in a testator so arranging that if any legatee die before receiving his legacy the legacy shall not vest in him, but pass to another or others. This is simply declaring that if the legatee does not survive to receive the legacy himself the testator prefers his own nominee to that of the legatee. He simply prevents the legatee from disposing of the money before he actually receives it. He puts him in no worse position than if he had predeceased the testator. And the testator, in the present case, actually states the alternative of the child "predeceasing me or dying before receiving payment of his share;" thereby, as I think, clearly intimating that the same practical result, in the way of the bequest not vesting, should alike hold good in both the cases.

In holding, as I do, payment of the bequest to be the essential condition of its vesting, it is not, I think, necessary, nor would it be proper, to construe the word so rigorously as to require the money to have actually passed into the party's hands. It would be reasonably considered sufficient if the time of payment had arrived, as, for instance, if a division had taken place and the party had had his share allocated. This, or the like, would be fairly and justly held payment in the true sense of the deed.

Again, it does not follow because division and payment are pre-requisites of vesting, that the time of vesting is in all cases to be postponed till the period, however prolonged, when the trustees shall have realised the estate. If the trustees have improperly or unreasonably delayed doing so, there is a principle of equity well known in our Courts, under the operation of which that which ought to have been done will be held to have been done in point of fact. It will not be necessary to establish any fraudulent purpose on the part of the trustees; it will be enough if their delay has been so unreasonable and unjustifiable, as to make it against equity that the legal rights of any one should be thereby prejudiced. In such a case it may happen that a bequest which ought to have been paid will be reckoned actually paid; to the effect of placing all concerned in the same legal position as if it had been so.

But admittedly no such undue delay is attributable to the trustees in the present case. Nor is it possible to point to any such proceeding of allocation on the part of the trustees as might be held equivalent to payment. At the death of Alexander Kirkpatrick Howat there was no room for any scheme of division, nor for a long time subsequent. Clearly Alexander Howat could not at any time anterior to his death have demanded payment of his share. The case, therefore, does not afford room for any equipollent to payment. It is just a case in which, consistently with the ordinary course of events, payment of his share had not been received by Alexander Howat before his death. According to the express words, and as I think, plain meaning of the trust-deed, the result is that the share had not vested in him, and was not validly conveyed by his settlement.

There is one clause in the deed which has at first sight an aspect of contrariety to this conclusion. It is that which empowers the trustees to advance to the children "before or after their attaining majority," such sums as may be necessary for their *extra* education, or outfit in life. These sums are described as being "parts of the shares falling to my said children;" and interest is to be calculated on

the advances from the date of payment, "till the division of my estates." This provision appears at first sight inconsistent with the idea of the shares not vesting till the time of division. But a moment's consideration shows that the difficulty created by the clause attaches as much to the theory of the shares vesting twelve months after the father's death, as to that of their not vesting till the time of payment. The clause is just as inconsistent with the idea of vesting at the one period as at the other. The provision would only fully square with the theory of the shares vesting *a morte testatoris*, which has not been maintained on either side, and is unmaintainable. I can only, therefore, regard this clause as introducing a modification on the general rule of the deed; which of course was quite open to the testator; but as leaving the general rule operative, except in so far as directly encroached on. The power here given to the trustees would, if acted on, reduce the amount which the child receiving the advance would be entitled to claim in the division. If he predeceased the division, it would reduce the amount which would fall by survivorship to his sisters and brothers. But except to this effect, the clause would not operate. And in all other respects the general rule of vesting prescribed by the deed remains applicable, and must be enforced.

I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

No expenses were allowed.

Agent for Howat's Trustees—John M'Cracken, S.S.C.

Agents for Judicial Factor—Hunter, Blair & Cowan, W.S.

Agent for Lonsdale Howat—John Galletly, S.S.C.

Agents for Mrs Rimmer's Trustees and Catherine—Mackenzie & Kermack, W.S.

Friday, December 10.

ABBOTT v. MITCHELL.

Lease—Bankrupt—Title to Sue—Proof. A granted an *ex facie* absolute disposition of certain subjects to B & Co.; but by a back-bond it was declared that they held it only in security of sums due to them by A. The disposition was recorded, but not the back-bond, and A continued in occupation of the subjects. The day before B & Co. stopped payment, and shortly before his own bankruptcy, A granted a lease of part of the subjects to his son. The son's possession being challenged, he brought a declarator of the validity of his lease. *Held* possession of the lease gave him a title to sue; and a proof was allowed both parties of their averments.

In 1861 William Abbott, spirit merchant in Glasgow, disposed to William Robertson, furrier, certain heritable subjects in London Street, Glasgow. But, by a back-bond and declaration of trust, granted on the same day by Robertson to Abbott, it was declared that Robertson held these subjects only in security of relief of certain obligations incurred by him for Abbott; and binding Robertson on receiving such relief to denude in favour of Abbott and his forebears. The disposition and the back-bond were duly recorded; as also a disposition granted in December 1862 by Robertson and

Abbott, in which, on the narrative of the above mentioned disposition and back-bond, and the relief of the obligations that had been incurred, Abbott required Robertson to denude himself of these subjects, and convey or concur in conveying them to Weir Brothers & Company, wine and spirit merchants in Glasgow, and the individual partners and the survivor and his heirs in trust for the company's behoof, and to their or his assignees. This disposition contained an assignation to the rents. Abbott continued in possession of the subjects; and he asserted that, notwithstanding the disposition, he exercised all the rights of a proprietor,—employed a factor to uplift the rents, granted leases, and settled claims against the property. The defender denied the validity of these leases, averring that the lease in dispute was granted by Abbott though aware that his bankruptcy was inevitable; and that his occupancy was only at the company's pleasure.

By an unrecorded back-bond of the same date as his disposition it was declared that Weir Brothers & Company only held these subjects in security of a sum due to them for goods and cash advanced to Abbott; and they were bound to denude in his favour on repayment. If, however, payment was not made three months after a demand for it, the company were authorised to sell the subjects. By a subsequent disposition, duly recorded, the company, with the concurrence of Robertson and Abbott, conveyed the subjects to the individual partners of the company, *nominatim*, in trust for the company's behoof; and by back letter of the same date the individual partners declared that they held the subjects only in security for payment by Abbott of the sum due by him to the company.

On 19th March 1867 Abbott let to his son part of the subjects for ten years at a rent of £75; and his son entered into possession in virtue of this lease. Weir Brothers & Company having stopped payment the following day, their estates were sequestrated on the 3d of April following; and Mr Moncrieff Mitchell, C.A., Glasgow was elected trustee. Abbott's estates were sequestrated on the 20th May thereafter, and his trustee raised an action in the Sheriff-court of Lanarkshire to have the lease declared invalid. Mr Mitchell having applied to the Sheriff for warrant to eject Abbott junior from the shop, he raised this action of declarator, to have it found that the lease under which he occupied was a good and valid lease. A great number of averments as to the rights and actings of the respective parties was made upon record. The first plea-in-law of the defender was a denial of the pursuer's title to sue. The Lord Ordinary (MANOR) repelled this plea; and the defender, having obtained leave, reclaimed against this interlocutor.

SCOTT and J. M'LAREN for him.

GIFFORD and MAIR in answer.

At advising—

LORD PRESIDENT considered that the existence of the lease and the possession of it by the pursuer gave him a title to sue, and an interest to have the lease declared valid. Whether or not he might succeed in getting it declared valid was a question on the merits of the case upon which it would be premature to pronounce any opinion. Before his title to prevail could be held good certain of the facts alleged must be proved. There were many allegations on both sides,—the defender averred that the pursuer's lease was fraudulently gained, and flowed a *non habente protestatem*. That must

be ascertained. But as the possession of the lease was sufficient to give the pursuer a title to sue, he was for recalling the Lord Ordinary's interlocutor, sustaining the pursuer's title to sue, allowing both parties a proof of their averments, and meanwhile reserving the question of expenses.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCH—The present is an action of declarator, raised for the purpose of obtaining a judgment of the Court declaring the validity of a lease for ten years of certain subjects in London Street, Glasgow, said to have been granted to the pursuer by William Abbot senior on 19th March 1867; and “that in virtue thereof the pursuer is entitled to the undisturbed possession, use, and enjoyment of the premises, during the endurance of the said lease.”

So far as regards the title to sue such an action, in the proper legal sense of that phrase, I consider it to be sufficiently afforded by the production or averment of the lease sought to be declared valid. Every one who lays before the Court a written title to property, whether by disposition or lease, is entitled, if he can show a sufficient interest, to ask the judgment of the Court that it is a legal and effectual instrument against those maintaining the contrary. To say that such an one must establish the validity of the right before his title to sue can be sustained, is, as I think, to ignore the distinction between the title to sue, and the merits of the case sued, and to throw confusion into legal phraseology.

In the present case the first plea in defence is, “No title to sue.” The Lord Ordinary repels this plea. And in so far as by this he merely sustains the title to sue in the sense I have now explained, his interlocutor is not open to impeachment.

But the terms of his interlocutor in other respects awake a strong suspicion, indeed show conclusively to my apprehension, that his Lordship intended to go much further than this, and not merely to sustain the title to sue, but to pronounce for the validity of the lease considered *in itself*, reserving to the defender to make good a challenge of it on some extrinsic ground. At least, the wording of the interlocutor is such as to make it proper for the Court to take steps for preventing any possible error in this direction.

I think it plain that before pronouncing on the validity of this lease one way or other, there must be proof of the facts which are in issue between the parties. The defender contended that, assuming the facts to be as stated by the pursuer, there were legal grounds on which to hold the lease invalid. I am not prepared to adopt this conclusion. And I see at least this very clearly, that according as the facts come out one way or other, a very different case will be presented for the determination of the Court. The defender reached his conclusion by a very summary and shorthand process. He reasoned thus—The grantor of the lease, William Abbott senior, had previously to its being granted divested himself of the subjects by an absolute disposition in favour of Weir Brothers & Co., who were infert, or in an equivalent position, by recording the disposition. This *ex facie* absolute disposition was declared by a back-bond to be a mere deed in security of a money advance; but the back-bond was not recorded, so that Weir Brothers & Co. remained absolute proprietors on the face of

the records. The defender, as trustee in their sequestration, came into their shoes as such; and in a question with him the lease, being granted by a person not the proprietor of the subjects, is null and void. Such is the defender's argument. But independently of its involving on its face very nice and delicate questions, not rashly to be encountered, there is to be considered the answer made by the pursuer, that although the back-bond was not recorded, William Abbott senior was left by Weir Brothers & Co., his creditors, in the entire administration of the subjects, drawing the rents, dealing with the tenants, and letting leases with the entire concurrence and consent of Weir Brothers; in short, was placed by them entirely in the same position with any proprietor who has merely granted an heritable bond over his property. The lease granted by him to the pursuer, and which was granted before any sequestration issued of the estates of Weir Brothers & Co., the pursuer contends to be as valid as if granted by a proprietor against whom nothing can be said but that he had executed a disposition in security over his property. I pronounce no opinion on these rival contentions. I only say that before coming to a determination I desire to see the true state of the facts explicated and established.

It must not be forgotten that besides maintaining that the lease is intrinsically null, the defender objects to it on the head of fraud, and as invalid, under the Act 1621, cap 18, in a question with prior creditors of Abbott senior. Any one of the grounds of defence may, if sustained, be sufficient to dispose of the case.

On the whole matter I consider it to be the only safe or judicious course to allow the parties a proof before answer of their respective averments; the case to be thereafter disposed of according to its true merits.

I do not think it expedient to have two or more proofs in the case; but to have one proof for all, and then to pronounce judgment.

Agent for Pursuer—John Galletly, S.S.C.

Agent for Defender—A. Kelly Morrison, S.S.C.

Friday, December 10.

SECOND DIVISION.

BRYDON v. DRUMMOND.

Sheriff—Final Judgment—Expenses—No Process—Appeal—Competency. Held (1) that a Sheriff having pronounced final judgment on the merits of the cause was *functus*, and it was incompetent for him to pronounce a subsequent interlocutor dealing with the question of expenses, there being then no process; (2) that it was competent to entertain an appeal against the Sheriff's judgment to the effect of declaring the incompetency of the later interlocutor; but *quoad ultra* the appeal held incompetent.

This was an appeal from the Sheriff-court of Perthshire, in which the question was as to the competency of the appeal. The Sheriff, on 3d December 1868, had pronounced a judgment which exhausted the merits of the cause, and said nothing about expenses. Thereafter, on 27th February, he took up the question of expenses on the motion of the appellant, and decided it against the appellant. The present appeal was then

brought, too late if the interlocutor of 3d December was to be taken as the last interlocutor in the cause, but otherwise within the time allowed by the Act. The question was, in these circumstances—(1) Whether the Sheriff could competently pronounce any interlocutor after that of 3d December; and (2) whether, if not, the appeal could yet competently be brought to get rid of the incompetent interlocutor of 27th February.

STRACHAN for appellant.

SHAND and MARGILL in answer.

The Court held that the Sheriff having exhausted the merits on 3d December without mentioning the matter of expenses, the cause was at an end, and there was thereafter no process and no interlocutor; but the Sheriff had assumed that there was a process, and had pronounced an interlocutor, and the Court must entertain the appeal to the effect of determining that there was no process; but having determined that, they must *quoad ultra* dismiss the appeal as incompetent, with expenses.

Agent for the Appellant—D. Milne, S.S.C.

Agents for the Respondent—Tods, Murray & Jameson, W.S.

Friday, December 10.

MALCOLMS v. MALCOLM'S EXECUTORS.

Tutors and Curators—Executors—Management for Children—Executory Funds—Interest—Annual Accumulations—Accounting. The executors of a deceased, who were appointed by his testament tutors and curators to his children, and executors for their behoof, entered on the management of certain farms in this capacity upon the testator's death, and mixed up the executory funds along with their private funds. Held, (1) that the executors, having managed as tutors and curators, were not entitled to make profit out of their office, and therefore had no claim for remuneration in respect of their management (2) that they were liable in the accounting in interest at the rate of 4 per cent. with annual accumulations, under deduction of a sum of £100, which they were entitled to retain throughout to meet current expenses.

The pursuers of this action are the children of the late Robert Malcolm, farmer, Harland, near Wick, who died in 1853, leaving a testament by which he appointed the defenders to be tutors and curators to his children (all of them under age), and to be "executors for behoof of my children, as above." At his death the testator was tenant of certain farms and grass parks on verbal leases, and after his death the executors—as they alleged at the request of the children, and in the conviction that it was for the interest of the children to do so—carried on the farms for many years, and with the result that the estate was considerably benefited thereby.

The children on coming of age brought the present action of count and reckoning against the executors. In the accounting the principal disputes between the parties related to two questions—viz., (1) Whether the defenders were entitled to charge commission for their management of the farms? and (2) the executors not having kept the executory funds in a separate executory account in the bank, but having mixed them up with their own funds,