

ground of the supposed necessity of conforming to authority.

I have considered the cases which were cited to us as precedents on this subject, and it seems to me that this precise point has not been determined by authority, although there are expressions of judicial opinion which lend some support to the objection to the summons. On the other side there is the authority of Erskine, the cases of *Johnston v. Arnold*, and *Richmond v. Graham*, and I refer especially to the clearly expressed opinion of Lord Glenlee in the first mentioned case, which are all in favour of the creditor's right to proceed against the co-obligants separately and independently. The authority of the civil law, on which our law of obligations is largely founded, is to the same effect, because it is perfectly clear that before the introduction of the benefit of division by imperial rescript (and after its introduction, if the benefit of division were renounced) the creditor might bring his action against any one of the joint obligants, on condition of acknowledging the right of the defender to an assignment of the claim. I understand some of your Lordships to be of opinion that the instance would have been good, if the pursuer in this summons had not set forth that there was another obligant jointly and severally liable. If this view be sound I think the pursuer ought to be allowed to amend or restrict his summons to avoid the effect of what is thus reduced to a purely technical objection. I wish to add that I agree with Lord Shand in not giving much weight in this question to the cases arising out of claims against dissolved companies. In all such cases the individuals sued have a right of relief against the partnership estate, and in order that this right may be preserved, it is necessary that the dissolved company should be represented through its members. In the present case there is no joint estate on which recourse can be had, and the reason of the rule referred to in *Muir v. Collett* does not apply.

But I do not wish to represent this question as one which depends on the authority of cases, and indeed in a question of procedure there seems to be no good reason for giving a decisive weight to authority of any kind, because it may be kept in view that no rights are affected and no injury is done to any person by any improvement in its procedure which a court of law may introduce through its decisions. For my part, I prefer in a question of this kind to consider the case on its merits, and according to my own ideas of fitness and justice, rather than to try to find out how other Judges who died fifty years ago would have decided the case, if it had been brought before them.

I am of opinion that the defender's plea to the effect that all parties are not called is not well founded, and that the case ought to be remitted to the Sheriff for proof.

The Court pronounced this interlocutor:—

“Having resumed consideration of the cause, with the assistance of three

Judges of the Second Division, and heard counsel for the parties upon the appeal and the record, after consultation with the said three Judges, and in conformity with the opinion of the majority of the Seven Judges present at said hearing, Recal the interlocutor of the Sheriff dated 19th October 1889 appealed against: Find that the summons concludes against three defenders jointly and severally to make payment of the amount of an open account: Find that the summons was not executed against the defender first named in the summons by reason of his being beyond the jurisdiction of the Sheriff: Find that the joint and several obligation on which the action was founded not being constituted either by writing or decree, the pursuer is bound to call all the alleged co-obligants: Therefore remit to the Sheriff to dismiss the action: Find the appellants entitled to expenses in both Courts,” &c.

Counsel for the Pursuer and Respondent—M'Watt. Agent—W. B. Glen, S.S.C.

Counsel for the Defenders and Reclaimers—Maconochie. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, March 7.

## FIRST DIVISION.

[Lord Trayner, Ordinary.]

MORRISON AND OTHERS (REDDIE'S TRUSTEES) v. LINDSAY AND OTHERS.

*Succession—Mutual Settlement of Spouses—Amount of Joint Estate Carried by Husband's Testament.*

By mutual settlement a husband conveyed to his wife, in the event of her surviving him, the whole estate which might belong or be due to him at the time of his death, constituting her his sole executrix, and the wife made a similar disposition in the husband's favour. These mutual conveyances were subject to the conditions (1) that any testamentary writing left by the predeceaser should receive effect, in the case of the husband being the predeceaser to an extent not exceeding three-fifths, and in the case of the wife being the predeceaser to an extent not exceeding two-fifths of the means and estate remaining at the death of the survivor of them; and (2) that the survivor should have full power by any writing *mortis causa* to test on or dispose of any part not otherwise tested on or conveyed away by the predeceaser as aforesaid.

The husband left a will whereby, on the narrative that the funds of his wife and himself amounted to £5000 at that date, of which £2000 belonged to his wife in her own right, he directed that

what was over after payment of expenses and certain legacies out of his share of the money as mentioned by him, viz., £3000 that belonged to him, should be equally divided among the families of his brother and his sisters.

The wife survived her husband eleven years, during which the estate increased considerably. She left a testament disposing of the balance of the estate.

In a competition between the residuary legatees of the husband and of the wife, held that the husband had only tested on the sum of £3000, and that the rest of the joint estate was carried by the wife's testament.

*Succession—Vesting—Husband and Wife—Power given to Survivor to Encroach upon Estate of Predeceaser—Conditio si sine liberis.*

By mutual settlement a husband conveyed to his wife in the event of her surviving him the whole estate which might belong or be due to him at the time of his death, constituting her his sole executrix, and the wife made a similar disposition in favour of the husband. These mutual conveyances were subject to the conditions (1) that any testamentary writing left by the predeceaser should receive effect to the extent of the estate belonging to him or her; (2) that the survivor should have full power to use or encroach on the means and the estate conveyed on either side, and to dispose by *mortis causa* writing of any part not tested on by the predeceaser.

The husband predeceased the wife, leaving a will whereby, on the narrative that the joint estate amounted to £5000, and that £2000 belonged to his wife, he bequeathed specific legacies to his sisters J. S. and C. S., to the families of his sisters J. P. and E. F., and to certain children of his sisters M. and W. and of his brother, and further directed that what was over of the £3000 belonging to him should be divided equally among each of the families of his brother and of his sisters. None of these provisions were to be paid till the death of his wife should she survive him. Certain of the legatees named survived the husband but predeceased the wife.

In a competition between representatives of these legatees and the surviving legatees, held that the special legacies and bequests of residue vested at the death of the testator.

*Opinion (per Lord Trayner)* (1) that the special legacies and bequests of residue did not vest till the wife's death, in consequence of the power given in the mutual settlement to her, as survivor, to use and encroach on the husband's estate; (2) that the *conditio si sine liberis* did not apply in the case of children whose parents died before the period of vesting, as the testator was not *in loco parentis* to his nephews and nieces, and did not by his testament put himself in that position.

*Opinion (per Lord President)* that with regard to the bequests of residue the word families included descendants of members of the families referred to.

By mutual disposition and deed of settlement dated 6th June 1867, and recorded in the Books of Council and Session 5th April 1876, executed by James Reddie and his wife Agnes Reddie, who resided at Alma Cottage, New Scone, each spouse conveyed to the survivor the whole estate, heritable and moveable, belonging to the predeceaser, and appointed the survivor to be executor to the predeceaser under the following condition, *inter alia*, that any will or testamentary writing left by the predeceaser should receive effect, in the case of the said James Reddie being the predeceaser to an extent not exceeding three-fifths, and in the case of Mrs Reddie being predeceaser to an extent not exceeding two-fifths "of our means and estate remaining at the death of the survivor of us, after deducting the just and lawful debts and funeral charges of the survivor, including the expense of making up titles and realising;" but declaring that the survivor should have full power to "use or encroach" on the funds and estate conveyed by the said mutual disposition and settlement on either side, and to test on or dispose by any deed or writings *mortis causa* of any part not otherwise conveyed away or tested on by the predeceaser.

James Reddie died on 5th February 1876, leaving a holograph writing dated 26th April 1873, by which he authorised his wife, as executrix of their mutual settlement, on the narrative that their funds at that date amounted to £5000, of which £2000 belonged to his wife in her own right, to make another settlement after his death, and to leave to his relations the following sums, which they should receive after her death:—"To the family of my sister Margaret Reddie or Lindsay to the oldest son James Lindsay one hundred and fifty pounds to William Lindsay fifty pounds and Ann Lindsay fifty pounds and Betsy Lindsay fifty pounds in all £300: To Janet Reddie or Stanhous residing at Gask Toll near Dunfermline the sum of three hundred pounds £300: To my late sister Jean Reddie or Purves' family in Austrelia the sum of three hundred and fifty pounds in all £350: To my sister's family Eliz. Reddie or Farmer at the farm of Drumrak the sum of twenty pounds in all £20: To my sisters Catheran Reddie or Simpson wife of William Simpson architect Stirling the sum of one hundred and fifty pounds in all £150: To my nephew Alex. Reddie farmer Littleton in the parish of Longforgan only son of my brother William Reddie the sum of one thousand pounds but all debts due me by him at my death or at the death of my wife Agnes Morrison or Reddie shall be deducted from the said sum of a thousand pounds and also to Jessie Reddie the the youngest daughter of my late brother William Reddie the sum of one hundred pounds £100: And to Alex. M'Intyre who was a long time a servant to me and now at Mid Lundie near Doune the sum of fifty pounds but if the said Alex.

M'Intyre should be dead before my wife then the £50 shall go to my sister Mrs Watson family and to my sister Ann Reddie or Watson's family at the farm of Mid Lundie in the parish of Doune To John Watson only son of my sister Mrs Watson three hundred pounds, and to his sister Eliz. Watson one hundred pounds and to Euphemia Watson one hundred pounds in all £500 And whatever money is over paying the foregoing sums to my relations and other expences that may be and a remuneration to a trustee that may be appointed to pay over those presents as mentioned to my relations and if any money is over after paying the foresaid presents and other expences that may be out of my shares of the money as mentioned by me viz. Three thousand pounds that belongs to me and two thousand that belongs to Agnes Morrison or Reddie in her own right of which she can leave to home she pleases but what money is over in paying the foresaid presents to be divided equally amongst each of the familys. But none of the foregoing presents shall be paid to any of my relations till after the death of my wife Agnes Morrison or Reddie."

On her husband's death Mrs Reddie was confirmed as his executrix, and the estate as given up by her in the inventory then amounted to £6137, 7s. 5d.

Mrs Reddie died on 17th November 1887, leaving a trust-disposition and settlement dated 22nd July 1876, by which, after referring to the mutual settlement and her husband's holograph writing, and stating that she had resolved to execute a settlement in order to give effect to the said testamentary writing by her husband, she disposed to Mrs Ann Morrison and others, as her trustees, the whole estate belonging to her at her decease, whether standing in her name as an individual or as executrix of her husband. By the 3rd purpose of the deed she directed her trustees to pay "the following legacies to the relatives of my said deceased husband in conformity with the said testamentary writings left by him, which legacies are to be held as paid out of the foresaid sum of £3000 belonging to my said husband,"—and she repeated almost *verbatim* the legacies specified in her husband's holograph writing. By the 4th purpose of the deed Mrs Reddie directed her trustees to deduct from the said sum of £6137, 7s. 5d. the said sum of £3000 belonging to her husband, and the sum of £2000 belonging to herself, and to make certain other deductions, and if any surplus should remain over of the said sum of £6137, 7s. 5d. to divide and pay half thereof along with the balance, if any, of the said sum of £3000, in so far as not expended in paying the legacies to her husband's relatives, to and among her husband's relatives as follows—holding the other half as a part of her own individual estate—viz., one thirteenth part to each of the legatees individually named (excepting Alexander M'Intyre), and one thirteenth part to each of the families *per stirpes* (viz., the families of Jean Purves

and Elizabeth Farmer) named in the holograph writing, who she declared should be held to be her husband's residuary legatees. By the 5th purpose of the deed Mrs Reddie declared that the remainder of the means and estate belonging to her at her death, or which should then stand in her name, either as an individual or as executrix of her husband, should be held to belong to her individually in her own right, and after providing for the payment of certain special legacies she directed her trustees to make over the residue of her estate to Jessie Corrigan and others, the daughters of her sister Catherine, and to the survivors of them equally among them.

Of the legatees named in Mr Reddie's holograph writing James Lindsay and William Lindsay, children of the testator's sister Margaret, and Janet Reddie, sister of the testator, survived Mr Reddie and predeceased Mrs Reddie. Alex. M'Intyre also predeceased Mrs Reddie.

After Mrs Reddie's death the trustees under her testament were confirmed executors. The gross amount of the estate given up by them in the inventory, including all funds held in Mrs Reddie's name as executrix of her husband, as well as in her individual name, amounted to £8772, 7s. 8d., which was subject to duties, expenses of the trust, &c.

Questions having arisen as to the division of this estate, the present action of multipointing and exoneration was raised by Mrs Ann Morrison and others, Mrs Reddie's trustees, the fund *in medio* being the sum of £8772, 7s. 8d. under the deductions mentioned.

A claim was lodged for Margaret Lindsay, the widow, and others, the children of the deceased James Lindsay, to the legacy of £150 bequeathed by Mr Reddie in his holograph writing to James Lindsay, and to one-fourth of one-seventh of the surplus of three-fifths of the whole fund *in medio*, after deduction of the legacies and expenses referred to in the holograph writing.

The claimants pleaded—“(1) On a sound construction of the said mutual settlement and relative holograph writing of the said James Reddie, the said legacy and the share of residue condescended on vested in the said deceased James Lindsay, and the claimants, as his widow and heirs *in mobilibus*, are entitled to payment thereof: Or otherwise, (2) The claimants who are children of the said James Lindsay having survived the said Mrs Agnes Morrison or Reddie, are, on a sound construction of the said deeds, entitled to payment of the said legacy and share of residue in virtue of the principle *si sine liberis decesserit*.”

Similar claims under the holograph writing of Mr Reddie were lodged by Janet Lindsay, the widow, and others, the children of the deceased William Lindsay, and by James Stenhouse, the executor-dative, and others, the children of the deceased Janet Stenhouse.

The following also lodged claims under Mr Reddie's holograph writing on the footing that he had thereby disposed of three-fifths of the joint estate of himself and his wife as

at the date of the survivor's death—Ann Jean Lindsay, Elizabeth Betsy Lindsay, Elizabeth Farmer or Morton, and others, children of Elizabeth Reddie or Farmer; John Gifford Purves and others, children of Mrs Jean Reddie or Purves; Catherine Reddie or Simpson, Alexander Reddie, Jessie Reddie, and Elizabeth Carnegie, children of Mr Reddie's brother; John Watson and others, children of Mrs Ann Reddie or Watson.

The above parties also lodged alternative claims in the event of it being held that Mr Reddie's will was invalid or only applied to the sum of £3000.

The following claim was lodged for Jessie Corrigan and others, the residuary legatees of Mrs Reddie—"The claimants claim equally among them the whole free residue, with interest, of the fund *in medio*, being the free residue of the trust-estate as it stood at Mrs Reddie's death, as the said residue shall be ascertained by dealing with the estate in the manner directed by Mrs Reddie in the fourth and fifth purposes of her settlement and codicil, including in the said residue any legacies or shares of legacies that may be found to have lapsed and fallen into residue by the predecease of the legatees."

On 6th February 1889 the Lord Ordinary (TRAYNER) pronounced the following interlocutor—"Finds (1) that the testamentary writing executed by the late James Reddie, dated 22nd and 26th April 1873, validly disposes of the sum of £3000 sterling (but no more), as therein specified, and imports a trust which the late Mrs Reddie (and now her trustees) are bound to carry out and fulfil; (2) that the residue of said £3000 not specially bequeathed falls to be divided among the seven families named in the said testamentary writing in equal shares *per stirpes*, and that no part of such residue falls to be paid over to the relations of the late Mrs Reddie; (3) that the special legacies and bequest of residue under said testamentary writing did not vest until the death of Mrs Reddie on 17th November 1887; (4) that there is no room in the circumstances of this case for the application of the principle *si sine liberis* in favour of the children of those legatees who predeceased the period of vesting," &c.

On 20th March the Lord Ordinary pronounced an interlocutor ranking the various claimants in terms of the above findings.

"*Opinion.*— . . . . . The second question is, what is the amount of the estate disposed of by Mr Reddie by his first testamentary writing? One party—the residuary legatees of Mrs Reddie—maintained that it was £3000 and no more; while, for the legatees under the testamentary writing, it is contended that Mr Reddie was disposing of three-fifths of the joint estate 'remaining at the death of the survivor.' This writing, no doubt, sets out by way of narrative with the statement that the joint estate at that date was £5000, and it is with three-fifths of that sum that Mr Reddie deals. But there is nothing to show or indicate that Mr Reddie was testing upon three-fifths of the joint estate as it might stand, more or less in amount, at the date of the sur-

vivor's death. The statement about the £5000 is made in my opinion only as justifying Mr Reddie in disposing of so much as £3000. But it seems to me apparent that he was dealing with the specific sum of £3000 and nothing more. For after granting the specific legacies, he directs what is to be done with what may be over the £3000 after certain expenses have been met. In short, he is resolved to test upon £3000 part of which he directs to be paid in specific legacies, the balance to be divided equally among each of the families. Assuming that under the mutual settlement he had the power to test on three-fifths of the whole estate—the joint estate as at the survivor's death—I think he has not done so, and whatever part of the three-fifths of the joint estate was not tested upon by Mr Reddie is at the disposal of Mr Reddie.

"What the 'familys' are who are to participate in what I may call residue of the £3000 is the next question. . . . I have come to be of opinion that the 'familys' named are not the families of Mr Reddie and of Mrs Reddie, but the seven families named and referred to in the testamentary writing to whom Mr Reddie so bequeathed the specific legacies.

"As to vesting, I think no vesting under Mr Reddie's testamentary writing did or could take place until Mrs Reddie's death. None of the legacies are payable until that event happened, and until then it could not be certain whether there would be any right to vest, as Mrs Reddie had power, if she so pleased, of using or disposing of the whole joint estate during the period of her survivorship. Further, I am of opinion that the condition *si sine liberis* does not apply here in the case of children whose parents died before the period of vesting. Mr Reddie was not *in loco parentis* to his nephews and nieces, and did not by his testamentary writing put himself in that position." . . . . .

The claimants Mrs Margaret Lindsay and others, Mrs Janet Lindsay and others, and James Stenhouse and others, reclaimed, and argued—(1) As to the amount carried by Mr Reddie's holograph writing—Mr Reddie had a right to test on three-fifths of the joint estate of the spouses as at the survivor's death, and his holograph writing carried so much. He had merely used the sum £3000 as expressing the proportion of the joint estate belonging to him, and the expression of amount was illustrative and not taxative of his intentions. (2) Question of vesting—There was no fee in the widow by survivorship—*Sprot v. Pennycook*, June 12, 1854, 17 D. 840. The special legacies and bequests of residue left in Mr Reddie's holograph writing vested *a morte testatoris* subject to defeasance so far as the widow might use her power of encroaching on Mr Reddie's share of the joint estate. That power was not of itself sufficient to cause a postponement of vesting any more than the chance of loss to which every fund was subject. It was a limited power, Mrs Reddie's right being only to use or encroach on the fee of Mr Reddie's property if the liferent of the

joint estate should prove insufficient for her maintenance. No power of disposal was given to Mrs Reddie, which distinguished the case from that of *Berwick's Executors*; *Kilgour v. Kilgour*, February 18, 1845, 7 D. 451, per Lord Jeffrey, 460; *Watson v. Majoribanks*, Feb. 17, 1837, 15 S. 586; *Sellar, &c. v. Stephen, &c.*, June 21, 1855, 17 D. 975; *Douglas v. Douglas*, March 31, 1864, 2 Macph. 1008; *Paterson's Trustees v. Paterson*, Jan. 29, 1870, 8 Macph. 449; *Kerr v. Ure, &c.*, June 28, 1873, 11 Macph. 780; *Storie's Trustees v. Gray, &c.*, May 29, 1874, 1 R. 953; *Ferrier v. Angus*, January, 21, 1876, 3 R. 396; *Haldane's Trustees v. Murphy*, December 15, 1881, 9 R. 269; *Snell's Trustees v. Morrison*, March 20, 1877, 4 R. 709; *Gregory's Trustees*, 16 R. (H. of L.) 10. (3) Assuming that vesting was suspended till Mrs Reddie's death the *conditio si sine liberis* applied in the case of the children of legatees who predeceased her—*Bryce's Trustees v. Bryce*, March 2, 1878, 5 R. 722; *Bogie's Trustees v. Christie*, January 26, 1882, 9 R. 453; *Gauld's Trustees v. Duncan, &c.*, March 20, 1877, 4 R. 691. At all events, as to the bequests of residue, the word "family" included all descendants—*Irvine v. Irvine*, July 9, 1873, 11 Macph. 892.

Argued for the respondents other than the residuary legatees of Mrs Reddie—(1) These respondents adopted the argument stated by the reclaimers as to the amount carried by Mr Reddie's holograph writing. (2) Question of vesting—The period of vesting intended by the testator was the death of his wife if she survived him. Till that event happened it could not be known whether there would be any fund to divide, owing to the power of encroachment given to her—*Berwick's Executor, &c.*, January 23, 1885, 12 R. 565. (3) The *conditio si sine liberis* did not apply in this case. In the first place, it was not applicable to particular legacies, but only to provisions—*Douglas's Executors*, February 5, 1869, 7 Macph. 504. In the second place, it was only applicable where the testator was or put himself *in loco parentis* to the beneficiaries under his testament, and where the provisions were to a class—*Berwick's Executor, supra*; *Blair's Executor v. Taylor, &c.*, January 18, 1876, 3 R. 362; *McCall v. Dennistoun*, December 22, 1871, 10 Macph. 281; *Rhind's Trustees v. Leith*, December 5, 1866, 5 Macph. 104.

Argued for the respondents, the residuary legatees of Mrs Reddie—Mr Reddie had only dealt with £3000 in his holograph writing, and the effect of that deed could not be extended beyond that sum. In any view, he had no right to test on his widow's savings, but only on the proportion of the joint estate belonging to him at his death—*Morris v. Anderson*, June 16, 1882, 9 R. 952; *Nimmo's Trustees v. Hoy's Trustees*, January 24, 1840, 2 D. 1158.

At advising—

LORD PRESIDENT—In this process of multiplepointing two interlocutors have been pronounced by the Lord Ordinary which are both submitted to review. The first is dated 6th February 1889, and contains certain findings which are applicable

generally to the construction of the settlement in question, and the second, dated 20th March following, contains the application of the findings to the claims of the different parties in the competition.

In the Outer House there seems to have been an argument to the effect that Mr Reddie's testamentary deed of 22nd and 26th April 1873 was not in the proper sense a will or settlement, but was a mere recommendation to his spouse if she survived to give effect to the wishes therein expressed, and accordingly not binding upon her. The Lord Ordinary has repelled that contention, and in my opinion quite justly, and the ground assigned by his Lordship for so doing is perfectly satisfactory. Indeed, I am not sure that this question was raised by the reclaimers in their opening speech. At all events, there is no doubt that the Lord Ordinary has come to a right conclusion.

The second question relates to the effect and import of the holograph writing to which I have referred, and the question is whether that writing is intended to dispose of three-fifths of the joint estate of the spouses as it should stand at the date of the death of the survivor, or only of £3000, which the testator assumes to be equal to three-fifths of the joint estate as it existed at the date of the settlement. The Lord Ordinary has held that the settlement disposes of £3000 of the joint estate and of no more, and I agree with his Lordship.

The mutual deed which comes first in order is of a very simple nature in its principal clauses. There is first a mutual conveyance by the spouses of their entire estate. The husband conveys his whole estate to his wife, and he nominates her his executrix, and, *vice versa*, there is a conveyance by the wife to the husband. If the deed had ended there it would have resolved into a settlement by which, according to our old phraseology, the longest liver "bruits all." But there are certain burdens attached to the mutual disposition. In the first place, there is the payment of debts, which requires no special notice. The second provision is of greater importance. It is this—"That any will or testamentary writing left by the predeceaser of us shall receive effect in the case of me the said James Reddie being the predeceaser, to an extent not exceeding three-fifths, and in the case of me the said Mrs Agnes Morrison or Reddie being the predeceaser, to an extent not exceeding two-fifths of our means and estate remaining at the death of the survivor of us, after deducting the just and lawful debts and funeral charges of the survivor, including the expense of making up titles and realising." That is one of the burdens imposed upon the mutual conveyance, or rather it is one of its conditions that the predeceaser of the spouses shall be entitled to dispose of the whole estate remaining at the death of the survivor—in the case of the husband being the predeceaser to the extent of three-fifths, and in the case of the wife being the predeceaser to the extent of two-fifths. Then there is a further burden to the effect that "the sur-

vivor of us shall have full power to use or encroach on the funds, means, and estate hereby conveyed on either side; and also to test or dispose by any deed or writings *mortis causa* of any part not otherwise conveyed away or tested on by the predeceaser as aforesaid."

It was under the first of these conditions or reservations that Mr Reddie proceeded to act when he made his holograph will, and after referring to the mutual disposition, and to the fact that his wife was to be his executrix if she survived him, and to the further fact that "our funds at this date is five thousand pounds, and of this two thousand belongs to my wife Agnes Morrison or Reddie in her own right," he goes on to authorise his wife "after my death to make another settlement, and to leave to my relations the following sums of which they will receive after your death," and he then enumerates a number of legacies. So far it is pretty clear that he intends to prescribe to his wife what she is to do with the two-thirds of the £3000 after his death. The objects of his bounty are seven families—the families of six sisters and of one brother—to whom he gives special legacies, in some cases to the sister or brother individually, and in other cases to particular members of their families; but each of the seven families is to a certain extent benefited by the special legacies. Then follows this provision—"And whatever money is over paying the forgoing sums to my relations and other expences that may be and a remuneration to a trustee that may be appointed to pay over those presents as mentioned to my relations and if any money is over after paying the forsaid presents and other expences that may be out of my shares of the money as mentioned by me viz. Three Thousand pounds that belongs to me and Two Thousand that belongs to Agnes Morrison or Reddie in her own right of which she can leave to home she pleases but what money is over in paying the forsaid presents to be divided equally amongst each of the families." This was a form of disposing of the residue of the £3000 which to my mind is perfectly conclusive as to the amount of estate which Mr Reddie must be held to have been disposing of in this will, because he emphasises the matter in this way—"Whatever money is over" "out of my shares of the money," i.e., the £3000, the residue is "to be divided equally amongst each of the families." When a man disposes of a sum of money partly by special legacies and partly by an apportionment of residue among certain relations, and says that the residue is the residue that may be left of £3000, after discharging the legacies, I do not see how it is possible to say that anything but the £3000 is the entire amount disposed of. Mr Reddie's power of disposal no doubt extended further. He was entitled to dispose of three-fifths of the estate at the death of his wife, assuming that his wife was the last survivor, but he was under no obligation to dispose of the entire amount. He was quite entitled to dispose of any sum within that amount. It was his pleasure to dispose

of £3000, and of not one shilling more, and therefore as regards that portion of the Lord Ordinary's interlocutor I have no doubt. I think his Lordship is right in his finding that Mr Reddie "validly disposes of the sum of £3000 sterling, but no more."

The next question was as to the term of vesting of the legacies, special and residuary, bequeathed by Mr Reddie, and there I am not disposed to agree with the Lord Ordinary. My reason for not agreeing with his Lordship's view arises from the opinion which I have just expressed upon the first branch of the case. The sum which the residuary legatees will eventually get is no doubt of an uncertain amount, but that is an observation which applies to all residuary funds, and also to all special bequests, because the estate may diminish in value. Nothing is so uncertain as the amount of the fund which a residuary legatee will receive in any case, and that uncertainty affords no reason for holding in the present case that the term of vesting is postponed. Another reason which is assigned for postponing vesting is that a power is given under the mutual deed to the widow "to use or encroach on the funds, means, and estate hereby conveyed on either side." Undoubtedly that is a very special and peculiar arrangement, but one cannot help seeing that it goes this length, that Mrs Reddie, after the decease of her husband, might not only use the estate in the sense of enjoying the whole income, but might also encroach upon the capital. Nevertheless, I apprehend that the clause is to be read in a reasonable sense. Mrs Reddie is not, I think, entitled to give away the estate, although she may dispose by will of so much of it as has not previously been disposed of by her predeceasing husband. But she is not to encroach upon it in the sense of dilapidating it, or of giving away the capital without consideration. If it is necessary for her maintenance, or perhaps for improving her condition in life and making her a richer woman, she is to be entitled to use a portion of the capital, but that is only for herself and not for anyone else. It appears to me, therefore, that in order to entitle her to encroach on the estate, within the meaning of the settlement, she must use the funds for herself and herself only. That gives the words in question a restricted meaning—different from what their literal meaning would be in different circumstances—and therefore I think that this power to encroach upon the estate does not make the amount of the estate which is ultimately to come into the hands of the residuary legatee more uncertain than it is in the usual case. It always depends upon the prosperity of the estate, and on the question whether it has been lost or not lost in whole or in part, and if a power to encroach upon the funds is given within the meaning I have assigned to it, that is only another accident to which the residuary bequest is subject. Indeed, it is given under that condition. Taking, then, all these things into consideration, I think they had no greater effect than this, that the amount of the fund is uncertain.

That does not appear to me to be sufficient to remove the force of the general rule that bequests of this nature, whether special or residuary, vest from the death of the giver of the bequest unless there is something in the deed or in the scope of the bequest to show an intention to postpone the vesting. Postponement of the period of payment is not enough. The existence of a liferent, for instance, is enough to account for that, and is certainly not enough to cause a postponement of the period of vesting. Accordingly, differing from the Lord Ordinary, I am of opinion that there is nothing here to show any intention on the part of the trustor to postpone the period of vesting.

The Lord Ordinary has further found that "the residue of said £3000 not specially bequeathed falls to be divided among the seven families named in the said testamentary writing in equal shares, *per stirpes*, and that no part of such residue falls to be paid over to the relations of the late Mr Reddie." I entirely agree with his Lordship in regard to that finding. I think the words of the will, in so far as they refer to the disposal of the residue, make this clear. These words necessarily refer back to the previous part of the will in which the families are named—the families of six sisters and of one brother—and although these families are there dealt with as regards their special legacies in different ways, and get different amounts, still they are all dealt with as families, and accordingly I do not think it is possible to limit the term "families" in the residuary bequest as being less comprehensive than to include the seven families mentioned in the previous part of the will. This leads necessarily to the further finding that there is no room for the application of the *conditio si sine liberis*, because a finding that there shall be equal division among the seven families necessarily includes the succession of children, the word families including all, and accordingly requiring no implied condition to let in children and grandchildren.

**LORD ADAM**—Our attention has been more particularly directed to two deeds of a testamentary nature dated in June 1867 and April 1873. With reference to the first of these deeds—the mutual disposition—I may say that it seems to me a very simple deed, and no questions of difficulty are referable to it. By it the husband conveyed to the wife all his property, and the wife conveyed all her's to her husband. There is this peculiar provision in it, that whichever may survive should have power to encroach on the estate conveyed by the other. The property of the survivor is to continue his or hers. Mr Reddie is to have power to test on the estate remaining at the death of the survivor to the extent of three-fifths, Mrs Reddie to the extent of two-fifths, and it is provided that power is given to the survivor to test on the whole estate not tested on under the power given to the predeceaser. These are the whole provisions of the deed.

Questions of difficulty, however, arise on the construction of the deed of 1873, and

the first is, whether Mr Reddie intended by that deed to dispose of £3000, or three-fifths of the joint estate, as at the death of the survivor? It is a peculiar writing, because instead of being testamentary in its terms it is framed on the somewhat peculiar terms of granting authority to his wife to make another settlement after his death. It was not disputed that the deed was to receive effect just as if it were an ordinary testament by which the testator himself left funds to various legatees or burdened his trustees with the payment of various legacies. That being so, the question is, as already stated, whether Mr Reddie intended to dispose of £3000 or of three-fifths of the joint estate as at the death of the survivor?

If we were entitled to speculate on what might possibly have been the testator's intention we might arrive at the conclusion that the testator meant to dispose of three-fifths of the joint estate. But that is not our duty, which is to take the words as they stand, and so doing, I have come to the same conclusion as the Lord Ordinary and your Lordship.

The testator begins by saying—"As our funds at this date is five thousand pounds, and of this two thousand belongs to my wife." That is the reason he assigns for the bequests he then makes, and I think that shows why he left legacies up to £3000; but we cannot get over the subsequent words—"Whatever money is over paying the forgoing sums to my relations and other expences that may be, . . . and if any money is over after paying the foresaid presents and other expences that may be out of my shares of the money as mentioned by me, viz., three thousand pounds that belongs to me."—that is to say, he directs that the special legacies are to be paid out of the £3000 belonging to him, and then says what is to be done with the residue of the £3000; left over from the sums mentioned, and I find from first to last no mention of three-fifths or two-fifths of the joint estate. It was suggested no doubt that £3000 and £2000 were three-fifths and two-fifths of the estate at the date of the writing, and that is quite true, but nowhere is the intention expressed in words to test on three-fifths of the estate, and I have come without hesitation to the conclusion that the testator was dealing with the sum of £3000 only.

With regard to the "families" among whom the residue of the £3000 is to be divided, I agree with your Lordship that the families meant are the families of the brother and sisters of the testator.

Now, with regard to the question of vesting. I confess to having entertained at first some doubts as to whether the Lord Ordinary had not decided that question rightly from the fact that the survivor of the spouses had the power to encroach on the funds belonging to the predeceaser, but after due consideration I have come to be of opinion that your Lordship has taken the right view, and that vesting took place *a morte testatoris*. The power of encroachment given to the survivor is the only thing at all to suggest that the legacies do not vest in the ordinary way, but the

difficulty in my mind arose from the fact that that power might lead to the disappearance of the whole fund. I am satisfied, however, on consideration, that it is not the right view to hold that there was postponement of vesting.

LORD M'LAREN—The chief difficulties in the interpretation of the settlements which have been under consideration in this case have relation to the holograph writing of Mr Reddie of April 1873. In dealing with cases on holograph testamentary writings we sometimes have occasion to say that the testator has failed to express his intention fully. In the present case the testator has intended to be lucid by using a great number of words to express his meaning, but has not succeeded in doing so without the assistance of the Court being invoked.

On one point I think the testator has made himself clear—I mean in limiting the fund of which he disposes to £3000.

In regard to the other points, I concur in the main with the Lord Ordinary except as to the question of vesting, on which I agree with your Lordship.

I should assent to the proposition that where a gift of residue is made subject to the exercise of an unqualified power of disposal given to some other person, it is impossible that the right to the residue should vest so long as that power subsists, because the amount to be taken by the legatee is wholly uncertain; indeed, it is in doubt whether he will receive anything. But when the power of disposal is confined to certain specified purposes, and is only to be used in certain circumstances, then I think it is consistent with previous decisions that vesting may exist concurrently with the existence of the power.

In the present case I think the power which was given to the surviving spouse, who was the wife, to use or encroach upon the residuary fund meant nothing more than this—that if her own share of the estate should turn out to be insufficient for her subsistence according to her accustomed mode of living she should have power to draw upon the fund which was destined by the testator to his own heirs. While the restriction in question does not admit of very clear definition, it is, I think, perfectly intelligible. The testator conferred a limited power of expenditure upon his wife for her comfortable maintenance, the exercise of which might have been restrained by a court of law if an attempt had been made to extend it beyond these limits.

The presumption is always in favour of vesting, and for the reasons I have given I think there was vesting *a morte testatoris*.

LORD SHAND was absent on Circuit when the case was heard.

The Court recalled the third finding of the Lord Ordinary's interlocutor of 6th February 1889, and in place thereof found that the special legacies and bequests of residue contained in Mr Reddie's holograph testamentary writing vested at the death of the testator, the said James Reddie, on

5th February 1876; *quoad ultra* adhered to the said interlocutor and ranked the claimants in accordance with the findings as altered.

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Counsel for Janet Lindsay and Others—Forsyth. Agent—James Forsyth, S.S.C.

Counsel for James Stenhouse and Others—Shaw. Agent—James Marshall, S.S.C.

Counsel for Ann Jean Lindsay—Watt. Agent—P. H. Cameron, S.S.C.

Counsel for Elizabeth Lindsay or Allan—Cooper. Agents—Buchan & Buchan, S.S.C.

Counsel for John Gifford Purves and Others—Gillespie. Agents—Dundas & Wilson, W.S.

Counsel for Alexander Reddie and Jessie Reddie—H. Johnston—Dundas. Agents—Henry & Scott, S.S.C.

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Friday, March 14.

## FIRST DIVISION.

[Lord Kinnear, Ordinary.]

### CAMPBELL v. DEANS AND OTHERS.

*Feu-Charter—Clause of Allocation of Feu-duty—Singular Successor—Heritable Creditor—Conveyancing and Land Transfer Act 1874 (37 and 38 Vict. cap. 94), sec. 4.*

A proprietor feued out certain ground for payment of a certain feu-duty by the vassal and his heirs and successors whomsoever, who were also taken bound to erect on the ground disposed, within twelve months from the term of entry, houses of not less than a total value of £2500. It was further declared in the feu-charter that heirs or singular successors acquiring right to any part or portion of the ground feued should be subject to the whole conditions contained therein, and should be bound to pay to the superior a rateable proportion of the *cumulo* feu-duty, for which proportion only they should be bound. The vassal erected houses of the required value, upon the security of which he borrowed certain sums, for which he granted bonds and dispositions in security over the plots on which the houses were built. The interest on the loans subsequently fell into arrear, and the bondholders having entered into possession, claimed right to pay only