

Wednesday, March 19.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

DRYDEN AND MONCUR v. MORRISON
(SPENCE'S FACTOR).

*Judicial Factor—Failure to Invest Funds—
Interest—Accounting—A. of S. 13th Feb.
1730.*

A judicial factor retained in his own hands uninvested from 1881 to 1888 a small portion of the capital of the factory estate, which he allowed to be increased by the addition of the interest on the estate during these years and by the amount of a loan of £300 paid up to the estate in 1886. He also failed to lodge accounts for the same period.

The factor having petitioned for discharge, his accounts were remitted for examination by the Accountant of Court, who debited him with interest at $4\frac{1}{2}$ per cent. on the sums kept by him in his own hands. Objection to the Accountant's report on the ground that the factor should have been found liable in 5 per cent. interest *repelled*, in respect that the irregularity of which the factor had been guilty had not occasioned loss to the estate, nor was of so gross a character as to subject him to special interest.

Alexander Morrison, solicitor in Elgin, was appointed judicial factor on the estate of Mrs Elizabeth Spence on 5th July 1879. She left a will by which she bequeathed the residue of her estate to her husband Dr Spence, but as he predeceased her that bequest lapsed, and her estate became divisible among her next-of-kin. These were (1) her brother Dr Laurie, who was entitled to the half of the estate, and (2) the two children of a deceased brother, viz., James Dryden and Harris Dryden, who was entitled to the other half of the estate. The factor having realised the estate, made up an account of his intromissions, which were submitted, at the request of Dr Laurie, and of trustees appointed by James Dryden, and of the judicial factor, to Mr Wm. Moncreiff, Accountant of Court, who on 14th April 1881, after meeting with the agents for the parties, found that the commission of the judicial factor for his management of the estate and his whole duties and responsibilities, inclusive of the final distribution of the balance of funds in his hands, should be fixed at £105.

The amount of the estate being ascertained, the judicial factor paid half of it to Dr Laurie and quarter to James Dryden's trustees, who granted discharges therefor, in which the commission as fixed by the Accountant of Court was specially mentioned. No sum was paid to Harris Dryden, who had sometime before gone abroad, and had not since been heard of, and her share, amounting to £1019, 1s., remained in the hands of the judicial factor.

On 17th July, by judgment of the Second

Division, James Dryden was found entitled to the estate of Harris Dryden under the Presumption of Life Act.

On 27th July 1888 Mr Dryden presented a note to the Court objecting to the factor's management of the estate and the non-production of factory account, which was answered by the judicial factor. Mr Dryden in a supplementary note prayed the Court to make a remit with a view to a report on the factor's management. Answers to this supplementary note were not lodged, but on 26th February the factor presented the present petition for authority to pay the balance of the estate in his hands to Mr Dryden and for exoneration and discharge.

Answers were lodged by James Dryden and William Moncur, the sole acting trustee under a trust-disposition by Dryden, and after certain procedure the Lord Ordinary remitted the accounts of the factor to the Accountant of Court to examine and report.

The Accountant of Court reported, *inter alia*—"3. That the judicial factor was entitled to the fee of one hundred guineas (taken credit for) as commission on the capital transactions, in terms of finding by Mr William Moncreiff, accountant, on 14th April 1881, but to no further commission.

"4. That although the estate had not been managed in strict accordance with the enactments of the statutes, it had not suffered therefrom; and, subject to the taxation of two untaxed business accounts, on payment of the above balance to the person entitled thereto, less such of the expenses of the present petition, and the actions leading thereto, as might be found chargeable against the estate, the judicial factor might be exonerated and discharged of his actings, and his bond of caution delivered up."

"*Note.*— The factor explains that the non-lodgment of annual accounts occurred through an oversight on the part of his agents, who had overlooked the provisions of the Act, and for which he and they express regret.

"The appended progressive state of intromissions shows the cash balances on hand for the period embraced by the fore-said amended account. The factor explains that the funds were looked after and attended to by Messrs Gatherer (of which firm his cautioner is a member), he having no actual intromissions therewith; and that it was difficult to obtain a suitable investment on heritable security for the accumulations of interest, &c. He is debited with interest at $4\frac{1}{2}$ per centum on the daily balances on hand, made up as shown by said progressive state, a similar rate to that received on the sums lent on heritage."

It appeared from the report and the accounts annexed thereto, that the factor had lodged no accounts between March 1881 and August 1888, and that after investing the bulk of the capital of the estate, the factor in June 1881 had a small sum of £25, 3s. remaining in the hands of his agents, which he allowed to be increased by the annual interest on the estate from 1881 to 1888, and

also by the amount of a loan of £300 paid up to the estate in 1886, till in August 1888 the amount so retained in the hands of his agents reached £600.

Mr Dryden and Mr Moncur objected to the report, *inter alia*, on the ground that the factor should have been charged with 5 per cent. interest on the sums retained uninvested in the hands of his agents.

On 28th January 1890 the Lord Ordinary (KINCAIRNEY) repelled the objections to the Accountant's report and approved of the report.

“*Opinion.*— 3. The objectors objected to the mode in which the reporter had dealt with the sums in the factor's hands. He has credited the estate with simple interest at 4½ per cent. The objectors maintained that he should have credited compound interest at 5 per cent., and referred to the cases of *Cranstown v. Scott*, December, 1, 1826, 5 S. and D. 60; *Blair v. Murray*, July 4, 1843, 5 D. 1315; and *Buchanan v. Mackersy*, February 13, 1849, 9 D. 700.

“This objection raises a question of greater difficulty. In repelling it I have regard to the special circumstances of this case, and do not consider that I am deciding any general question. It may be that in many cases the proper mode of debiting a factor for funds which he retains in his hands may be that contended for by the objectors. In the case of *Blair*, which was the chief case quoted, a *curator bonis* had retained in his hands the whole curatorial funds, which he ought to have invested. In that case he was dealt with strictly, and debited with accumulations of interest at 5 per cent. But the case here is quite different. The whole of the capital of the estate, or almost the whole of it, was advantageously invested, and yielded 4½ per cent. It appears from the appendix to the Accountant's report that at 30th June 1881 there was in the hands of the judicial factor, or of his agents, a sum of £25, 3s. uninvested, and that this sum in hand increased from year to year. The reason why it so increased was apparently that the factor or his agent did not invest or lodge in bank the sums of interest on the estate as they fell due. These were small sums, and I can readily believe that it would have been difficult, if not impossible, to find investments for sums so small, although no doubt they ought, if not invested, to have been lodged in bank; but if they had been lodged in bank of course they would not have produced to the estate anything like the 4½ per cent. with which the factor has been debited, whether interest was accumulated annually or not. It may also be noticed that no commission beyond the £105 fixed in 1881 has been allowed. The judicial factor and his agent are chargeable with considerable laxity, but there is no suspicion that either of them had any corrupt motive. The estate has not suffered. The judicial factor or his cautioner are apparently called on to account for more interest than they received.

“On the whole, I do not think that this is a case in which I ought to disturb the conclusion on this point at which, after

careful consideration, the Accountant has arrived.”

The respondents reclaimed, and argued—The factor had failed to observe the rules laid down in the Act of Sederunt of 13th February 1790, and was liable in compound interest at 5 per cent. on the sums kept by him in his own hands. It was a wholesome rule that a factor allowing factory funds to be mixed up with his own funds should be subjected to such a penalty. The case of a factor earning a commission was different from that of a gratuitous trustee. Cases cited in Lord Ordinary's note—*Nairn v. Robertson (Nairn's Factor)*, March 4, 1863, 1 Macph. 515; *Thoms on Factors*, 563.

Argued for the petitioner—The factor had been debited by the accountant with 4½ per cent. interest, and there was strong reason to abide by his report. The estate had not suffered from the factor's irregularity, and he on his part had derived no benefit from the way in which he had dealt with the estate—*Wellwood's Trustees v. Boswell*, December 17, 1856, 19 D. 187; *Lamb v. Ritchie*, December 14, 1857, 16 Sh. 219.

At advising—

LORD PRESIDENT—With regard to the duty of the factor to accumulate the funds annually, and the rate of interest to be charged for failure in this duty, I think that that matter is entirely in the discretion of the Court. The circumstances here are certainly very peculiar. The money in the factor's hands was neither more nor less than the share of Miss Harris Dryden, who had disappeared, and it certainly appears that he might have kept his accounts more regularly, but I do not think that there has been such gross irregularity on the part of the factor as to subject him to penal interest. I am very much inclined, therefore, to take the view of the Lord Ordinary when he says—“The whole of the capital of the estate, or almost the whole of it, was advantageously invested, and yielded 4½ per cent. It appears from the appendix to the accountant's report that at 30th June 1881 there was in the hands of the judicial factor, or of his agents, a sum of £25, 3s. uninvested, and that this sum increased from year to year. The reason why it so increased was apparently that the factor or his agent did not invest or lodge in bank the sums of interest on the estate as they fell due. These were small sums, and I can readily believe that it would have been difficult, if not impossible, to find investments for sums so small, although, no doubt, they ought, if not invested, to have been lodged in bank; but if they had been lodged in bank, of course they would not have produced to the estate anything like 4½ per cent., with which the factor has been debited, whether interest was accumulated annually or not.” And to that he adds the important and significant fact that no loss has resulted to the estate.

The only difficulty which has presented itself to my mind on this part of the case arises from the circumstance that a loan of £300 was paid up in 1886. Now, it may very well be that that sum should have been re-

invested or lodged in bank in a separate account, but that seems not to have been done, and so from Candlemas 1886 to Lammas 1888 a portion of the capital of the estate remained in the hands of the factor uninvested. Now, suppose the principle of accumulating the funds year by year were applied to that short period, we are not informed what the effect would be, and it seems to me the benefit to the objectors would be very small, perhaps about £5, 5s. Is that a reason for disturbing an arrangement sanctioned by the Accountant of Court and approved of by the Lord Ordinary? I think not. We do not sit here to settle questions of fractional abatements of this kind, but rather to decide points involving questions of general principle.

LORD SHAND—I am of the same opinion, and have nothing to add, except that it is quite evident that the Lord Ordinary has taken great pains with the case, and I should be slow to interfere with his decision unless it were very clear that he had violated some clear rule of court or made some evident blunder.

LORD ADAM and LORD M'LAREN concurred.

The Court adhered.

Counsel for the Reclaimers—Young—Salvesen. Agent—D. Howard Smith, Solicitor.

Counsel for the Petitioner and Respondent—J. A. Reid. Agent—John Rhind, S.S.C.

Thursday, March 20.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

DUKE OF ATHOLE v. STEWART.

Superior and Vassal—Entry—Casualty—Composition—Relief—Trust—Conveyancing Act 1874 (37 and 38 Vict. c. 94), sec. 4.

A vassal infeft in certain land, and entered with the superior, died in 1835 leaving a general trust settlement whereby he conveyed his estates to trustees, directing them, *inter alia*, to convey, under burden of a certain life-rent, the lands to his eldest son alive at the time of his death and the heirs of his body, whom failing certain other heirs of destination. The trust-deed conferred no power of sale.

The trustees took infestment in 1835 and conveyed the said lands by disposition dated 1852 and registered 1855 to the truster's eldest son, who took infestment thereon.

In 1887 the superior of the lands claimed payment of a casualty of composition from the son on the ground that his entry under the 1874 Act implied a confirmation of the infestment of the trustees, whose entry had there-

fore effected a change of the investiture. The defender maintained that the trustees had held for him, that no new investiture had been created, that he himself was infeft before the passing of the 1874 Act, that the form of his title was immaterial, that he was heir-at-law of his father and that as such he was liable to pay relief-duty only.

Held that only relief-duty was due.

Diss. Lord Rutherford Clark, who thought that the trustees' infestment was confirmed by the passing of the 1874 Act, and that the defender as disponent of the trustees was liable in a casualty of composition.

The Duke of Athole as superior of the lands of Strathgarrie, within the parish of Moulin, late regality of Athole and sheriffdom of Perth, brought an action against Allan Duncan Stewart of Strathgarrie, to have it found and declared that in consequence of the death of Lieutenant-Colonel Alexander Stewart of Strathgarrie, who was the vassal last vest and seised in all and hail the five merk land of Strathgarrie, &c., . . . a casualty being one year's rent of the lands became due to the pursuer as superior of the said lands upon the 1835, being the date of the death of the said Lieutenant-Colonel Alexander Stewart, and to have the defender decerned and ordained to make payment to the pursuer of said casualty.

The late Lieutenant-Colonel Alexander Stewart of Strathgarrie, who died in 1835, was the last entered vassal vest and seised in the lands, conform to charter of resignation and *novodamus*, dated 21st May 1830, granted in his favour by John, Duke of Athole, and instrument of sasine following thereon. By a general trust-disposition and settlement, dated 17th November 1834, and registered in the Sheriff Court books of the county of Perth 3rd August 1835, Colonel Alexander Stewart conveyed to trustees, *inter alia*, the said lands for the purposes of the trust thereby created.

The purposes of the trust were—(1) Payment of debts, funeral expenses, and expense of executing the trust; (2) payment of an annuity to the widow, or at her option to give her the life-rent of the said lands of Strathgarrie; (3) (4) (5) payment of annuities and legacies; (6) "I appoint my said trustees to convey and make over the said lands and estate of Strathgarrie, Inverenty, and other heritable property hereby disposed, but under the burden of the life-rent presently secured to the said Mrs Janet Daniel or Stewart, by the contract of marriage before recited, over the lands of Inverenty and others, or under the burden of the life-rent hereby directed to be conveyed to her if she shall declare her acceptance thereof as aforesaid, to and in favour of my eldest son alive at the time of my death, and the heirs of his body, whom failing my other sons in succession and the heirs of their bodies respectively, whom failing to the eldest daughter alive at the time of my death and the heirs of her body, whom failing to my other daughters in succession, and the heirs of their