

nelius to the pursuer in the said one-half of the account sued for, between and including 17th April 1876 and the close of the proceedings in the Sheriff Court, and in one-half of the sum of £3, 3s. on account of said proceedings in this Court: Further, find the said defenders Clunas & Sey and David Clunas liable to the pursuer in another fourth part of the said account sued for, between and including the 17th April 1876 and the close of the proceedings in the Sheriff Court, and in the other half of the said sum of £3, 3s.: Therefore decern against the defenders Henry Harding and William Cornelius, conjunctly and severally, for payment to the pursuer of the sum of £26, 6s. 5d., with interest thereon at the rate of five per centum per annum from 14th December 1876 until payment; and decern against the defenders Clunas & Sey and David Clunas for payment to the pursuer of the sum of £8, 16s. 3d., with interest thereon at the rate of five per centum per annum from 14th December 1876 until payment: Find no expenses due to or by any of the parties since the date of the Lord Ordinary's interlocutor of 17th May 1877; and decern."

Counsel for Pursuer (Reclaimer)—Fraser—Rhind. Agent—Party.

Counsel for Defenders (Respondents) Harding and Cornelius—Millie. Agents—Watt & Anderson, S.S.C.

Saturday, November 17.

SECOND DIVISION.

SPECIAL CASE—HOUSTON OR MITCHELL AND OTHERS.

Succession—Fee and Liferent—Protected Succession.

A testatrix disposed of the residue of her estate by giving two-fifths to her nephews and three-fifths to her nieces, the share of any one predeceasing her to be divided equally amongst the whole surviving nephews and nieces. The principal sums were to be at her nephews' disposal as they attained majority, "but my nieces' shares to be invested on good security, and in the event of any of them being married, to be settled on themselves and their children." In the event of any of her nieces dying after her without issue there was a destination-over of her share, which was to go to the surviving nephews and nieces. — *Held* (1) that the nieces of the testatrix were entitled to the absolute right of the fee of the shares falling to them, and that the terms of the will imported no effectual qualification of that right; and (2) (distinguishing the case from *Lady Massy v. Scott's Trustees*, December 5, 1872, 11 Macph. 173; and *Gibson's Trustees v. Ross*, July 24, 1877, 14 Scot. Law Rep. 694) that there was no such indication of the intention of the testatrix as would induce the Court to

direct each niece's share to be invested for the purpose of excluding the *jus mariti* and preventing gratuitous alienation.

Miss Jane Houston died on the 15th of November 1853, leaving a holograph will dated the 8th of February 1847, which contained, among others, the following bequest—"The residue of my estate I bequeath to the children of my said deceased brother James Houston, and appoint the same to be divided among them in manner following, viz., I appoint two-fifths of said residue to be divided equally among my five nephews, sons of my deceased brother James Houston, and the remaining three-fifths of the said residue I appoint to be divided equally among my four nieces, daughters of my said deceased brother James Houston; and should any of my said nephews or nieces not survive me I appoint the share that would have otherwise fallen to said nephew or niece predeceasing me, to be divided equally among the whole of the surviving said nephews and nieces. The principal sums or shares falling to my nephews under this will be at their own disposal as they severally reach the age of twenty-one years; but my nieces' shares is to be invested on good security, and in the event of any of them being married, to be settled on themselves and their children. The interest of both nephews' and nieces' shares to be spent on their education till they reach the age of twenty-one years, or allowed to accumulate till then for their behoof, as my executors may see fit; and in the event of any of my nieces dying after me without leaving any children, the amount settled on her shall revert equally after her death to the remaining branches of the family of my deceased brother James Houston, viz., to be divided equally among the surviving nephews and nieces, and the children of such of them as may have died leaving children, in which case said children to be entitled to the parent's share." The will further contained the following nomination of executors—"And I hereby appoint [four were named], or such of them as shall accept the office and be at the time in Great Britain, to carry this, my latter will, into effect, with power to my said executors, if they shall see fit, in case of the death of any one of them, to appoint another or others to succeed to the charge."

After the death of the testatrix, her sister-in-law Mrs Helen MacDonald or Houston, one of the executors nominated by the will, accepted that office, and continued to exercise it until her death, when her son and executor-nominate Patrick Cruikshank Houston, M.D., who was the third party to this Special Case, entered into possession of the residue of the estate of his aunt Miss Jane Houston. The residue amounted to a sum exceeding £4000, and consisted entirely of moveables.

The Case was brought after all the beneficiaries had attained majority.

The first parties, who were Mrs Margaret Houston or Mitchell, wife of Arthur Mitchell, M.D., and her three sisters, the four nieces of the testatrix (Mrs Mitchell alone being married), maintained that under the will they were entitled absolutely to three-fifths of the residue of the estate, to be divided equally among them.

The parties of the second part, who were the only child of Mrs Mitchell, and his uncle Cruikshank Houston, the only nephew now interested

in the succession, contended that the intention of the testatrix was that her nieces should enjoy merely a life-tenant of the three-fifths of the residue, the share or shares life-tenant by such as might die leaving issue being divisible among such issue, and the share or shares of such as might die without issue reverting to the remaining branches of the family; or alternatively, that the third party was bound to invest the shares of the first parties in their own names in fee, exclusive of the *ius mariti* of their husbands, and after their death in favour of their children also in fee, subject to the condition that the children's right of succession should not be defeated by any gratuitous act of their mothers, and failing children to Miss Houston's surviving nephews and nieces and the children of predeceasers in terms of her will.

The question submitted to the Court was—“Whether the parties hereto of the first part, nieces of the said Miss Jane Houston, are vested each to the extent of one-fourth with an absolute right to the fee of the said three-fifth parts of the residue of Miss Houston's estate?”

Argued for the first parties—The terms of the deed appointing the bequest of residue imported an express gift of fee, and there was nothing in the subsequent part of the deed to indicate an intention to restrict this gift. There was no doubt a direction to invest, and that the shares in the event of marriage should be settled on the nieces and their children with a destination-over in case there were no children. But this did not make them the less absolute fiars. Such a direction was merely a direction to pay the shares in the form of good securities—*Allan's Trustees v. Allan*, December 12, 1872, 11 Macph. 216, 45 Scot. Jur. 144. A direction to settle on the mothers and their children when there was nothing to import a life-tenant allenerly still left the mother fiar—*Alexander v. Alexander*, December 13, 1849, 12 D. 345 and 348. In the event of the nieces dying without issue, it was very doubtful whether the destination-over would have any effect, as it implied a substitution in moveables—*Buchanan's Trustees v. Dalziel's Trustees*, February 28, 1868, 6 Macph. 536. The case was distinguished from those of *Lady Massy* and *Ross*. In these cases there were elements showing the testator's distinct intention of limiting the legatee's right to a life-tenant—*Massy v. Scott's Trustees*, December 5, 1872, 11 Macph. 173; *Gibson's Trustees v. Ross*, July 24, 1877, 14 Scot. Law Rep. 694. In this case the testator had indicated no such intention, and the Court would not thus construe provisions capable of quite a different construction.

Authorities—*Supra*, and *Dyer v. Curruthers*, May 27, 1874, 1 Rettie 943; *Scott's Trustees v. Stack*, June 16, 1865, 3 Macph. 950.

Argued for the second parties—It was evident from the distinction made between the bequest to the nephews and to the nieces that the testatrix intended to limit in some way the right conferred on her nieces. The executors were really intended to be trustees. They were to carry the will of the testatrix into effect, and they had a power of assumption, and if necessary could have retained in their hands the nieces' shares for behoof of themselves and their children. The testatrix intended either to convey to her nieces a life-tenant allenerly and a fee to their children, or a right of fee to

her nieces with a protected succession to their children, and failing them to others, which the nieces could not defeat. In either case the course followed in the cases of *Lady Massy* and *Ross*, referred to *supra*, would carry out the intentions of the testatrix.

Authorities—*Massy v. Scott's Trustees*, and *Gibson's Trustees v. Ross*, *supra*; *Ramsay v. Beveridge*, March 3, 1854, 16 D. 764; *Dawson, &c.*, November 10, 1876, 4 Rettie 597, 14 Scot. Law Rep. 71.

At advising—

LORD JUSTICE-CLERK—In this case the question which we are asked is—Whether the nieces of the testatrix are vested each to the extent of one-fourth with an absolute right to the fee of three-fifths of the residue of her estate? I am of opinion that they are, and that the terms of the will import no effectual qualification of their right which can prevent them having at once the full and free enjoyment of their provisions.

The provision of the deed on which the question turns is as follows—[reads bequest as above]. These are the terms of the bequest, and that it is a bequest in fee to the nieces of the testatrix, so far as the words I have referred to go, is beyond a doubt. But then there follow some qualifications of the bequest.

The deed proceeds—“And should any of my said nephews or nieces not survive me, I appoint the share that would have otherwise fallen to said nephew or niece predeceasing me to be divided equally among the whole of the surviving said nephews and nieces.” Now, it is quite clear that under that clause, had any of the nephews or nieces predeceased the testatrix, what, in consequence of his or her death, would have fallen to the surviving nieces as well as nephews would have been the full and unqualified fee.

Then the deed goes on—“The principal sums or shares falling to my nephews under this will to be at their own disposal as they severally reach the age of twenty-one years; but my nieces' shares to be invested on good security.” Now, no doubt that raises an inference that while the nephews were to have their shares at their own disposal on attaining majority, the nieces were not, but were to be limited in their enjoyment of their shares in some way which is not pointed out. But it is a sure inference of the intention of the testatrix, which, so far as I can see, she has not carried out to any practical effect. Then she further adds—“And in the event of any of them [the nieces] being married, to be settled on themselves and their children.” Whatever may be the effect of that provision, at all events it is only to take effect in the event of any of the nieces being married, and, as I think, married before attaining the age of twenty-one. A direction to invest on good security neither infers a life-tenant nor a restriction of the fee. And a settlement “on themselves and their children” would not restrict the bequest of fee to the nieces, because the gift being an express gift of fee, it cannot be qualified unless there follow words leading necessarily to an opposite result.

Then, finally, after a provision for the disposal of the income of the nephews' and nieces' shares prior to their attaining the age of twenty-one, there comes this clause—“And in the event of any of my nieces dying after me without leaving

any children, the amount settled on her shall revert equally after her death to the remaining branches of the family of my deceased brother James Houston, viz., to be divided equally among the surviving nephews and nieces, and the children of such of them as may have died leaving children, in which case said children to be entitled to the parent's share." Now, that operates, in the event of the death of any of the nieces without issue, as a substitution of the surviving nephews and nieces and the issue of predeceasers. It operates as a substitution, but to no larger or further effect.

On a consideration therefore of the whole terms of this settlement, I am of opinion that there is no case for liferent at all. The settlement is entirely a settlement of fee, and there are no provisions of any kind which could restrict the enjoyment thereof to a liferent interest. Nor is it to be assumed that either the children of the nieces or the persons substituted to them were more favoured by the testatrix than the nieces themselves. The tendency of decision in all cases of this class is rather against restriction, and when there is a clear indication of the testator's intention to give a fee to persons marked out, the presumption is in favour of that fee being unqualified.

The only real question in the case appears to me to be, whether there is a protected succession? But even admitting that the fee, unquestionably given, was still to be so settled as to prevent the fund being affected by gratuitous deeds, there is, I think, no reason for supposing that the testatrix meant anything more, or to impose restrictions which she has not in terms imposed. It is said that *Lady Massy's* case (11 Macph. 173) is analagous to the present. But that is a case the principle of which I should not be inclined to carry farther than was there done. In that case there were two or three material elements which do not occur here. Lady Massy was married at the date the will was executed. A power of disposal, failing issue, was expressly conferred on her; and failing issue and disposal by her, the provision was to go to her own heirs, to the exclusion of those of her husband. In these circumstances there was a presumption of intention to limit or qualify the bequest which there is not here. The intention was apparent to protect the right of Lady Massy's children, but the machinery was defective, and the Court interfered to require such a settlement to be made as would give effect to the intention and protect the children's right of succession. But I do not think that the Court is entitled to interfere to supplement defective machinery unless the testator's intention is very clear indeed.

Lady Massy's case was followed by the case of *Ross* (14 Scot. Law Rep. 694). But in that case also there were clear words pointing to a restriction of the mother's right to one of liferent, and the Court gave effect to the testator's clear intention by requiring an appropriate settlement to be made.

But here there is not expressed, and there is no clear indication that the testatrix intended, any restriction upon the full right of fee conferred on her nieces, either for the benefit of their children or of the other substitutes. To ask the Court to protect the rights of succession of substitutes when the testator has shown no intention that they

should be protected, is to ask the Court to step beyond the limit of its functions.

There is certainly a considerable amount of obscurity in the terms of the deed, but it has, I think, been caused by the testator's use of language, the full force and effect of which she did not properly understand, and not from any clear intention of limiting or restricting the rights conferred in the manner contended for by the second parties to this case.

LORD ORMDALE—It is very difficult to give a consistent construction to the will and settlement here in question, or to reconcile with each other all the particulars it contains. This arises probably from the circumstance of the will having been prepared, as it bears to have been, by the testatrix herself without professional assistance.

The question to be solved relates exclusively to three-fifths of the residue of the estate belonging to the testatrix, which consists entirely of money. The question is whether the first parties to the case, nieces of the testatrix, are now entitled absolutely to the three-fifths referred to of the residue of the testator's estate, or, as contended for by the other parties, to only a liferent of these three-fifths. It was, failing the contention as to a liferent, maintained that the three-fifths of the residue in question, in place of being paid over to the first parties as belonging to them absolutely, must be settled upon them in such a way as to exclude the *jus mariti* of their husbands, and secure it from their gratuitous disposal.

Now, in regard to the first parties having merely a right of liferent in the disputed fund, I can find nothing in the will to warrant any such conclusion. I think it contains unmistakable indications to the contrary. In particular, it contains words of bequest and division of the capital. So far, therefore, as concerns the suggestion of a liferent, I have no hesitation in rejecting it; and that, according to what is stated in the case, disposes of the whole difference which has arisen between the parties.

But it was pleaded alternatively at the debate that the disputed fund must be secured in some such manner—it was not said how—as to exclude the *jus mariti* of the husbands of the third parties and secure it from gratuitous alienation; and this matter, according to some views that may be taken of it, is not unattended with difficulty; but after careful consideration I am satisfied that it ought not to stand in the way of the first parties being found entitled to payment absolutely of the fund. The will contains no express direction to the effect that the *jus mariti* of husbands is to be excluded. It merely says that the fund is to be settled on the nieces of the testatrix and their children; but supposing this were done in literal compliance with the direction, the *jus mariti* of the husbands would not be thereby excluded. And, again, a disposal of the fund simply to the nieces and their children would, as it appears to me, give the fee of the capital to the nieces themselves. It might no doubt be possible by means of a trust, or through the medium of something like an entail, to secure and protect the fund from husbands and gratuitous alienations, but no such modes of security are prescribed or enjoined by the testatrix, and I am unable to see how they can be resorted to without making a new will for her.

Nor am I satisfied that qualified restrictions, such as those which were prescribed by the Court in the cases of *Lady Massy*, December 5, 1872, 11 Macph. 173, and of *Gibson's Trustees v. Ross*, 14 Scot. Law Rep. 694, are called for in the present case. The case of *Gibson's Trustees* is so very different in its circumstances as really to have little or no application. And in *Lady Massy's* case there was an ulterior destination of a character so different from anything that is to be found in the present as to prevent it being a precedent. It appears to me that the case of *Allan's Trustees v. Allan*, December 12, 1872, 11 Macph. 216, where Lord Cowan took occasion to remark on the case of *Lady Massy*, is much more in point, and there the Court held that as there was a clear direction to the trustees to pay to the beneficiaries, and as the Court could not consistently therewith create a trust, which was the only mode of rendering their provisions inalienable, they were entitled to receive payment on their own receipts.

Adopting the principle of decision given effect to in that case, I am of opinion with your Lordship that the question submitted to the Court in the present case ought to be answered in the affirmative.

LORD GIFFORD concurred.

The Court answered the question in the affirmative.

Counsel for Houston or Mitchell and Others (First Parties)—Kinnear—Thomson.

Counsel for Second and Third Parties—Rutherford—H. Johnston. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

* Saturday, November 17.

OUTER HOUSE.

[Lord Curriehill, Ordinary.

LORD ADVOCATE *v.* GRIERSON.

Revenue—Mortis causa or inter vivos Donation?—Legacy Duty

A deposit-receipt was taken in name of a party (whose only means of subsistence it was) and the daughter of her brother, payable to either of them and the survivor. The first party, *intuitu mortis* and shortly before her death, gave the receipt to the second party, desiring her to get the money placed in her own name, which she did.—*Held* (by Lord Curriehill, Ordinary) that in the circumstances of the case as proved, the donation was *mortis causa*, there not being sufficient proof by the donee that it was *inter vivos* and irrevocable, and legacy duty accordingly found payable upon it.

This was an information by the Lord Advocate on behalf of the Crown against the defender, concluding for—(1) The sum of £15, being the amount of stamp duty on the inventory of the personal estate and effects of the deceased Mrs Grace Grierson or Harper, which inventory the defender, as having intromitted with the said

* Decided 12th November.

estate and effects, was bound to exhibit in terms of the Acts 48 Geo. III. cap. 149, and 55 Geo. III. cap. 184, schedule part 3, and 23 & 24 Vict. cap. 80, sec. 5; and (2) for the sum of £45, by virtue of the statutes 36 Geo. III. cap. 52, 45 Geo. III. cap. 28, 55 Geo. III. cap. 184, schedule, part 3, and 8 & 9 Vict. cap. 76, sec. 4, being legacy duty on the sum of £450 given by the deceased to the defenders as a donation *mortis causa*, and subject as such to duty as a legacy. At the hearing of the case the pursuer did not insist in the first count of the information, and in answer to the second count it was alleged by the defender that the sum in question had been gifted to her by the deceased absolutely and *inter vivos*, and that consequently legacy duty was not payable thereon. The facts of the case as admitted and proved in evidence are sufficiently stated in the note appended by the Lord Ordinary in Exchequer Causes (Curriehill) to his interlocutor, which was as follows:—

“*Edinburgh, 12th November 1877.*—The Lord Ordinary having heard the counsel for the parties and considered the closed record, proof, and whole process—(1) Finds that the pursuer does not now insist in the first count of the information, Therefore assolizies the defender therefrom, and decerns: (2) Finds in terms of the second count of the information, and decerns.

“*Note.*—In this case the parties are agreed that a donation of £450 was made by the deceased to the defender, and the only question is, Whether the donation was *inter vivos* and absolute or was *mortis causa* and therefore revocable and a legacy; The defender maintains that the gift was absolute and *inter vivos*, and the *onus probandi* rests with her. The proof of such a donation must be clear and unambiguous.

“The circumstances of the case, as admitted on record and disclosed in the proof, are shortly as follows:—The defender, who is the illegitimate daughter of a brother of the deceased Mrs Harper, resided from her childhood with the deceased, who at the time of her death on 29th April 1871 was upwards of seventy years of age. She had been for a year before her death suffering from heart disease, and in April 1871 she became dropsical, and was plainly dying from the effects of her disease. Several years before her death Mrs Harper acquired a sum of about £450 through the death of her husband, and that sum she deposited in bank on a deposit-receipt taken in name of herself and the defender, and payable to either of them and the survivor. From time to time the money was uplifted and re-deposited, the interest being received by the deceased and applied towards her maintenance, and she always kept the receipts in her own custody. She had no other means of subsistence than the money in question except supplies of farm produce from one of her brothers to the value of about £20 per annum. The defender, who gave her evidence throughout with great candour, and I believe with perfect truth, stated that the money was originally deposited by her aunt in the terms above set forth in order that in the event of her decease it might be a provision for the defender. And she further stated that on 18th April her aunt, being aware of her precarious state of health, and fearing lest after her death the defender might have difficulty in getting the money for her own use, gave the deposit-receipt to the