

the defender and reclamer, who was a farmer, would have reaped and disposed of his crops, and would have thereby deprived the pursuer of the means of making the diligence on his decree effectual.

It was objected that by the Court of Session Act (13 and 14 Vict. c. 36), sec. 28, parties could without leave extract decrees *ad interim* in all those cases in which the Court had been in use to grant leave, and that therefore this motion was either incompetent or unnecessary.

The Court, in respect of the reasons added, *granted* leave.

Counsel for the Pursuer and Respondent—Baillie. Agents—Horne & Lyell, W.S.

Counsel for the Defender and Reclamer—W. Campbell. Agents—Murray, Beith, & Murray, W.S.

Friday, July 17.

FIRST DIVISION.
SCOTT v. THORBURN AND
ANOTHER.

Succession—Residue—Vesting a morte testatoris.

A testator after making certain provisions for his wife, and leaving £3000 to each of his daughters, payable after their mother's death, declared that "in consideration of the foregoing arrangements my son is to succeed to whatever may remain of my estate and effects after these payments are made." Failing the son certain other persons were named as residuary legatees. The son predeceased his mother without issue.

Held that the words "after these payments are made" were not referable to a point of time, and that the residue vested in the son *a morte testatoris*.

David Scott, farmer, Meadowfield, Duddingston, died on 26th August 1882, leaving a holograph trust-disposition and settlement dated 24th June 1870, whereby he disposed to the trustees therein named "all the heritable and moveable property which may belong to me at my death, as well as the new lease of Lochend and the leases of the other farms; also, so far as not impossible, in trust for the following purposes: After my death the farms to be carried on for the benefit of the family till the Martinmas and separation of the crop of the year that my son David is twenty-three. He is then to get Northfield, Meadowfield, and Heriot, and the use of all the stock and stocking on these farms till his mother's death, upon payment of Three hundred pounds a-year as interest upon the stock and stocking. He will then (at his mother's death) get Lochend also, upon payment of fifty pounds a-year to each of his sisters so long as they remain

unmarried during the currency of the lease. I leave to my two daughters and their heirs Three thousand pounds each, payable six months after the death of their mother. And in consideration of the foregoing arrangements, my son David is to succeed to whatever may remain of my estate and effects after these payments are made, whom failing to his wife in liferent, and her children in fee, whom failing to my two daughters in equal value between them, as to my trustees may appear the best division. I appoint and nominate my son David Francis Scott, as above, to be my executor. My wife to live either at Meadowfield or at Lochend as she may wish, and she is to have the liferent use of whatever furniture she may require; and if the profits of the farms and the interest on my other means will afford it, I desire that she may be allowed Five hundred pounds a-year; if not, as near that sum as my trustees may think prudent." By subsequent codicil the sum left to each of the daughters was reduced to £2000.

The net value of the testator's personal estate was £4044, 18s. 4d., and at the time of his death he was tenant of the following farms—Meadowfield, Northfield, Lochend, and Heriot. The testator was survived by his wife, his son David Francis Scott, and two daughters. The son died on 6th August 1888 unmarried and intestate, and aged about thirty-six.

After his death a question arose as to whether the residue of the trust estate had vested in him, and the present case was presented in order to obtain the opinion of the Court on the following question—"Did the residue of the trust estate vest in the testator's son, and did the second party become entitled to one-third thereof in respect of his death without issue and intestate?"

The parties to the case were (1) the trustees under David Scott's settlement, (2) the widow, and (3) the two daughters of David Scott.

The party of the second part argued that the right to the residue vested in her son *a morte testatoris*, and that she therefore became entitled to one-third thereof so far as moveable in respect of his death without issue and intestate. The parties of the third part argued that the right to the residue did not vest in their brother, and that they were entitled under the destination in the will to take the whole residue as conditional institutes.

At advising—

LORD PRESIDENT—We have clear evidence on the face of this will that the testator though not a lawyer was an intelligent man of business, and he has expressed himself with considerable felicity in regard to the way in which he desired his estate to be disposed of. He was engaged in farming to a large extent, having four farms in his hands.

Now, his will was made in 1870, and at that time his only son David had not then attained the age of twenty-three, which he did not do until 1875. The testator died in

1882, and so he had realised before his death the fact that the condition which he had thought fit to introduce regarding his son attaining the age of twenty-three no longer operated. He had to consider therefore how his four farms were to be carried on, and how his widow and children were to be provided for. Now, I think he has expressed himself clearly in reference to these matters—[His Lordship here read the direction in the will above quoted]. So far there is no difficulty in understanding the intention of the testator. Till he attains the age of twenty-three, his son is to have nothing to do with the farms, but when he reaches that age he is to have the use of the stock in the three farms mentioned, until his death upon payment of £300 a-year as interest, and he is also at his mother's death to get Lochend upon payment of £50 a-year to each of his sisters. Then he leaves to his two daughters and their heirs £3000 each reduced by a subsequent codicil to £2000. He then proceeds as follows—“and in consideration of the foregoing arrangements my son David is to succeed to whatever may remain of my estate and effects after these payments are made.” Now, it is said that these words necessarily imply that until the payments were made there was no succession in the son, that there was no gift, and therefore no right to the accrued residue until after the payments were made. It was urged that the word “after” was referable to a point of time, but I do not think that is the correct interpretation. I think that the testator meant in this clause to give his son an immediate gift subject to the payments provided for in the preceding clause. That is the more natural meaning to give to the words used, and is also more in accordance with the general rule of law as to vesting a *morte testatoris*. There is nothing to militate against it. Therefore, giving due effect to the presumption of law as to vesting a *morte*, there is no difficulty in giving effect to the plain meaning of the testator. I am therefore for answering the question in the affirmative.

LORD ADAM—I do not think that this is at all a difficult case, and I think that your Lordship has said everything that can be said upon the point. The question is whether the son's share vested in him a *morte testatoris*, and I have no doubt that your Lordship has put the true construction on the words of the residuary clause. The son in my opinion was to get the whole estate subject to the payments mentioned in the preceding clause. I am therefore prepared to concur with your Lordship.

LORD M'LAREN—I concur, and desire to add only a single observation. It is no doubt laid down in the leading cases that words of conditional institution or limitation, as they are called in the House of Lords, *prima facie* are to be taken to refer to the distribution of the estate. But while that is so, it is also to be observed that in determining the period of distribu-

tion there is an important distinction between the case where a general liferent of the estate is given with a destination of the capital at the time of distribution and the case (which we have here) of an unlimited fee burdened with an annuity. The rule of vesting is perfectly satisfied in the latter case, and I therefore concur with your Lordships in the proposed judgment.

LORD KINNEAR concurred.

The Court answered the question in the affirmative.

Counsel for First and Second Parties—Vary Campbell—C. K. Mackenzie. Agents—Ronald & Ritchie, S.S.C.

Counsel for Third Party—Jameson—Cullen. Agents—J. & J. Milligan, W.S.

Friday, July 17.

FIRST DIVISION.

THE PAROCHIAL BOARD OF THE PARISH OF BORTHWICK v. THE PAROCHIAL BOARD OF THE PARISH OF TEMPLE.

Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 50, sub-sec. 3—Special Case—Relevancy.

By sub-section 3 of section 50 of the Local Government (Scotland) Act 1889, the Boundary Commissioners are empowered, when making an adjustment under that Act, to state a special case for the opinion of the Court on any question of law arising.

The Boundary Commissioners for Scotland, acting under their statutory powers, detached an outlying portion of the parish of T, and annexed it to the parish of B. When the liabilities of the two parishes came to be adjusted, a question arose as to which parish would be bound to support persons who had at the date of the transference a settlement by birth or residence in the detached portion of T, and might thereafter require parochial relief.

Held that no question of law had been submitted, and case *dismissed*.

Opinions (per Lord M'Laren and Lord Kinnear) that the questions submitted to the Court were just those which the statute intended the Commissioners to deal with and to dispose of.

By order dated 24th November 1890, the Boundary Commissioners for Scotland declared that a detached portion of the parish of Temple, containing 228 acres or thereby, situated at or near Gorebridge, should cease to be a part of the parish of Temple, and should form part of the parish of Borthwick. The order came into operation on 15th May 1891. Before the transfer the population of Borthwick was 1902, and of Temple 1646. The population of the