

then by section 33 of the existing statute all the powers, rights, and privileges, in reference to the roads and bridges transferred to the respondents, are declared to be thenceforth possessed and exercised by them.

I shall only add that the recent report of Mr Doull, engineer, procured by the respondents for the information of the Court, is important as showing their actings to be consistent with the exercise of a sound discretion, assuming that the statute is not wholly adverse to the proceedings they have adopted.

The other Judges concurred, and the Court refused the interdict.

Agents for Complainers—Horne, Horne, & Lyell, W.S.

Agent for Respondents—D. Curror, S.S.C.

Wednesday, January 31.

FIRST DIVISION.

SPECIAL CASE FOR GEORGE YOUNG HENDRY AND OTHERS (JAMES HENDRY'S TRUSTEES) AND OTHERS.

Succession—Vesting.

Where a testator made a destination of his property to certain persons in succession, who should be alive on the occurrence of a certain event, but on another event, which necessarily evacuated the previous destination, and which did actually happen, directed it, on the falling in of certain annuities, to be divided equally among his three nephews, the children or other next of kin succeeding to the share of any nephew who should predecease the term of payment or division:—

Held, that, though under the first destination the period of vesting was postponed till the time of payment, yet, under the second, the change of terms manifestly showed that vesting was intended on the purifying of the condition, though the term of payment might be postponed.

The late James Hendry, of Cambridge Terrace, Hyde Park, London, who died in 1849, by trust-disposition and settlement dated 27th September 1843, and two codicils thereto dated 21st September 1847, and 23d October 1848, conveyed to James M'Gavin, then residing in Glasgow, and certain other trustees, and to any person they might assume, two properties in Brunswick Street, Glasgow, adjoining each other, occupied as warehouses and offices. The said trust-disposition and settlement contained one set of purposes as to the property which was thereby first conveyed, and another set of purposes as to the property which was thereby second conveyed. The present Special Case referred only to the property second conveyed by the said trust-disposition. The clauses and provisions on which the present question arose are as follows:—“*Second*, with regard to the subjects in the second place before conveyed, I hereby direct and appoint my said trustees, out of the first and readiest of the rents and proceeds of the same, to pay to Mrs Barbara Roxburgh or M'Gavin, spouse of the said Robert M'Gavin, and sister of my deceased first spouse, Martha Roxburgh, of a free annuity during all the days and years of her life,

of one hundred and fifty pounds sterling, payable at two terms in the year, Martinmas and Whitsunday, by equal portions . . . and after her decease I direct and appoint my said trustees to pay to each of her three unmarried daughters, Mary M'Gavin, Martha Roxburgh M'Gavin, and Barbara M'Gavin, out of said rents and proceeds, a free annuity of fifty pounds sterling during all the days and years of their respective lifetimes, payable in manner above mentioned . . . and on the decease of any two of them, I direct my said trustees to increase the annuity to the survivor to one hundred pounds sterling, and I leave and bequeath said respective annuities accordingly. And I appoint the remainder of the said rents and proceeds accruing after my decease as aforesaid, after deduction of all charges and expenses, and of the three annuities of twenty pounds sterling each, after bequeathed, to be paid over to the said James M'Gavin, my trustee, yearly and termly, until the decease of his said mother and the whole of his said sisters, and failing him by decease to his eldest son; whom failing to his next son or other sons in succession, the eldest alive being always preferred; whom failing, then to his eldest daughter or other daughters in succession, the eldest alive being always preferred for the time; and on the decease of the said Mrs Barbara Roxburgh or M'Gavin, and of her said three daughters, should the said James M'Gavin be then alive, I direct and appoint my said trustees to pay over to him during his lifetime the whole free rents and proceeds of said subjects, under deduction of said three small annuities, and should he, at the said period of the decease of the last survivor of his said mother and sisters, have a son or sons, daughter or daughters, or should he at any subsequent period have a son or sons, daughter or daughters, then I direct and appoint my said trustees to convey and make over the full fee and property of the said subjects second described, under the burden always of the said James M'Gavin's own liferent and said small annuities, to and in favour of his the said James M'Gavin's eldest or other son in succession then alive, and failing sons at that period, then to his the said James M'Gavin's eldest or other daughter in succession then alive . . . Farther, in the event of the death of the said James M'Gavin before that of the last survivor of his said mother and sisters, I direct and appoint my said trustees, upon the death of such last survivor, should the said James M'Gavin have left a child or children, to convey and make over the full fee and property of the said subjects second above conveyed, under the burden always of said three small annuities after bequeathed if then subsisting, to and in favour of his eldest or other son in succession then alive, the eldest alive being always preferred, and failing sons, then to his eldest or other daughter in succession then alive, the eldest alive being always preferred . . . Farther, in regard to the fee and property of the subjects second before conveyed, in the event of the said James M'Gavin having no children, or in the event of his own intermediate death, leaving no children alive at the death of the last survivor of his mother and sisters as aforesaid, I direct and appoint my said trustees, on the death of such last survivor, to sell and dispose of these subjects either by public roup or private bargain, for such price or prices as they can obtain for the same, and after deduction of all charges and expenses, to pay over and divide the free proceeds with any inter-

mediate rents to and among my said three nephews, Henry, George, and James Young, in equal proportions, and in the event of any or all of their deaths before a division, the share of the decessor or decessors shall go to and be equally divided amongst the children or other next of kin of such decessor or decessors, and should these or any of these be in minority, my trustees are authorised to lay out and invest their shares, or make advances out of the same for their behoof, in such way and manner as they may think fit, for which purpose they are hereby appointed their tutors and curators. But the whole foresaid destinations both of liferent and fee of the subjects second before conveyed, and eventual sale thereof, are hereby expressly burdened with the payment of the following annuities exigible out of the same," &c.

The parties to this Special Case were the trustees of the first part, and George Young Hendry, and James Young, two of his nephews mentioned in this last clause of the deed, and the next of kin of the deceased Henry Young, the third nephew, of the second part.

"Mr James M'Gavin died in March 1857, unmarried. Of the annuitants named in the trust-disposition in connection with this second part of the trust-property, two only survived—viz., Miss Mary M'Gavin, residing at Partick, near Glasgow, now seventy years of age; and Mrs Martha Roxburgh M'Gavin or Moir, now sixty-four years of age, wife of Mr James Moir, one of the trustees. Each of these two annuitants was entitled to an annuity of £50 per annum; and on the death of either the survivor would be entitled to an annuity of £100. Shortly after Mr M'Gavin's death a deed of agreement and factory was entered into between George Young (therein called George Young Hendry) and James Young, the surviving nephew of the said James Hendry the truster, and the next of kin of the deceased Henry Young, the truster's third nephew, with consent of the trustees. Since the death of James M'Gavin the free rents of the property, mentioned in article 3 hereof, after paying the annuities and other charges affecting the same, had, under the arrangement contained in the said deed of agreement and factory, been divided half-yearly among the second parties to this Special Case—viz., one-third to each of the said George Young Hendry and James Young, who were nephews of the truster; and the remaining third to the representatives of their deceased brother Henry Young, who died on 6th June 1848 unmarried and intestate. These representatives were the said Mrs Janet Hendry or Young, his mother; the said George Young Hendry and James Young, his brothers; the said Janet Young and Margaret Young, his sisters; along with Isabella Young and Mary Young, children of his deceased brother John Young. The property referred to in article 3 hereof was recently taken by the Glasgow Court-houses Commissioners, by virtue of the compulsory powers contained in the Glasgow Court-houses Amendment Act 1868, and the Lands Clauses Consolidation (Scotland) Act 1845, which is incorporated therewith. The price was fixed by arbitration, and the amount, £10,000, was consigned by the said Commissioners in the Union Bank of Scotland, on 28th June 1871, in terms of the 67th section of the Lands Clauses Act.

"In reference to the £10,000 thus consigned, a petition was presented to the Court (Junior Lord Ordinary) by the trustees, with consent of the parties of the second part, for authority to uplift and

invest £2500 of it to secure the subsisting annuities, and to divide the remaining £7500 among the second parties. No objection was stated by the annuitants, but the question of vesting having been raised, it was thought advisable to bring this Special Case before proceeding farther with the petition."

The second parties to this case contended that the fee of the said property had vested in them, and on this footing required the first parties hereto to divide the same among them, after retaining a sum sufficient to secure the annuities to Miss Mary M'Gavin and Mrs Moir, and the survivor of them.

The question on which the opinion and judgment of the Court was craved was:—

"Has the fee of the property second conveyed by the trust-disposition, and referred to in article 3 hereof, vested in the parties hereto of the second part?"

J. A. CRICHTON for the first parties.

Solicitor-General (A. R. CLARK) and BIRNIE for the second parties.

Authorities—*Pretty v. Newbigging*, March 1, 1854, 16 D. 667; *Aberdein's Trustees*, March 19, 1870, 8 Macph. 750; *Carleton v. Thomson*, July 30, 1867, 5 Macph. H. of L. 151.

At advising—

LORD PRESIDENT—The question that comes before us is, whether the fee of a certain fund settled by the trust-disposition and settlement of the late Mr James Hendry has vested in the parties of the second part to this Special Case? That question depends upon the construction and effect of that portion of the deed which disposes of the particular property which has produced this fund, but the whole settlement requires consideration if we are fully to understand this part of it.

The deed conveys to trustees two different properties, with regard to the first of which it is only necessary to say that it is settled to a great extent in the same form, and with the same objects as the second. The direction to the trustees is to pay to the truster's sister Mrs Janet Hendry or Young the annual produce of this first property, and after her decease an annuity of £50 is to be paid to her eldest son John Young, and the remainder of the annual proceeds divided among his brothers and sisters. Then, after the decease of all his brothers and sisters, the testator appoints the whole fee to go to the said John Young, if then alive, failing him to his eldest son, and failing him on through the children in succession of the remaining brothers and sisters of the said John Young, but always on the condition of the party succeeding being then alive. Finally, failing all of them, he appoints the subjects to be sold, and the proceeds to be divided among the whole of his own then next of kin. So that, as regards this first property, at any rate, there can be no doubt that the parties to take, in any event, must personally survive the period of vesting or division, and under such a destination there can be no vesting of the fee until the term of vesting or division actually come. The question is, whether the second part of the settlement is open to the same or a contrary construction.

As regards the first part of the second destination, there is a remarkable similarity between it and the previous one, for the testator directs his trustees to pay to Mrs M'Gavin, his deceased wife's sister, an annuity of £150, and after her decease to pay to each of her three unmarried daughters £50 a-year each, and on the decease of any two of them he appoints this annuity to be increased to £100.

Then he appoints the free annual produce of the second property to be paid over to his trustee James M'Gavin, son of the said Mrs M'Gavin, after payment of the above, and one or two other small annuities, and this "yearly and termly until the decease of his said mother, and the whole of his said sisters, and failing him by decease, to his eldest son," and so on. The testator then proceeds to direct that, on the decease of the said Mrs M'Gavin and her three daughters, the whole annual produce of the property should be paid to the said James M'Gavin during his lifetime, and at the same time,—that is, at the death of the last survivor of his mother and sisters,—that the fee of the said property should be conveyed to his eldest son, or other son in succession then alive, under burden of his own liferent. Now, as regards the event contemplated in this clause, it is plain enough that till the death of the annuitants, not only of Mrs M'Gavin, but also of her three daughters, there can be no vesting of the fee of this property in any one, because the vesting of the fee is contingent on the parties being alive at the time the annuities fall in. But then there is another event provided for by the testator, namely, the case of James M'Gavin predeceasing the last survivor of the annuitants, and leaving children. In this event he appoints his trustees, upon the death of the said last survivor, to convey the fee to his eldest or other son in succession then alive. And so in this case, as in the last, it is quite plain that, just as was provided with regard to the first property, the survivance of the annuitants is an express condition of taking the fee. But neither of the events thus provided for occurred, for James M'Gavin died unmarried and survived by two of the annuitants, and for this state of matters the testator has also carefully provided in another clause, but it is one which has not much similarity with the rest of the deed. He there provides that in the event of James M'Gavin having no children, or in the event of his predeceasing the last survivor of the annuitants, and leaving no children who should survive them, that then, in that case, the subjects composing the second property should be sold, and the proceeds divided equally among his three nephews Henry, George, and James Young, "and in the event of any or all of their deaths before a division, the share of the deceiver or deceasers shall go to and be equally divided amongst the children or other next of kin of such deceiver or deceasers." The condition of surviving the last survivor of the annuitants is not here expressed, and the whole language of the clause is totally different from that employed in any other part of the deed. Upon the condition being purified on which their succession depends, each of these nephews is to take a third part of the proceeds of the property to himself or his heirs. In every event that can happen after the said condition is purified, the fund must be divided into three equal parts, and even if these nephews predecease, their shares go, not merely to children, but to next of kin, whomsoever they may be. It is impossible to read that clause without giving it the simple meaning of a legacy to each nephew, and his heirs and executors. It is impossible to doubt that there is here no destination over, even in the most limited sense of the term. Looked at in this light, the bequest of this fund must be held to vest from the time the succession opens, the term of payment being postponed, possibly by the burden of M'Gavin's liferent, or possibly, as has actually happened, by the survivance of some of

the annuitants. I am therefore of opinion that the sum has vested, and that we should answer the question put to us in the affirmative.

LORDS DEAS and ARDMILLAN concurred.

LORD KINLOCK—Under the trust-settlement of the late James Hendry, he disposes to trustees certain subjects, described as those conveyed in the second place, with instructions to pay certain annuities out of their proceeds, and *quoad ultra* to hold the subjects for behoof of James M'Gavin and any children he may have, according to certain prescribed rules of succession. And he further declares—"In the event of the said James M'Gavin having no children, or in the event of his own intermediate death, leaving no children alive at the death of the last survivor of his mother and sisters, as aforesaid, I direct and appoint my said trustees, on the death of such last survivor, to sell and dispose of these subjects, either by public roup or private bargain, for such price or prices as they can obtain for the same, and after deduction of all charges and expenses, to pay over and divide the free proceeds, with any intermediate rents, to and among my said three nephews Henry, George, and James Young, in equal proportions; and in the event of any or all of their deaths before a division, the share of the deceiver or deceasers shall go to, and be equally divided among, all the children or other next of kin of such deceiver or deceasers."

James M'Gavin has died without children. Two of the annuitants still survive, and under the settlement the property is not to be sold till the death of the survivor. The question put to us is, whether the fee of the subjects, or their proceeds—they having been, in point of fact, compulsorily sold to the Glasgow Court House Commissioners—has vested in the disponees appointed on failure of James M'Gavin without issue.

I am of opinion in the affirmative. The right being given to the parties named, and failing them "their children, or other next of kin," is, I think, simply given to these parties, their heirs and successors. I can give the clause no other legal construction. Such a clause has always been held to vest a fee so soon as the deed giving it comes into operation. It is true that the period of payment has been postponed till the death of the last annuitant. But it is trite that vesting is not necessarily simultaneous with payment. There is no suspension of vesting till the death of the last surviving annuitant. The deed gives no warrant for holding that the grantor intended that the right should remain unsettled till the death of the last annuitant, and should attach to the party then in existence to claim it. This occurs in regard to several other rights conferred by the deed. It might possibly have held here also had there been any substitution or destination over in the proper legal sense. It might then have reasonably been argued that vesting was suspended, in order that it might be seen who was in life at the death of the last annuitant. But the devolution on heirs and successors is not a destination over in any correct legal sense. It is just the primary destination prolonged. It is the man himself in the person of his heir. It was never heard of, so far as I am aware, that a man's right stood suspended in order to operate a contingent fee to his heir-at-law. A disposition to a man and his heirs operates a complete present fee to the donee. It gives the fee to the heirs, failing the donee, but the donee, if himself in life, is absolute fiar.

A different question might have arisen if the persons called, failing the primary disponees, had not been their heirs-at-law, but their children simply. It is unnecessary to consider that case. Even then it would have required a careful consideration of the deed in order to see whether it was the intention of the grantor to suspend vesting in the father in favour of the children, and, as it were, to run the life of the father against the lives of the children. But as things are, the question does not occur.

The object in postponing payment, whatever it might be in the case of other parties whose rights have now vanished by death, is not, as I think, in the case of the parties now before the Court, to postpone vesting. It can be held only to be to secure the annuitants by preserving the estate for their behoof in the hands of the trustees, so long as the annuities run. How this interest may be satisfied is not in the question put to us. To the question, as put, I think an affirmative answer is to be given.

The Court accordingly found and declared that the fee of the property had vested in the parties to the case of the second part, but reserving the question whether the trustees are entitled without consent of the annuitants to forestall the time of payment.

Agents for First Parties—G. & J. Binny, W.S.
Agents for Second Parties—Webster & Will,
W.S.

Thursday, February 1.

SECOND DIVISION.

MACLAREN, ETC. v. ROBERTSON.

Agreement—Locus Pœnitentiæ.

An agreement as to land may be constituted by letters by one of the parties, and a draft agreement in similar terms being returned to the writers of the letters by the other party.

Holograph Writing.

Opinion that a holograph writing containing the name of the writer, though unsubscribed, is binding if delivered for the purpose of being acted on.

This was an action of declarator, &c. by Mrs Maclaren, Mrs Weir, and Miss Robertson, daughters of the late William Robertson, against their brother William Robertson and their sister Mrs Kilgour. Disputes arose among the parties as to their rights under their father's settlement, and an attempt was made to come to an arrangement. The only question was whether these negotiations had resulted in a binding arrangement. The defender alleged—"The pursuer Mrs Weir, in connection with such arrangement, wrote a letter in the following terms:—

'Glasgow, 91 North Hanover Street,
'Dec. 22, 1869.

'Dear Sisters,—I agree to give my brother £50 sterling from 16 Rose Street, combined with his share in No. 8 Rose Street, and any other claim that is contained in father's settlement, but stand firm to father's settlement being in any way altered or broken by selling of shares. This I appointedly object to shares being sold or bought in No. 8 Rose Street.

'MARIA G. WEIR'

"The pursuer Margaret Robertson also wrote a

letter in almost the same terms, and to precisely the same effect. The other sisters also agreed to this arrangement. Said letters were delivered to the defender; and it was then further arranged that an agreement embodying and carrying out their terms should be entered into between the defender and his sisters; but on said agreement being prepared by the pursuers' agents, it was found, on its being sent for revival to the defender's agent, that it deviated from the terms of said arrangement. It was therefore revised in accordance therewith, and returned for execution, but the pursuers have never executed the same."

The Lord Ordinary (JEANVISWOODE), after a proof, found, "with reference to the averments in articles 16, 17, and 18 of the statement of facts for the defender William Robertson, as to which averments a proof was allowed to the defenders, that certain negotiations took place between him and his sisters, including the female pursuers, with a view to an arrangement of all questions as to the validity of the said testamentary writing, and his right, as heir-at-law of his father the said deceased William Robertson, to the house or flat in No. 16 Rose Street, Edinburgh, which belonged to his said father, and as to his rights under the disposition and settlement of his said father; that in the course of said negotiations the pursuers Margaret Robertson and Mrs Weir wrote to their sisters, and despatched to their sister Mrs Maclaren, for the purpose of being communicated to their brother the said William Robertson, defender, the letters referred to in article 17 of the said statement of facts, and that said letters were delivered to him by his said sister Mrs Maclaren; that the said letters were re-delivered to her by the said William Robertson, and that thereafter, with his sanction, a draft minute of agreement was prepared by the law agent of the pursuers, for the purpose of giving effect to the arrangement as proposed in said letters; that said draft minute of agreement, as so prepared, was approved of by the pursuers Mrs Weir and Margaret Robertson, and by their sisters, and was afterwards revised, on behalf of the defender, by his law agent; but that the said pursuers subsequently declined to execute the said agreement, and that it has not been executed by the parties."

His Lordship afterwards pronounced this finding:—"Finds as matter of law—(1) That the arrangement or agreement referred to in articles 16 and 17 of the statement of facts for the defender William Robertson, and which was entered into between him and his sisters, including the female pursuers Mrs Weir and Margaret Robertson, with a view to a settlement of the questions out of which the present action has arisen, was a concluded arrangement between the said parties, and that the pursuers have failed to establish facts relevant and sufficient to entitle them to rescind from said arrangement, and to refuse to execute a formal deed of agreement embodying the terms thereof; therefore sustains the second plea in law for the defender William Robertson, assolizes the said defender from the conclusions of the summons, and decerns."

The pursuers reclaimed.

WATSON and MACLAREN for them.

SCOTT and DUNDAS GRANT for respondents.

LORD JUSTICE-CLERK—(After stating the facts)—I think there was here a concluded agreement, which was expressed in writing. If the letters of Margaret and Mrs Weir, on the one hand, and the