

under the civil law *sponsio* was a contract to deposit a sum in Court to await the result of a lawsuit. In the title of the Digest, *De Aleatoribus* (11, 5, 2.) this distinction is made—" *Senatus consultum vetuit in pecuniam ludere; præterquam si quis certet hasta vel pilo jaciendo vel currendo, saliendo, luctando, pugnando, quod virtutis causa fiat.*" A *cutamen de virtute*, therefore, did not fall under the description of *sponsio ludicra*. This involves the distinction between a game and a bet upon a game. There is nothing illegal in a game. What is illegal is making it the subject of a bet. The cases are quite consistent with the view that horse-racing is a lawful pastime. In the case of *Graham* the Court had no difficulty in entertaining the question to whom a picture, which was a prize at a coursing meeting, should be given. The case of *O'Connell* was not about a prize, but a bet of £100 to £57, that one horse should beat another. A good illustration of the principle is a prize at a rifle meeting. We could not entertain the question which of the competitors had made the highest score, but in the event of there being no dispute who was entitled to the prize, we could give decree against the holder of the prize. Here then is a pure question of the contribution of 5 parties, having paid their money into the hands of the stake-holder, who does not deny receiving it, nor is there any dispute as to who is entitled to receive the money. There is no difficulty as to our jurisdiction.

The other Judges concurred, and the Court adhered to the Sheriff's judgment.

Agent for the Pursuer—Alex. Cassels, W.S.

Agent for the Defender—W. S. Stuart, S.S.C.

Tuesday, July 11.

FIRST DIVISION.

SPECIAL CASE—WILLIAM JOBSON AND PATRICK ANDERSON (LOW'S TRUSTEES) AND OTHERS.

Process—Special Case—Competency—Trustee. Circumstances in which it was held that it was competent for a testator to make his trustees the sole competent judges on certain special points connected with his estate, and that when he had done so neither the trustees nor any party taking benefit under the deed could come to the Court with a special case, asking the Court's opinion on these points.

This Special Case was brought before the Judges of the First Division by the trustees and beneficiaries under the trust-deed of Thomas Low of Mylnfield, in Forfarshire, to determine three questions—(1) Whether the sums realised from the working of a certain quarry of freestone upon the estate were to be paid by the trustees to the liferenters, or were to be retained and accumulated by the trustees for behoof of the fiars of the trust-estate. (2) Whether the sums realised by the sale of wood, being the thinnings of the plantations upon the estate on a somewhat extensive scale, should be paid to the liferenters or to be accumulated as above for behoof of the fiars. (3) In the event of the above mentioned sums being to be accumulated by the trustees, whether the interest upon them was to be paid to the liferenters or not.

In the course of the argument of counsel upon these questions, the Court called attention to the

following clause in the trust-deed:—" *Eighthly*, It is hereby expressly provided and declared that the said trustees shall be the sole and only competent judges (*first*), of what shall form and be included in the said free residue and remainder of my said estate and effects, to be paid, assigned, and disposed as aforesaid; and (*secondly*), of what shall form the said nett rents, interest, dividends, and annual profits of the said free residue and remainder to be paid and disposed of as hereinbefore directed; and that the judgment or opinion of the said trustees on these points, and on all other points, as to which it is herein declared that they shall be the sole and only competent judge, shall be final and binding, and obligatory upon all parties concerned or interested under these presents."

The case was continued for argument on the question, Whether, in view of this clause, it was competent for the parties to come into Court at all on these matters?

ADAM and A. J. YOUNG for the trustees.

Solicitor-General (CLARK) and JAMIESON for the beneficiaries.

At advising—

LORD PRESIDENT—The question before us is, whether we should refuse to consider this special case? And before we determine to do so, we must satisfy ourselves that it was the intention of the testator here to prevent any such legal proceeding being taken by his trustees or the beneficiaries. As to the competency of a testator making such a provision, I really cannot entertain much doubt. If a testator were to lay down in his will that there was to be no litigation about his succession whatever, I should have great doubt about the validity of such a provision. But where a testator merely provides that there shall be no going to law upon certain special points, and arranges so clearly for their determination as here, the case is very different, and the provisions must receive effect. I think we may fairly draw an analogy in the matter before us from the 10th section of the trust-deed, which provides that the trustees shall be the sole competent judges in matters connected with the expenses of management of the trust property. Now, can there be the slightest doubt that this clause precludes any person taking benefit under the deed from raising any question in an accounting or otherwise, with respect to such expenditure by the trustees. Now, what is the difference between that class of questions and the ones we have proposed for our decision. These latter questions seem to me just to arise in the course of the administration of the trust. The deed provides that the trustees shall be the sole competent judges of the two questions—1st, What shall be included in the free remainder and residue of the estate to be ultimately paid to certain persons as fiars? And 2d, What shall form the nett annual revenue of the said free residue to be paid in liferent to certain other persons, beneficiaries under the trust? Now, I think that was just as competent a provision on the part of the testator as the one before alluded to. Questions arising between liferenter and fiar are generally questions of detail, better solved by ordinary sound headed men of business than by courts of law. The testator intended that this should be the case here, and that his trustees should not be bound by strict rule of law in the determination of these questions, but should judge, in the exercise of their own discretion as *boni viri*, what was the fair proportion of these sums to

place to capital, and what to income. I should be very sorry to interfere with such a reasonable intention of the testator, so well expressed. I am therefore of opinion that this Special Case should be refused.

The other Judges concurred.

Agents for the Trustees—Pearson & Robertson, W.S.

Agent for the Beneficiaries—M'Ewen & Carment, W.S.

Thursday, July 13.

SPECIAL CASE—MRS ANN MOFFAT OR
ROPER AND OTHERS.

Succession—Legacy—Fee and Liferent—Vesting. A testatrix provided a fund to a woman in liferent, and at her death to be divided among her children in equal shares; the sons to take a fee, but the daughters a mere liferent, and their children the fee. One of the daughters survived the testatrix, but predeceased her mother, never having had any children. *Held* that the share destined to her and her children fell to the surviving legatees of the fund.

Mrs Margaret White or Wilson died on 15th April 1854, leaving a trust-disposition and settlement. After providing for certain legacies and annuities, she directs her trustees to pay the free annual proceeds of one-half of the residue of her estate to her husband's sister, Mrs Isabella Wilson or Grieve, in liferent, and upon her death to divide the fee among her children who survive the testatrix. The other half of the residue is provided to her husband's other sister, Mrs Mary Wilson or Moffat, in liferent, and after her death the trustees are directed to divide the said half among Mrs Moffat's children in equal shares, viz., one share to Mrs Elizabeth Moffat or Purves in liferent only, and her children in fee; one share to Mrs Ann Moffat or Roper in liferent only, and her children in fee; and one share to each of Mrs Moffat's three sons, William, Walter, and John, "and to the survivors of the said Mrs Elizabeth Moffat or Purves, Mrs Anne Moffat or Roper, William Wilson Moffat, Walter Grieve Moffat, and John Moffat, at my decease, and the children of such as may have then predeceased leaving lawful issue, such issue only succeeding to the share which would have belonged to their deceased parent, and that also equally among them; declaring always that the shares of the said Mrs Elizabeth Moffat or Purves and Mrs Ann Moffat or Roper shall be strictly alimentary," &c.

It will be observed that while all the children of Mrs Grieve who survive the testatrix take a fee, the daughters of Mrs Moffat are restricted to a bare liferent, to take effect on their mother's death, the fee of their shares going to their children.

Mrs Moffat died on 28th January 1870, survived by all her children except Mrs Purves, who never had any children, and died on the 16th July 1861, having thus survived the testatrix, but predeceased her mother. The share destined to Mrs Purves in liferent and her children in fee was claimed by—(1) The surviving residuary legatees of the half of the residue liferented by Mrs Moffat. (2) The next of kin of Mrs Purves. (3) The next of kin of the testatrix, who claimed the share as undisposed of by her trust-deed,

and therefore falling to be dealt with as intestate succession of the testatrix.

J. MARSHALL and MACLEAN for the *First Parties*.

J. M'LAREN for the *Second Parties*.

LEE for the *Third Parties*.

At advising—

LORD PRESIDENT—The general intentions of the testatrix with regard to the disposal of the residue of her estate are easily understood. She intended to divide it into two halves, one for a family of Grieves, and the other for a family of Moffats. There is no difficulty about the half given to the Grieves. Mrs Grieve, the mother, is to have the liferent, and upon her death the fee is to be divided among her children alive at the death of the testatrix. The children, both sons and daughters, are all made fiars. But with respect to the half which is given to the Moffats, there is this peculiarity, that the testatrix has restricted the share of the two daughters to a liferent, and given the fee to their children. This is how the question arises. I cannot think that by restricting the daughters' shares to a liferent the testatrix intended to carry away from the Moffats any part of the residue destined for them, or, in other words, to leave any part of it in intestacy. She may have done this without intending it, but the presumption is very strong against her intending to do so. We must endeavour to construe the clause so as not to land in intestacy. The children of Mrs Moffat, among whom the share liferented by their mother is to be divided, are to be the children who survive the testatrix. The period of division is the death of the liferenter. The rule of division is equal shares, not specified by number. The effect of the directions is that the number of shares into which this half is to be divided depends on the condition of matters when the trustees proceed to exercise their office. *Prima facie*, it must be a number of shares corresponding with the number of children who survive the testatrix. As all the children survived the testatrix, the number of shares is apparently five. When the period of division arrives, the trustees find themselves in this position. Mrs Purves survived the testatrix, but no right ever vested in her. She was confined to a bare liferent, which could only commence at her mother's death. She predeceased her mother, so that she never had anything vested in her. The trustees will consequently act in accordance with the intention of the testatrix, if they divide this half of the residue among the children of Mrs Moffat, excluding Mrs Purves. It is quite plain that the Moffat family are intended to get the half. It is a *casus improvisus* (though that is a somewhat perilous phrase to use where the heirs *ab intestato* are in the field), in the sense that the particular thing which has occurred has not been made matter of special direction. The question then is, whether in the general scope of the settlement there is not enough to guide the trustees. This view excludes intestacy. As to the next of kin of Mrs Purves, their case is quite hopeless; she never had anything vested in her.

The other Judges concurred.

The Court decided the following question in the affirmative:—

"Whether, under the said deed, the parties of the first part are entitled, as surviving residuary legatees of one-half of the residue of the trust-estate of the deceased Mrs Margaret White or Wilson, liferented by the late Mrs Mary Wilson or Moffat, to that share of said