

LOED ADAM—I concur. I think the Lord Ordinary has decided the case on the right ground. I think the arrangement come to was of the nature of a compromise, and the resolution of the creditors, it appears to me, should not be disturbed. If Marshall & Aitken had appeared and made an offer to keep the estate *indemnitas* of any loss which might occur as well as to pay the costs of the action, if allowed to sue, and the creditors had refused such an offer, quite a different question would have been raised.

The Court adhered.

Counsel for the Appellants—Henderson Begg—Napier. Agents—Tait & Johnston, S.S.C.

Counsel for the Respondents—Goudy. Agents—Smith & Mason, S.S.C.

Friday, July 5.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

GILCHRIST v. YOUNG PENTLAND AND ANOTHER (GILCHRIST'S TRUSTEES).

Parent and Child—Legitim—Time of Valuation to Ascertain Legitim—Discretion to Trustees.

A trustor directed his trustees immediately after his death, or as soon thereafter as they should deem it expedient, to realise his whole estate, which included certain ship shares, and to invest the proceeds for the purposes of the trust. Six months after the trustor's death the trustees announced their resolution to retain the estate for the behoof of the beneficiaries. The son of the trustor sued the trustees for legitim.

Held (1) that the trustees were not bound to realise the estate in order to ascertain its value, and (2) (*rev. Lord Fraser*) that as legitim was a claim of debt against the estate as at the father's death, the pursuer was not entitled to a proof that the market value of the shares had risen since that date.

Lord Shand *diss.* on the ground that in so far as the shares had risen in value between the date of the father's death and the resolution of the trustees to retain the property, the additional value should be taken into account in fixing the amount of the pursuer's claim.

John Gilchrist, wine merchant, Leith, died on 14th June 1888, survived by his wife and four children.

By trust-disposition and settlement he directed his trustees "immediately after my death, or as soon thereafter as they shall deem expedient, to realise my whole moveable means and estate, including my present business of wine and spirit merchant, and invest the proceeds thereof in good heritable security, and apply the income or annual produce thereof for the purposes of the trust." By codicil he recalled certain provisions which he had made in favour of his son James Watson Gilchrist, and in place thereof bequeathed to him £100 in full of all his claims.

James Watson Gilchrist claimed legitim, and

raised this action against the trustees.

The defenders lodged a vidimus of the deceased's personal estate as at the date of his death, including various stocks and shares in the ownership of three steamships and one sailing vessel. The estate liable for legitim was shown at £7359, one-twelfth whereof, being the pursuer's share, was £612, 10s., and the entry embracing the ship shares was as follows:—"8. Ship shares—(1) 6/64 shares of the steamship 'Scotsman' of Leith, at £137, 10s. per share, per Messrs Blaik & Company's valuation, £825; (2) 6/64 shares of the steamship 'Sicilian' of Leith, at £10 per share, per Messrs Blaik & Company's valuation, £60; (3) 6/64 shares of the steamship 'Nicosian' of Leith, at £20 per share, per Messrs Blaik & Company's valuation, £120; (4) 5/64 shares of the ship 'Zuleika' of Leith, per Thomas Law & Company's valuation, £350."

The pursuer objected to the principle upon which the statement was made up. He alleged (1) that the vidimus represented the value of the stocks and shares as at the date of his father's death on 14th June 1888, whereas these stocks, some of which had increased in value since the death, must be estimated as at the value of the present time; and (2) that that value could only be ascertained by selling the whole of the stocks and shares.

The defenders lodged answers, and explained that they regarded the pursuer's claim of legitim as a claim of debt which emerged on the death of his father, and the amount of which was to be ascertained according to the value of the free moveable estate as it then stood. They maintained that the pursuer's claim amounted to his legal proportion of the estate, according to its fair value, as at the date of death, less the necessary expenses of realisation, or according to the amount which it would have fetched if the whole estate had been immediately realised; that his claim was not affected by subsequent fluctuations in value of investments which the defenders continued to hold; and that they were not bound to realise the whole estate under their charge in order that the amount of the pursuer's one-twelfth share might be thereafter ascertained. In explaining their principle of valuation they stated with regard to the ship shares—"Item 8. This item represents the value of certain shares in three steamers and one sailing ship held by the deceased. At the date of his death two of the steamers were heavily burdened with debt, for which each individual owner was liable *in solidum*. The value of the shares in each vessel was obtained from information supplied by the managing owners, which was based upon their knowledge of the condition in which the ships were at the time, and the price received for other shares in said steamers sold during the month current at the death. Had these shares been immediately realised, the defenders believe they would not have fetched more than the sums stated, if so much. The defenders repeatedly advertised the shares for sale, but no offers were made for the steamship shares in answer to their advertisement. The shares in the sailing ship were sold on 4th September 1888 at an increase of £80 on the valued price. At this time the market price for ship property had considerably improved. The defenders, at the request of the beneficiaries, have continued to hold said steamship shares,

and have no intention meanwhile of realising them."

On 16th March 1889 the Lord Ordinary (FRASER) repelled the objections stated by the pursuer to the vidimus lodged by the trustees except as regarded the value put upon the shares of the three steamships; found that these shares must be entered as of the market price of the present day; and reserved to the pursuer to move the Court to be allowed a proof that the vidimus did not correctly set forth the market price of the other stocks and shares therein referred to as at the date of death.

"*Opinion.*—[After stating the facts and the two heads of the pursuer's objections]—With regard to the first of these points, the Lord Ordinary is of opinion that in the general case the estate out of which legitim is claimable must be taken as of the value at the father's death. To this general rule there are exceptions, as where the estate consists of doubtful or contingent claims, the value of which cannot be ascertained until the money therefor has been actually received by the executor. In such a case the accounting with the claimant for legitim must of necessity be according to the amount actually received. In the present case there was no such difficulty in the way of ascertaining the value. All the stocks of companies, except one, were quoted on the Stock Exchange, and the ship shares, although of no great value at the date of death, were still marketable. The defenders state that they endeavoured to sell the shares in the steamers and could not find a purchaser, although it is said that these have now somewhat increased in value and are saleable. This is a good reason for taking the value of the steamships in estimating legitim as at the present date, instead of at the small nominal value at the date of the testator's death.

"The general rule now stated rests upon this doctrine, that legitim is a claim of debt against the executy for a certain proportion of the personal estate which vests in the child claiming it at the father's death. He is entitled to that proportion and no more. If the executor delays to settle the claim, and the property sinks in value, the claim of the child is not thereby diminished, and in like manner if it increases in value the claim is not thereby enhanced in amount. If the executor without justifiable excuse delays to pay the legitim, he is liable in interest according to many decisions, and that interest is five per cent. In the case of *M. Murray v. M. Murray's Trustees*, 17th July 1852, 14 D. 1048, the point was very distinctly brought out and determined. It was held 'that the legitim was a debt to be measured by the amount of the fund at the father's death, and did not infer a right to participate in profits realised by the application of the fund after the father's death.' The whole estate had been employed in the father's business, and profits had been made of which the child claiming legitim demanded a share. Lord Ivory explained the grounds of judgment in the following terms—'The claim of legitim is a claim of debt against the testator's estate. In the ordinary case of a debtor in business, the fund out of which the debt is to be paid is put in peril, but the creditor does not get the profits. In this case the pursuer's claim was a claim

against the general fund, and was due at the moment of the testator's death. If the trustees have put the estate into peril and made profit that enlarges the estate—the measure of the creditor's security but not of the claim—the debt is the same as before, unaffected by their trading. It is still due with interest and nothing more. Legitim is a claim of debt. Suppose a party thinking he has right to dispose of his whole property, leaves all of it to one of his children and excludes another, and the child to whom the property was left enters into possession and uses the estate in trade, would that entitle the excluded child on his claiming legitim to claim a share of the profits? It would not, and he would not be worse off; for if the business turned out ill the other would be obliged, if he sacrificed the fund, to answer for it with his own funds.' In like manner, in the case of the *Earl of Dalhousie v. Crokeat*, March 26, 1868, 6 Macph. 659, the point was again submitted to the Court although under different circumstances. A loss was sustained of the fund from which legitim was payable in consequence of the executor having allowed his agent to embezzle it. The Court held that the executor must bear the loss, and that no part of it could be allowed to diminish the claim for legitim. 'It appears to me,' said Lord Ardmillan, 'that the child entitled to legitim is a creditor of the executor for a share of the free executory estate—that is, for a share of the free moveable estate left by the father as at the date of his death, or as soon thereafter as it can be realised. . . . If the executor had employed the funds of the deceased in trade, the pursuer would have taken no benefit thence arising. If the executor had purchased railway or bank stock, and the stock had risen in value, I cannot think that the legitim would have been increased so as to amount to anything beyond the price paid for the stock, since if the price had fallen the legitim would not have been diminished. Legitim must be calculated as at the date of the father's death, and profit or loss arising after realisation in consequence of the executor's mode of dealing with the funds cannot augment or diminish the claim of the child.'

"There are cases where, in consequence of arrangements between a child claiming legitim, or a widow claiming *jus relictae*, these persons will be found entitled to a share of profits made from the application of the funds to purposes of trade, and of this class of cases there is an illustration in the case of *Ross v. Masson*, February 3, 1843, 5 D. 483. The judgment was not unanimous, as Lord Medwyn dissented, and held that there was not such a speciality as to take the case out of the general rule. It was a claim by a widow for *jus relictae*, and Lord Medwyn said—'The widow is entitled to revert to her legal rights notwithstanding all that she has done. But then must she not take her *jus relictae* according to the state of the moveables at the death of her husband? She is not tied down by the valuation then made. She may show that this is inadequate, and she will get her share estimated at their full value. I always understood that the share of the moveable estate payable out of the estate of the husband to the children as legitim, and to the widow as *jus relictae*, was estimated as at the death and not as it might be at any future period. If the widow had claimed her *jus relictae*

at the time, would she have been entitled to more than the estimated value of the right according to the then rate of the market? And if by some unexpected opening of trade, or the failure of some neighbouring coal work, the value of this some years afterwards greatly increased, would she have been entitled to claim this additional value after having obtained its value at the time of her husband's death? Lord Moncreiff assimilated the case to a contingent fund, and upon that ground allowed the widow's claim for a share of the profits. 'If,' he said 'the claim had been a contingent fund which could not be realised at the time of the husband's death, there is no doubt that a widow would be entitled to claim upon it as at the time when it was realised.' And this doctrine is not disputed, for the general rule allows of such an exception.

"The second point made by the pursuer is, that the whole of the stocks and shares ought to be sold in order to pay off his one-twelfth proportion. Now, there is no such absolute right on the part of a claimant for legitim or *jus relictae*. This is a matter entirely in the discretion of the Court, who are entitled and bound to look to the interests of the other beneficiaries who have claims upon the estate, and if they object to such sale the Court will give heed to such objection. To throw all these stocks and shares into the market merely to pay the pursuer's small proportion would be putting the property to the chance of loss, and would certainly be attended with very considerable expense in brokerage charges and commission. If the pursuer challenges the statement that the stocks, &c., are not entered as at the market prices of the day at the time of death, he will be allowed to prove this, but if not he must be settled with according to that market price, seeing that if the property had been all sold he would have got no more from the sale."

On 23rd May 1889 the Lord Ordinary (KYLACHY) pronounced the following interlocutor:—"In respect the pursuer is satisfied that the vidimus correctly sets forth the market price of the stocks and shares other than the shares of the steamships therein mentioned, Finds it unnecessary to order proof in regard thereto: Allows to the pursuer a proof of the market price at the present time of the said shares of the steamships mentioned in the vidimus, and to the defenders a conjunct probation; and appoints the proof to proceed on a day to be afterwards fixed."

The defenders reclaimed against both interlocutors, and argued—The date of the testator's death was the only time at which legitim could be calculated. If that period were departed from great difficulties would be encountered. The claim of legitim was a claim of debt—*M' Murray v. M' Murray's Trustees*, July 17, 1852, 14 D. 1048. It was not necessary to fix the exact day of the testator's death for the calculation of legitim, but it ought to be about that time, and interest should run as from the day of death. The pursuer was not entitled to have the whole trust-estate realised—*Earl of Dalhousie v. Crokat*, March 26, 1868, 6 Macph. 659; *Pringle's Trustees v. Hamilton*, March 15, 1872, 10 Macph. 621; *Minto v. Kirkpatrick*, May 23, 1833, 11 Sh. 632; *Fisher v. Dixon*, June 16, 1840, 2 D. 1121 and 1138. The duty of the executors here was

simply to do what they have done, to estimate the pursuer's share, and to tender the amount thereof—*Chalmers' Trustees v. Chalmers and Others*, March 16, 1882, 9 R. 743.

Argued for the pursuer—He was entitled to have the estate realised as at the date of liti-contestation in the present action in order that the true amount of his legitim might be determined; he was not bound to accept a random sum reached by the trustees from *ex parte* valuations. He was not bound to accept anything but money in satisfaction of his claims, for legitim was a money claim. He was entitled to have not only the ship shares but the whole stock valued as at present rates. There had been a considerable increase in the *cumulo* value of the trust-estate, and the pursuer was entitled to a share of that increased value, and was not to be prejudiced by the delay on the part of the trustees as regarded realisation—*Fraser on Husband and Wife*, vol. ii. p. 983; cases cited by the Lord Ordinary.

At advising—

LORD ADAM—By the interlocutor of 23rd May 1889 submitted to review, the Lord Ordinary, "in respect that the pursuer is satisfied that the vidimus, No. 10 of process, correctly sets forth the market price of the stocks and shares, other than the shares of the steamships therein mentioned, finds it unnecessary to order proof in respect thereto."

I understand that the pursuer is still satisfied that the vidimus correctly sets forth the market price of the stocks and shares, other than the shares of ships, including the sailing ship, as at the date of the trustor's death, and if this be so, I think that a proof as regards the value of these shares is unnecessary.

But the Lord Ordinary further "allows the pursuer a proof of the market price at the present time of the said shares of the steamships mentioned in the vidimus."

I do not concur in this part of the interlocutor, because I think the proof to be allowed ought to be one of the value of the ship shares, as at the date of the testator's death.

The claim of legitim by the pursuer is undoubtedly a claim of debt against his father's estate, and the amount must be estimated according to the value of the estate at his death. But the defenders, his trustees, are not bound, in order to ascertain that value, to realise the estate. They may retain the whole, or any part of it *in forma specifica*. The trustees are entitled to realise the estate or any part of it, and had they done so, the amount so realised under the deduction of the expenses of the realisation would be the value of the estate of which the pursuer is entitled to a share.

On the other hand, the trustees may resolve not to realise the whole or any part of the estate, and in that case the value must be estimated as at the trustor's death.

In this case, when the claim for legitim was intimated on 22nd October 1888, no part of the estate had been realised except some shares in a sailing ship. The defenders allege that they were then, and are now, holding the estate for the benefit of the beneficiaries, and had resolved not to realise it. If that be so, it appears to me that the value of the estate must be estimated as

at the date of the trustor's death.

If the shares had fallen in value, the loss must have fallen on the defenders, and so if they have risen in value, they are entitled to the gain.

With reference to the value of the shares of the sailing ship which were sold on 4th September 1888, I think the question whether the pursuer is entitled to a share of that value depends upon the question whether or not the shares were then being held by the trustees for the beneficiaries, or were in point of fact sold with a view to realisation as at the date of the trustor's death.

The Lord Ordinary recognises the general rule that the value of the estate must be estimated as at the date of the testator's death, and has given effect to it as regards all the estate except the ship shares. The defenders state (he says) that they endeavoured to sell the shares in the steamers and could not find a purchaser, although it is said that these have now somewhat increased in value and are saleable. This is a good reason (he says) for taking the value of the steamships in estimating legitim as at the present date instead of at the small nominal value at the date of the testator's death.

While I think that the contingency of a possible or probable prospective rise in value is an element which may fairly be taken into consideration in estimating the value of the shares as at the date of the trustor's death, I cannot see that the fact that the shares have increased in value since the trustor's death can be a reason for taking such increased value as the value at the date of death.

I think therefore that the Lord Ordinary's interlocutor ought to be recalled.

LORD MURE—The only difficulty which appears to me to exist in this case is as to the time at which the various stocks and shares left by the testator are to be valued. Lord Fraser has laid down at considerable length the general rule as to when valuations for legitim are to take place, and he has referred to several cases, all of which go to show that the date of the testator's death is the time at which such valuations ought to be made. The Lord Ordinary has accordingly applied the rule which he has thus laid down to the ordinary shares left by the deceased, but he has made an exception in the case of the ships. For that exception I can see no good or sufficient reason. It may be that such shares do not find so ready a market as others, but I cannot see that that circumstance ought to make any difference as to the time at which such shares are to be valued for the purposes of legitim. I agree with Lord Adam in thinking that the whole stocks and shares left by the testator, including the ship shares, ought to be treated in the same way, and that the time at which a valuation for legitim ought to take place is the death of the testator.

LORD SHAND—In common, I understand, with all your Lordships I agree that legitim is not a right to a share of the estate which entitles the claimant to have the estate realised in order that he may have the realised value of his share. It is a debt, but, at the same time, it is a debt to be measured by the actual value of the moveable estate left by the father at his death. While

this is so, it appears to me that it would not be safe nor proper to lay down the rule that the value is to be taken by a valuator of each article or item of the estate made as on the very day of the father's death. What a son claiming legitim is entitled to is a share of the value of the estate—that is, a share of the amount which the estate would bring if it were realised. It is true the executors or beneficiaries are not bound to realise if they resolve and declare that they intend to hold parts of the estate, and to take the risk of future loss by depreciation of value, and the benefit of any profit which may accrue by a rise in value. But even if such a resolution be formed and intimated, the claimant is entitled to have a share of the value which would have been received if the different items of the estate had been realised or sold.

When I say that I think this value is not necessarily to be ascertained as on the very day of the death of the deceased, I mean that a share of the value of the estate as if the estate had been realised, infers that the amount to be ascertained shall be as on a reasonable and prudent realisation, made with a view to gaining the best advantage—realisation such as a person having no purpose of holding for profit, but yet being anxious to make the most of the estate in its different parts or items, would adopt in the ordinary administration of a deceased's estate. There are many parts of an estate which must be advertised with a view to sale, and time must elapse to admit of this, and there may be parts of an estate which it would be quite clearly imprudent as a mere question of realisation to sell without a few days or a few weeks delay.

In reference to property of which this can be said, I do not think that in the ordinary case the value of these is to be taken simply as the sum which could be got for them on the day of the death. If any such hard and fast rule were to be taken, what would be said of the case of a testator having shares in a company which became insolvent some days after his death, involving it might be such consequences as in the case of the *City of Glasgow Bank*? The claimant for legitim could not seek to have the result to the estate thrown out of view in a question with him if prudence and due diligence had been used in the realisation, and so it appears to me that if parts of an estate realized in the ordinary course of an administration have risen in value since the day of the testator's death the benefit should be taken into view in fixing the amount of the estate of which the legitim fund is a fixed part. In short, if the estate is to be realised as for all concerned, then the actual realisation in the ordinary course carried out with due diligence and prudence is the amount to be looked to. If executors or beneficiaries resolve to hold and not to realise, they cannot, as it seems to me, thereby diminish the legitim fund. The value of the estate at the deceased's death should, I think, still be fixed by ascertaining in the best way possible what would have been the amount if a diligent but prudent realisation for the best advantage had actually taken place. And I must further add that where trustees or beneficiaries in answer to a claim for legitim say, it may be at a considerable interval after the testator's death, that they or the beneficiaries mean to hold particular parts of the estate for the beneficiaries,

it appears to me that they ought not on that mere statement to be allowed to take the entire benefit of an increased value which has arisen in the interval of these parts of the estate which it is in the general case to be assumed they held for realisation. If they can show clearly that a resolution was definitely and finally formed at a certain date to retain and hold the property the case would be different, but I think in so far as the property has risen before that resolution was formed the additional value should be taken into view in ascertaining the value of the deceased's estate in order to fix the amount of legitim.

Now, applying these observations to the present case, I have very considerable difficulty in agreeing with the limited judgment suggested by Lord Adam. The trust-deed by its leading purpose provides that—"My trustees shall immediately after my death, or so soon thereafter as they shall deem expedient, realise my whole moveable means and estate, including my present business of wine and spirit merchant, and invest the proceeds thereof in good heritable security and apply the income or annual produce thereof for the purposes of the trust." It thus appears that immediate realisation was by the expressed intention of the testator, one of the purposes of this trust. Six months after his father's death, the pursuer claimed legitim, and when that claim was made it was not suggested by the trustees that realisation of this estate was not to take place. About the same time the agents for the trustees wrote to the pursuer's agent asking some evidence as to the pursuer's identity, and as to the extent of his claim. This letter contains the following passage—"Although our clients are averse to go on with a family litigation like this, they will have no alternative but to follow you into Court and resist the action if you will persist in proceeding, but with the view of an amicable settlement we are instructed to offer your client, which we now do, the sum of £650 in full, but without prejudice. To enable you to judge of this offer we send you copy of the inventory of Mr Gilchrist's personal estate and vidimus of the estate made up as at the date of the death, being the date at which the legitim fund falls to be adjusted." Now, the document forwarded with the letter was only a copy of the inventory of the deceased's personal estate made up for Revenue purposes, in which the values of the different articles are put at their very lowest. So stood matters at the date when the present action was raised, and there is nothing on record to suggest that the defenders were going to make any delay in the realisation of this estate; it was indeed only at a subsequent stage of the proceedings that any objections to prevent realisation were taken.

In the answers by the defenders to the pursuer's objections, under head 8, the matter is thus dealt with—"This item represents the value of certain shares in three steamers and one sailing ship held by the deceased. At the date of his death two of the steamers were heavily burdened with debt, for which each individual owner was liable *in solidum*. The value of the shares in each vessel was obtained from information supplied by the managing owners, which was based upon their knowledge of the conditions in which the ships were at the time, and the price received for other shares in

said steamers sold during the month current at the death. Had these shares been immediately realised the defenders believe they would not have fetched more than the sums stated, if so much. The defenders repeatedly advertised the shares for sale, but no offers were made for the steamship shares in answer to their advertisement. The shares in the sailing ship were sold on 4th September 1888 at an increase of £80 on the valued price. At this time the market price for ship property had considerably improved. The defenders, at the request of the beneficiaries, have continued to hold said steamship shares, and have no intention meanwhile of realising them." Now, taking this to be the first intimation which the pursuer had that his father's estate was not to be realised, what then is the legal result? In order to get the greatest benefit for all parties the trustees thought it would be better to hold on to the ship shares, and to pay the pursuer his legitim as on a valuation obtained at that date. As the trustees were holding for the good of all the beneficiaries, I think that the pursuer is entitled to get the benefit of any rise in value of these ship shares since his father's death, and it is my doubt as to whether the judgment proposed by your Lordships will secure to him this benefit which makes me hesitate about concurring in it. I think that he is entitled to a share of his father's estate as on a fair realisation of the estate six months after his father's death. These ship shares rose during that period, and I think the pursuer is entitled to get the benefit of that rise, and that our interlocutor should be so expressed.

LORD PRESIDENT—I agree with the view of this case which has been taken by Lord Adam, but at the same time I do not think that there is any serious difference of opinion between the members of the Court as to the principles which are to determine this question. Any difficulty which there is will arise when the proof is taken as to the value of the ship shares at the death of the deceased, and it is unnecessary for us at present to anticipate any of these difficulties.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of 16th March 1889; also recal the interlocutor of 23rd May 1889; and in respect the pursuer is satisfied that the vidimus, No. 10 of process, correctly sets forth the market price of the stocks and shares (other than the shares of the ships therein mentioned), as at the date of the testator's death, Find it unnecessary to allow a proof as to the value thereof: Allow to the pursuer a proof of the value of the said shares of ships as at the date of the testator's death, and to the defenders a conjunct probation."

Counsel for the Pursuer—Sir C. Pearson—C. N. Johnston. Agent—Andrew Wallace, Solicitor.

Counsel for the Defenders—Asher, Q. C.—Salvesen. Agents—Snody & Asher, S.S.C.