

meaning of section 103, because, supposing the annuity to have been otherwise a right of such a nature as to vest in him before the date of his discharge, so as, if he had been solvent, to be attachable by his creditors, and therefore, in case of insolvency, to be carried by his sequestration, it was prevented from so vesting by the second clause of the will, and was forfeited by the existing bankruptcy of the person in whom, on the above supposition, it would then otherwise have vested.

4. A discharge obtained without consent of or composition with creditors has not the effect of annulling the sequestration with respect to property vested in or disposable by the bankrupt before his discharge, though not actually payable to him till after the date of the discharge.

Agents for Petitioner—C. & A. S. Douglas, W.S.
Agent for Respondent—John Latta, S.S.C.

Friday, November 3.

SPECIAL CASE—LADY MONTGOMERY
CUNINGHAME AND MRS VASSALL.

Interest—Loan—Legacy. Held, under special circumstances, that the interest on a debt due but not uplifted before the death of the testatrix, was carried by a bequest of the debt to the debtor's mother, and did not fall unto the general executry of the testatrix.

In the year 1829 the deceased Sir James Boswell obtained from his aunt, the late Mrs Leslie Cuming, a loan of £2000. The debt was constituted in the following manner:—Mrs Leslie Cuming gave Sir James Boswell a cheque upon her bank account for £2000, dated 30th January 1829. In return, Sir James granted the following receipt:—

“Edinburgh, January 30th, 1829.—Received from Mrs Leslie Cuming the loan of Two thousand pounds sterling on the thirtieth of January Eighteen hundred and twenty-nine.

“JAMES BOSWELL.”

Sir James Boswell cashed the cheque the same day, drew the money, and appended to the cheque a receipt in the following terms:—“Received the above, James Boswell.” The cheque, with Sir James Boswell's receipt for the money annexed, Mrs Leslie Cuming afterwards got up from her bankers. During her life Mrs Leslie Cuming took no steps to recover payment of the sum of £2000, or of any interest thereon, from Sir James Boswell while he lived, nor from his representative after his death, which took place in November 1857. Ten days after the date of the loan Mrs Leslie Cuming bequeathed the debt to Grace Lady Boswell, mother of Sir James, by a testamentary writing, in the following terms:—

“£2000. Springfield, Feb. 10, 1829.

“I give the Two thousand pounds I lent Sir James Boswell, my nephew, to his mother Grace, Lady Boswell, at my death.

(Signed) “JANE LESLIE CUMING.

“To Grace Lady Boswell, Feb. ten, Eighteen hundred and twenty-nine.”

This document is holograph of, and signed by Mrs Leslie Cuming, and it was addressed in her handwriting on the back thus:—“Grace Lady Boswell.” It was found in Mrs Leslie Cuming's repositories after her death, along with her cheque and Sir James' receipt. Mrs Leslie Cuming left

several other legacies, but no settlement of her general estate, and died on 22d February 1863.

After Mrs Leslie Cuming's death, her executors Sir Thomas Montgomery Cuninghame raised an action against Lady Boswell, Sir James Boswell's widow and executrix, for payment of the sum of £2000, with interest at 5 per cent. from the 30th January 1829 till payment. The Lord Ordinary (ORMIDALE) decreed in terms of the conclusions of the summons, and the Second Division adhered; 29th May 1868, 6 Macph. 890. 5 Scot. Law Rep. 557. Lady Boswell appealed to the House of Lords; but, before judgment, the action was compromised with consent of all parties interested, Lady Boswell paying to Sir T. Cuninghame, as Mrs Leslie Cuming's executor, the principal sum, with interest at 3 per cent. from the 30th January 1829 to the date of payment.

Grace Lady Boswell survived the testatrix, but is now dead, and represented by her daughter Mrs Vassall.

It was admitted that Mrs Vassall, in right of her mother, was entitled to the principal sum of £2000, with interest from the date of Mrs Cuming's death; but a question arose in regard to the interest prior to Mrs Cuming's death. This was claimed, on the one hand, by Mrs Vassall, as part of the bequest to her mother by Mrs Leslie Cuming, and, on the other hand, by Sir T. M. Cuninghame (and thereafter by his widow and executrix), as part of Mrs Leslie Cuming's general executry.

The question submitted to the Court was the following:—

“Whether Mrs Vassall, as representing her mother the deceased Grace Lady Boswell, is entitled to the interest accruing prior to the death of Mrs Leslie Cuming upon the said sum of £2000, lent by her to the late Sir James Boswell, and bequeathed by her to the said Grace Lady Boswell?”

MACKINTOSH, for Mrs Vassall, the second party to this case, referred to Digest, b. 32, t. 34; *Chaworth v. Beech*, 4 Vesey 555.

MARSHALL, for Lady Cuninghame, the first party, referred to *Morris v. Harrison*, 2 Maddock, 268; *Rollo v. Irving*, 4 Paton, 521; *Cumming*, Feb. 26, 1824, 2 S. 743; *Loch v. Venables*, Dec. 16, 1859, 27 Bevan, 598.

At advising—

LORD PRESIDENT—This case is attended with great difficulty. The facts are very peculiar, though they are few and easily stated. Mrs Leslie Cuming's sister was Lady Boswell, mother of Sir James Boswell. Upon 30th January 1829 Mrs Leslie Cuming lent £2000 to her nephew Sir James. She took an acknowledgment of the loan. He received the money in the form of a cheque, cashed it, and noted on the cheque that he had received the money. The cheque was sent by the bank to Mrs Leslie Cuming, and put up by her with the receipt for the loan. In the course of ten days Mrs Leslie Cuming wrote another document, a bequest to her sister Lady Boswell, of this debt. All these papers were found in her repositories after her death. She died in 1863. During the whole interval from 1829 to 1863 no interest was ever paid, or, as far as we know, asked on that £2000. The question whether interest for thirty-four years was notwithstanding due, and could be recovered by Mrs Cuming's executors, was, I think, a question of the greatest possible difficulty. But we have not to determine it. It has been settled by the Second Division that in-

terest was due. I am not surprised that there was a difference of opinion on the Bench, but I am surprised that among the defences stated the true and proper defence is not stated. The defender in that action pleads that the debt itself is not due, a very hopeless plea. The plea in regard to interest is that the claim is excluded—(1) In respect that there was no stipulation and no demand ever made for interest; and (2) in respect of taciturnity and *mora*. The true defence, and that at once suggested by the document of debt is, that Mrs Leslie Cuming did not intend interest to run on the loan. If this defence had been stated, the defender in that action would have had a better chance; I say no more. At all events it is now *res judicata* between the representatives of the debtor and the representatives of the creditor that interest is due from 1829 to 1863. This sum, amounting, even at 3 per cent. (to which it was restricted by agreement), to a sum above £2000, was in fact paid by Sir James Boswell's representative to Mrs Cuming's executor. The only question that remains is, whether this interest belongs to Mrs Cuming's executor or to the representatives of Grace Lady Boswell, the legatee of the £2000. It is difficult to approach the decision of that question in a proper condition of mind. One has a lingering suspicion that Mrs Leslie Cuming never intended interest to run at all, and so it is exceedingly difficult to say whether she intended it to go to the legatee or to her executor. We are bound to assume a certain intention on her part. Assuming, then, that she intended interest to run on this money, and taking into consideration the fact that she never received or asked for payment, we must presume that she intended the interest to run up in the debtor's hands for some one's benefit. These considerations point to an accumulation for her sister's benefit. She does not leave a sum of £2000 generally to her sister, but this particular £2000. The difference between these two kinds of legacies is well known and important. This is a legacy of a specific fund. All these circumstances, particularly (1) the assumption that Mrs Leslie Cuming intended interest to run; and (2) the fact that she never uplifted or asked for interest in her lifetime, naturally infer that she meant the interest to run on and accumulate for his mother's benefit. I am therefore for answering the question before us in the affirmative.

LORD DEAS—If this had been a bequest to the debtor, it would no doubt have been a bequest of interest past due as well as of capital. But it is a bequest to a third party, and the question is one of intention, to be gathered from the terms of the document in connection with the real evidence of facts. I do not think that the rule of the Roman law, that the interest is always to follow the principal, has been received to its full extent in our law. With us it goes no further than a presumption. If this had been a bequest of the document of debt, it would undoubtedly have carried interest, but it is a bequest of the £2000 lent to Sir James Boswell "at my death." These expressions raise a difficulty. Upon the other hand, the relationship of the parties is very material. Laying out of view the question whether Mrs Cuming intended to exact interest from her nephew, I am of opinion that, whatever was exigible from him, she meant to give to his mother. The time of making the

bequest is also material. Almost immediately after the loan is made, she makes the bequest. If she had died shortly after, there would be no doubt that she meant that all that was owing by Sir James was to go to his mother. Although in certain points of view a testament is considered to be of the date of the testator's death, in others the date of its execution is very material, and I am not disposed to lay this element out of view.

LORD ARDMILLAN concurred.

LORD KINLOCH—I am of opinion that this case is to be decided, not by the application of any absolute or inflexible rule, but by a sound construction of the meaning of Mrs Leslie Cuming in the document bequeathing the claim. Applying this principle, I arrive at the conclusion that Mrs Cuming must be held to have bequeathed to Lady Boswell the arrears of interest as well as the principal, and that both belong to Mrs Vassall, as Lady Boswell's representative,

It must be held settled that this was a debt bearing interest, for the Court have decreed for interest against the debtor's representative. It must be further held that Mrs Cuming, the creditor, did not intend to exact interest during her lifetime, for in point of fact she never asked any. The question then is, whether Mrs Cuming, in bequeathing the claim to Lady Boswell, the debtor's mother, intended to bequeath also the interest, which it was her purpose to accumulate with the principal during her own lifetime.

I have no difficulty in answering this question in the affirmative. Although there is no inflexible rule on the subject, there is always a fair presumption that the interest on the principal sum goes with the principal, to which it is an accessory. There might have been considerable difficulty, if it had been clear that Mrs Cuming had intended to uplift the interest during her lifetime, and that it was only by accident that it remained unexact, or if this was a mere balance of interest remaining unpaid. In such a case it would have been open to be strongly pleaded that, not intending to leave any interest over at her death, but to uplift it all during her life, the claim for arrears of interest had not been made over to the legatee, and so by force of law remained with the creditor's general representative. But in the actual case, and holding that Mrs Cuming intended the whole interest to lie over unexact till her decease, I cannot suppose her purposing anything else than that Lady Boswell was to be creditor both in principal and interest. I cannot suppose her purposing to make two creditors in the claim—the one for the principal, the other for the arrears of interest. Her object was plainly to give to Sir James Boswell, the debtor, a friendly creditor who would not deal hardly with him, perhaps would not exact anything at all, or only so much as his circumstances made reasonable. This object would have been frustrated if the interest, which from Mrs Cuming's longevity became of greater amount than the principal, had been severed from the principal, and left to devolve on the creditor's general representative, whoever that might be. I am of opinion that such was not Mrs Leslie Cuming's intention; that Lady Boswell was made her legatee both in the principal and prospective interest; and that Mrs Vassall, as now representing Lady Boswell, is alike entitled to both.

The Court answered the question in the affirmative.

Agents for Lady Cuninghame—Dalgleish & Bell, W. S.

Agents for Mrs Vassall—Mackenzie & Black, W. S.

Thursday, November 2.

SECOND DIVISION.

KERR v. WIGNALL.

Widow—Legal and Conventional Provisions—Election. Circumstances in which held that a wife who survived her husband for only ten months had not made her election between her legal and conventional provisions under a deed of her husband.

Testament—Cheque—Delivery—Donation. There was found in the repositories of a gentleman on his decease a cheque dated ten years back, requesting a bank to pay to his wife "all the money deposited in your bank in my name when she presents this cheque." Held by Lord Gifford, and acquiesced in, that, there being no delivery real or constructive, the cheque constituted neither a donation *mortis causa*, nor a valid and subsisting testament.

Thomas Young and Grace Wignall were married on 6th September 1845. There was no contract of marriage. After her marriage Mrs Young succeeded to a considerable sum of money. On 15th September 1868 Mr Young died, survived by his widow, but leaving no children. Before his death he executed a liferent disposition *mortis causa*, by which he disposed to his wife in liferent, but that only so long as she should remain a widow, all his heritable and moveable estate, for her liferent use alienary.

There was found in Mr Young's repositories after his death a cheque or letter holograph of him in the following terms:—

"Bradford Banking Co.

"Pay Grace Young or Wignall, my wife, all the money deposited in your bank in my name when she presents this cheque, and for her own use solely.

"THOMAS YOUNG,

"Dec. 1st, 1859."

When Mr Young died the sum deposited in his name with the said Bradford Banking Company amounted to £1813, 12s. 6d.

Mrs Young died on 16th July 1869, surviving her husband ten months only. During the greater part of that time she was in bad health.

The present action was raised by the next of kin of the late Thomas Young, against the executor of the late Mrs Young, and concluded for payment "of the whole capital sums and subjects, parts and portions of the estate and funds of the said deceased Thomas Young, uplifted, realised, and disposed of by her, the said Mrs Grace Wignall or Young, or by the defender, with the interest due and payable thereon from the date of Mrs Young's death, when her liferent right ceased and determined."

The defender pleaded—" (1) The cheque or letter addressed by the deceased Thomas Young to the Bradford Banking Company having constituted or instructed a reasonable provision, or a bequest or donation *mortis causa*, or donation *inter vivos*, in favour of the now deceased Mrs Young, of the sums deposited in the said bank in name of

the said Thomas Young, the defender is entitled thereto as her executor, and to be credited therewith in this action. (2) The said Mrs Grace Wignall or Young having elected to claim her *jus relictae* and terce, instead of the provisions conceived in her favour in the disposition executed by her husband, the defender, as her executor, is now entitled to the amount thereof. (3) Or if it shall be held that the said Mrs Grace Wignall or Young did not elect between her *jus relictae* and terce and the said provisions, the defender is now entitled to claim the amount of the *jus relictae*. (4) If the defender be held entitled to claim the amount of the said *jus relictae*, and also the sum in the said cheque, whether as a reasonable provision as aforesaid, or as a donation *inter vivos*, or a donation *mortis causa*, or a bequest, he is entitled to decree of absolvitor in this action."

A proof was led, the import of which sufficiently appears from the interlocutor and note of the Lord Ordinary (GIFFORD), which is appended:—

"Edinburgh, 19th April 1871.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, and whole process, finds that the pursuers have failed to prove that the deceased Mrs Grace Wignall or Young, widow of the deceased Thomas Young, formerly chemist and druggist in Bradford, afterwards residing in Edinburgh, elected to accept, or did accept, the conventional provisions made in her favour in the liferent disposition *mortis causa* by her husband the said deceased Thomas Young, dated 17th January 1862; and finds that the pursuers have failed to prove that the said Mrs Grace Wignall or Young had in any way barred herself from repudiating the said liferent disposition, and from claiming her legal rights as the widow of the said deceased Thomas Young: Therefore finds, in point of law, that the said deceased Mrs Grace Wignall or Young was, at the time of her death, and that the defender as her representative is now, entitled to claim payment of or credit in account with the pursuers for the whole amount of the *jus relictae*, and other legal rights of the said Mrs Grace Wignall or Young, as widow of the said deceased Thomas Young: Finds that the cheque No. 35 of process was never delivered, either actually or constructively, by the said Thomas Young to the said Mrs Grace Wignall or Young; and finds that the said cheque, being prior in date to the said *mortis causa* liferent disposition, the said Mrs Grace Wignall or Young was not entitled, and the defender as her representative is not entitled, to claim the funds or sums of money mentioned in the said cheque; and finds, *separatim*, that in the event of the defender, as representative of the said deceased Grace Wignall or Young, repudiating the said *mortis causa* liferent disposition, he is not entitled to claim the sums of money mentioned in the said cheque.

"Note.—Although the circumstances of this case are a little complicated, the questions at issue between the parties are substantially only two, viz.—*First*, Whether the late Mrs Young during her life elected to accept, and did accept, of the conventional provisions made in her favour by her husband's liferent disposition of 17th January 1862, and renounced or barred herself from claiming her legal rights? and *second*, Whether the late Mrs Young, in virtue of her husband's cheque, dated 1st December 1859, No. 35 of process, was entitled to the money in the bank therein mentioned? This second question has two aspects, for the