

Saturday, March 10.

SECOND DIVISION.

SCHOOL BOARD OF BURGH OF PETERHEAD,  
PETITIONERS

*Presumption of Life—Presumption of Life Limitation (Scotland) Act 1881, sec. 1—Where Person presumed to be Dead was a mere Liferenter “Entitled to Succeed”—Competency.*

Where the liferenter of estate has disappeared for upwards of seven years, the fiar, not being “entitled to succeed” to such person in estate of which he was possessed at the time of his disappearance, is not entitled to obtain the annual income of the estate under the Presumption of Life Limitation (Scotland) Act 1881.

James Yule died on 8th August 1866, leaving a trust-disposition and settlement of date 29th March 1864, and a relative codicil of date the 6th December 1864. By the said trust-deed he conveyed to trustees his whole heritable and moveable estate which should belong to him at the time of his death, and directed them in the second purpose of the trust to uplift the interest that might fall due thereupon, and to pay over the said interest, under deduction of the annuity of £16 sterling per annum (after mentioned), to John Sangster, his nephew, who was then residing with him. Then followed a bequest of an annuity of £16 to his housekeeper Isabella Cassie; and the fourth purpose of the trust provided as follows:—“Upon the death of the said John Sangster, my trustees shall uplift and realise all my estates and the sums of money which they may have lent out and invested as aforesaid; and in case the said Isabella Cassie is then alive, they shall secure to her, by purchase or otherwise, payment of the said annuity during the remaining days and years of her life; and in case the said John Sangster shall have left lawful issue, they shall thereafter divide and pay the whole of the residue of my estates, and the proceeds and produce thereof then remaining, to and amongst such issue equally, share and share alike.” . . .

By the fifth purpose of the trust the testator provided as follows:—“In case the said John Sangster shall die without leaving lawful issue, or having left lawful issue, that such issue shall all die in minority without leaving lawful issue, my trustees shall, out of the residue of my estate, pay to the directors of the Peterhead Academy, for the purposes of education in that institution, the sum of £500 sterling, which sum shall be lent out and invested by these directors in the Government funds, and the dividends to arise thereupon shall be applied by them yearly or half-yearly exclusively for the purposes of education, and not for the purposes of paying off any debts of the institution or any other purpose whatever; and shall also pay to the directors, managers, or other office-bearers of the Peterhead Union Industrial School the sum of £500 sterling, to be lent out and invested in the same manner as the above sum to the Peterhead Academy, and the dividends to arise thereupon shall be applied exclusively for the purposes of education in the said Union Industrial School, and for no other purpose whatever.”

By the codicil he declared that in respect John Sangster had become of unsound mind, and it was doubtful whether he would be capable of managing his affairs, the trustees were only to pay him the interest, if they should at any time judge it expedient and for his benefit that it should be so paid to him.

John Sangster when at the age of fifty-three, and unmarried, disappeared while under the charge of a keeper at Stanley Railway Station on 3d August 1870, and had never since been heard of. At that date he continued to be of unsound mind.

This petition was presented in 1883 under the first section of the Presumption of Life Limitation (Scotland) Act 1881 by the School Board of the burgh of Peterhead, as disponees and assignees of the educational institutions above named, for authority to receive and discharge the free annual income of the two sums of £500, and to possess and use the same as if John Sangster were dead.

Yule's trustees lodged answers. They denied that the petitioners were entitled to the income of the two sums of £500 specified in the fifth purpose of the said trust-disposition and settlement; but they maintained, in the first place, that the present application was not competent under the Presumption of Life Limitation (Scotland) Act 1881. The Act did not apply to the case of a liferenter disappearing, and the income being claimed or sought to be extinguished by the party entitled to the capital on the termination of the liferent. Besides, the sums of which the income was now claimed were not sums of which the said John Sangster was possessed, or to which he was entitled at the date of his disappearance. The sums claimed were two specific legacies of £500 each, payable out of the general residue. John Sangster was not entitled to the liferent of any part of the estate, unless to such extent as the trustees should consider it expedient and for his benefit. Lastly, there was no presumption under the Act or at common law that John Sangster died without leaving lawful issue.

The respondents also denied that the petitioners had acquired right, by assignation or otherwise, to the bequests in favour of the Peterhead Academy and the Peterhead Union Industrial School.

By the 1st section of the Presumption of Life Limitation (Scotland) Act 1881 it is enacted that “In the case of any person who has been absent from Scotland, or who has disappeared, for a period of seven years or upwards, and who has not been heard of for seven years, and who at the time of his leaving and disappearance was possessed of or entitled to heritable or moveable estate in Scotland, or who has become entitled to such estate in Scotland, it shall be competent to any person entitled to succeed to an absent person in such estate to present a petition to the Court setting forth the said facts; and after proof of the said facts, and of the petitioner's being entitled as aforesaid, and after such procedure and inquiry, by advertisement or otherwise, as the Court may direct, the Court may grant authority to the petitioner to uplift and enjoy the yearly income of the heritable or moveable estate of such absent person, as the case may be, and to grant all requisite discharges for the same, as if the said absent person were dead; or the Court may sequester the estate, and appoint a judicial

factor thereon, with the usual powers, and with authority to pay over the free yearly income of the estate to the petitioner, whose discharge shall be as valid and effectual as if granted by the absent person."

By the 8th section of said Act it is enacted that "For the purposes of this Act, in all cases where a person has left Scotland, or has disappeared, and where no presumption arises from the facts that he died at any definite date, he shall be presumed to have died on the day which will complete a period of seven years from the time of his last being heard of at or after such leaving or disappearance."

Argued for petitioners—They were the assignees of the Peterhead Academy and the Peterhead Union Industrial School, and were therefore in right of the two sums contained in Yule's trust-disposition and settlement. These two sums were bequeathed to Sangster in liferent, and on his death without issue to the above institutions in fee. Sangster had disappeared seven years ago, and had no issue. After the lapse of another seven years another application would fall to be made in order to get payment of the capital of the two sums. The application was competent, for the Act was not to be construed so judaically that in no case was a fiar to be debarred from succeeding under the Act to a liferenter.

Replied by Yule's trustees—This application was incompetent, and was just an attempt to get declarator that Sangster was dead, and that the trust fell to be wound up. The person said to have disappeared was at most nothing more than a liferenter, and the Act only applied to the cases of persons who disappeared possessed of the fee of heritable or moveable estate. The best illustration of the position of the parties here was that of liferent and fiar. The fiar never succeeds to the liferenter. The liferent is a mere burden on the fee, and on the death of the liferenter the fee is set free.

At advising—

**LORD JUSTICE-CLERK**—It is impossible to disguise that the question now raised is an important and wide one, and that a decision on it may very materially affect the operation of this remedial statute, which undoubtedly was intended to operate relief in cases of hardship. But I have come to be of opinion that this particular case does not fall within the words of the statute. Whatever may be the petitioners' rights at common law, I am clearly of opinion that they cannot proceed under the clauses of this Act.

I do not think that the provisions of the statute extend to such a case as this; it is necessary that anyone who can present a petition under it must be entitled to "succeed" to the person who has disappeared.

If the School Board of Peterhead was entitled to "succeed" to something belonging to the person who has disappeared, then they would be within the statute, but no better illustration can be given of their position than the one which has been stated of liferent and fiar. The fiar does not "succeed" to the liferenter; the liferent is a burden on the fee, and on the death of the liferenter the fee is set free.

On the ground, then, that the petitioners are not in terms of the statute entitled to succeed to this liferenter, I am of opinion that this application

cannot be brought under the Act. Of what common law remedies are still open to the petitioners I say nothing, but they do not come under the statute.

**LORD CRAIGHILL**—In this petition the School Board of Peterhead, who claim to have right to two legacies of £500 contingently bequeathed by the late James Yule—the one to the directors of the Peterhead Academy, and the other to the directors, managers, or other office-bearers of the Peterhead Union Industrial School—pray the Court to grant authority to them to receive the free annual income of the said two sums of £500. This application is rested, first, on the testamentary trust-deed of Mr Yule, and second, on section 1 of the Presumption of Life Limitation (Scotland) Act 1881. The trustees carrying on the administration of the estate out of which these legacies, should they ever become exigible, were to be paid, oppose this application for two reasons—first, that the statute referred to does not apply to the circumstances of this case, and second, that the petitioners are not, and have not acquired the rights of, the legatees. On the latter question it is unnecessary for me to say anything, because in the former there is enough for the decision of the controversy.

The facts to which it is necessary to advert are few and undisputed. (1) The trustor died in 1866. (2) He left a trust-settlement, consisting in part of the original deed executed in March 1864, and in part of a relative codicil made in the following December. (3) His whole estate was conveyed to trustees for specified purposes, those with which we are concerned being the second of the trust-deed as altered by the codicil, whereby a liferent, subject to conditions and qualifications, was given to John Sangster, the trustor's nephew; the fourth, by which the trustees were directed after this nephew's death to realise the estate, and in case he should leave lawful issue, then to pay the residue to such issue; and the fifth, by which, should the nephew die without leaving lawful issue, or leaving issue that should die in minority, the legacies in question were directed to be paid. Mr Sangster's nephew disappeared in August 1870, and has never since been heard of, and more than seven years having thus elapsed from the date of his disappearance, the petitioners, conceiving that the sums constituting the legacies in question were moveable estate in Scotland of which he was possessed or to which he was entitled when he disappeared, have presented this petition to the Court that they may be found in the meantime entitled to the income or interest of the legacies. This is the ground of their application. I am of opinion that the case is not one which is covered by the Act, and concur with your Lordship in thinking that this petition ought to be dismissed.

The reasons of this view of the matter appear to me to be plain, and may be briefly presented. The question—and truly the only one in this case—is, Was John Sangster possessed of, or was he entitled to, real or moveable estate to which the petitioners are entitled to succeed to him in such estate? The answer must be in the negative, for at the most, assuming, contrary to the contention of the respondents, that he had as much, all he had was a liferent of the trust property. But this liferent ends when he dies or is to be held as

dead, and to that consequently there can be no succession. No doubt through his death the fee is disburdened and those portions to which, failing children of the liferenter, the legatees would be entitled are as a consequence left free for distribution. But neither the fee nor any part of it belonged to him, and those taking the fee do not and cannot take it as his successors in that estate. This result becomes the more obvious when section 3 of the statute is taken into account. Those who may pray for the authority which may be conferred under the first section are the same as those who may pray for that which under the third section may be conferred. The subject of the one application is the income; that of the other is the capital; and both or to both the person who has disappeared must have possessed or been entitled. Tried by this test the failure of the petitioners' argument becomes clear to demonstration. The petitioners say that the principle on which the statute is based is wide enough to comprehend them, but the words are not. Nay more, these not only do not support, but they are inconsistent with, the interpretation to which the petitioners seek the sanction of the Court. I would only add, that if the result contended for by them were to be recognised, this trust and many trusts would be frustrated. Interests intended to be protected would be left without protection, and contingent interests which were intended to be operative only when the conditions were purified would often be rendered effectual even from the opening of the trust. This is a consideration which, even had the words of the statute been ambiguous, which they are not, would have materially influenced my opinion on the question before us.

**LORD RUTHERFURD CLARK**—I am of the same opinion. The statute enables us in certain events to dispose of the estate of an absent person, and at two several times. First, when he is absent and has not been heard of for seven years, we are entitled, on the application of the person entitled to succeed, to give the petitioner the income of the heritable and moveable estate of the absent person, or we may sequestrate the estate of the absentee and appoint a judicial factor thereon. If the person continues to be absent for another period of seven years, then the same petitioner may renew his application to the Court, and the Court may then, if it thinks proper, direct the fee of the estate to be paid to the petitioner or his representatives, who may take the estate in his place.

These are the statutory provisions, and they seem to include all the cases which can possibly occur under the statute—the first application dealing with the interest, and the second with the fee of the estate.

Now, the petitioner here asks us to deal with the estate of an absent person who is presumed to be dead under the statute, where that person was a mere liferenter and nothing else, perhaps not even that—we are therefore asked to deal with the estate of a person who by his death lost the estate claimed.

Now, I cannot see why we should be thought to be giving a judicial construction to the statute if we reject this application, because I think that there is no estate with which the Court should deal. There are other questions involved in the petition on which I do not touch. For

instance, I am clear that we ought not to decide whether the petitioners have any right to the legacies.

LORD YOUNG was absent.

The Court refused the petition.

Counsel for Petitioners—Mackintosh—Guthrie.  
Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Respondents—Trayner—Hon.  
H. J. Moncreiff. Agent—Alex. Morison, S.S.C.

Tuesday, March 13.

## FIRST DIVISION.

[Lord M'Laren, Ordinary

### REID AND OTHERS v. PRESBYTERY OF ARBROATH.

*Ecclesiastical Buildings and Glebes (Scotland) Act 1868 (31 and 32 Vict. cap. 96), secs. 3, 4, 14—Designing of Glebe—Appeal to Sheriff—Suspension and Interdict—Jurisdiction.*

A presbytery having, on the petition of a minister of a parish within the bounds, found him entitled to have a glebe designed to him, certain of the heritors appealed to the Sheriff in manner provided by the Ecclesiastical Buildings and Glebe (Scotland) Act 1868. Other heritors presented a note of suspension and interdict against the presbytery and the minister for interdict against designing a glebe, or taking any further procedure on the minister's petition. The Court refused the suspension on the ground that the question was *sub judice* before the tribunal appointed by the Ecclesiastical Buildings and Glebes (Scotland) Act 1868 for its determination.

Section 3 of the Ecclesiastical Buildings and Glebes (Scotland) Act 1868 provides that "From and after the passing of this Act, if in the course of any proceedings before any presbytery of the Church of Scotland, relating to the building, rebuilding, repairing, adding to, or other alteration of churches or manses, or to the designing or excambing of sites therefor, or to the designing or excambing of glebes, or to the designing or excambing of sites for or additions to churchyards, and the suitable maintenance thereof (including the building or repairing of churchyard walls), any heritor, or the minister of the parish, shall be dissatisfied with any order, finding, judgment, interlocutor, or decree pronounced by such presbytery, it shall be competent for such heritor or minister, within twenty days of the date of such order, finding, judgment, interlocutor, or decree, to stay such proceedings by appealing the whole cause as hereinafter provided; and such appeal, on being duly intimated to the clerk of the said presbytery, shall have the effect of staying the presbytery from taking any further steps in connection with said proceedings."

By section 4 it is provided that the appeal under the said Act "shall be taken by the appellant or his agent presenting a summary petition to the Sheriff of the county in which the parish