

ing them away after they have been sold. I am speaking only of the case at common law when there is no specialty, and I am of opinion that the auctioneer selling goods upon his employer's premises is under no responsibility whatever for the state of the premises, or for the sufficiency of the provision made for bringing forward or taking away the goods. There might be some specialty in the case which would impose liability upon an auctioneer, but there is no liability at common law. I put the case of a sale of furniture upon the first floor of a private house, and the staircase giving way when some furniture is being carried up or down it. In that case there would be no *prima facie* responsibility upon the auctioneer. The same rule would apply to the use of a chair or a ladder in the house. This case of course must be distinguished from the responsibility of an auctioneer having rooms of his own with appliances for bringing forward articles. He is there responsible, both to his customers and to his own men, for the sufficiency of what he provides and is paid for. I am of opinion, therefore, that there is no relevant case against Scott Croall & Sons, and that they were under no duty to see to the sufficiency of the hoist, or to see if it was properly loaded or worked.

Then with respect to the action against the Clelands, the customers who purchased the goods which were being lowered when the accident occurred. It is an accidental detail that one of them had, according to the pursuer's averment, been an apprentice at Drew & Burnett's, and knew that the hoist was insufficient to carry the goods upon this occasion. I cannot take this to be a fact grounding an action of damages. I think it was for the pursuer, who was sent to superintend the matter, to see to it, both as to the sending up and lowering of the goods, that the hoist was not overloaded; and if it was overloaded he can have no action against the purchaser of the goods on the ground that he had served an apprenticeship in the place and knew that the hoist could not carry the load put upon it. He misjudged, and the pursuer misjudged, as to what the hoist would carry with safety, but that gives the one no right of action against the other. The customer bought the goods in *bona fide*, and he stood in no contractual relation, or any other relation, to the pursuer, so that he should be liable for having misjudged the weight that the hoist would bear. It often happens that two men are working with the intention of carrying out the same piece of work, and that both are doing their best to complete the work, but that one misjudges the effect of what he is doing, with the result that an accident happens to the other. That, however, does not create an actionable wrong, giving the one a right of action against the other.

It seems that a man named Cleland, who was not a member of the defenders' firm, although he may be a relation, jumped upon the pole which the pursuer was using as a brake at a critical period when the pursuer cried out for assistance, and that

the pole then broke. That may give the pursuer a ground of action against him individually, but it cannot give him a relevant ground of action against the firm of the Clelands, whose goods were being lowered when the accident occurred.

LORD RUTHERFURD CLARK—I think that Scott Croall & Sons ought to be assoltized, but I prefer to put my judgment on the ground that the pursuer's averment is that the hoist broke from being overweighted. They were not responsible for the overweighting, and I think there is no relevant averment of fault against them.

With respect to the case against the Clelands I have had more difficulty, but, on the whole, I have come to the conclusion that no case of fault has been sufficiently stated against them.

LORD TRAYNER and the LORD JUSTICE-CLERK concurred.

The Court pronounced this judgment:—

“Recal the interlocutor of the Sheriff-Substitute of date 23rd December 1891: Find that there is no relevant ground of action against either of the defenders, Scott Croall & Sons, and H. & D. Cleland: Therefore assoltzie them from the conclusions of the action: Find the pursuer liable to them respectively in expenses,” &c.

Counsel for Pursuer—Baxter—Rhind. Agent—John Veitch, Solicitor.

Counsel for Scott Croall & Sons—Salvesen—C. Thomson. Agents—Macpherson & Mackay, W.S.

Counsel H. & D. Cleland—Sym. Agents—J. & J. Ross, W.S.

Tuesday, February 2.

SECOND DIVISION.

HENDERSON'S TRUSTEES.

Succession—Fee or Liferent—Disposal of “Proceeds” of Estate—Failure to Dispose of Fee—Intestacy.

A testator by his trust-disposition and settlement provided “(first) that one-half of the clear proceeds arising from heritable properties belonging to me, as well as interest accruing from all my moveable property, shall be assigned annually or half-yearly to my niece, . . . and I also leave to her during her lifetime the use of my house with all the furniture therein; (next) that my trustees shall devote £10 annually to provide a bursary; (next) that the remaining portion of the annual proceeds of my estate shall be devoted to Home Mission work . . . under the management of the office-bearers of Free Martyrs' Church, Dumfries.” *Held* (1) that he had died intestate *quoad* all the fee of the whole of his estate both heritable and moveable; (2) that his

niece was entitled under the settlement to the liferent of the house, to the liferent of the furniture therein, and to payment during her lifetime of one-half of the clear revenue or income derived from the remainder of the truster's estate, both heritable and moveable, and that the office-bearers of said church were entitled to payment of one-half of the clear revenue or income derived from the said remainder of the truster's estate, both heritable and moveable, under deduction of £10 annually for said bursary.

A special case was presented to the Court by the trustees of the late George Henderson of Nunholm, who died at Ivy Bank House, Dumfries, on 6th March 1891, of the first part, his niece Susan Milligan Andson, his heir *in mobilibus* of the second part, his nephew William Andson junior, M.D., his heir-at-law, of the third part, and the office-bearers of Free Martyrs' Church, Dumfries, of the fourth part, to have certain questions arising out of his trust-disposition and settlement, dated 27th December 1888, and recorded 13th March 1891, determined. The purposes of the trust were that the trustees, after payment of the testator's debts, should appropriate his means and estate as follows—“(First) That one-half of the clear proceeds arising from heritable properties belonging to me, as well as interest accruing from all my moveable property, shall be assigned annually or half-yearly to my said niece for her maintenance and private uses, and I also leave to her, during her lifetime, the use of my house at Ivy Bank, with all the furniture and other effects therein belonging to me; (next) that my said trustees shall devote £10 annually to provide a bursary . . . ; (next) that the remaining portion of the annual proceeds of my estate shall be devoted towards Home Mission work in that part of Dumfries from King Street eastwards to English Street, and to be under the charge and management of the office-bearers of Free Martyrs' Church, Irving Street.” . . . The heritable estate left by the testator consisted of the small property of Nunholm, near Dumfries, of his house at Ivy Bank, Dumfries, and of some shop and house property in Dumfries. The total gross rental thereof was £285 per annum, and the probable value £5200. The free moveable estate amounted to about £1900.

The questions of law submitted were—“1. Did Mr Henderson die intestate *quoad* any, and, if so, what part of his estate? And is the third party, as heir-at-law, and the second party, as next-of-kin, entitled to any, and, if so, to what part thereof? 2. Is the second party's right, under the primary provision of Mr Henderson's settlement, a right of liferent or of fee? 3. And, accordingly, is she entitled—(1) To the liferent of the house at Ivy Bank and to the fee of one-half thereof, or only to the liferent of the said house? (2) to the fee of the furniture, &c., in the house at Ivy Bank, or only to the liferent thereof? and (3) to the fee of one-half of the residue of

the estate, or is she entitled only to the liferent, and, if so, whether to the liferent of one-half of the heritable estate and the whole moveable estate, or only of one-half the estate, both heritable and moveable? 4. Are the fourth parties entitled, subject to the second party's rights, as the same may be ascertained under the previous queries, and subject also to the provision of payment of £10 annually to found a bursary for a Free Church divinity student, to have the free proceeds of the whole estate paid over to them, to be applied in Home Mission work in Dumfries.”

The second party argued—That under the settlement she was entitled either (1) to the liferent of the house at Ivy Bank, whether she was entitled to the fee of one-half *pro indiviso* thereof or not, to the fee of the furniture in the said house, and to the fee of one-half of the free estate, heritable and moveable, left by Mr Henderson; or (2) to the liferent of Ivy Bank, to the fee of the furniture therein, and to the liferent of half the heritable, and the liferent of the whole moveable estate; and (3), but in the event only of Mr Henderson being found to have died intestate as to any part of his estate, to that part thereof which was moveable, she being his next-of-kin. Intestacy was to be avoided if possible, and liferent given to person so favoured as she was, implied a fee. The truster showed no intention to benefit his heir-at-law—*M'Laren on Wills*, i. 334; *Williams on Executors* (8th ed.) 1199; *Sanderson's Executor v. Kerr, &c.*, December 21, 1860, 23 D. 227; *Anderson v. Thomson, &c.*, July 17, 1877; *Lawson's Trustees v. Lawson*, July 17, 1890, 17 R. 1167.

The third parties argued—That the truster died intestate as regarded the whole or at least as regarded the half of his heritable estate, and he was entitled to succeed as heir-at-law. The idea of liferent alone predominated and did not here imply a fee—*White's Trustees v. Whyte*, June 1, 1877, 4 R. 786; *in re Taber*, July 5, 1882, 51 L.J. (Chan.) 721. “Remaining portion” meant the other half of the proceeds and was not equivalent to “the residue”—*Green v. Pertwee*, 1846, 5 Hare. (Chan.) 249; *Wrench v. Jutting*, 1841, 3 Bead. (Chan.) 521.

The fourth parties argued—That the second party was only entitled to the liferent of the house at Ivy Bank, and of the furniture therein, and of one-half of the residue of the estate. They further maintained that the testator effectually disposed of his whole estate, and that no part thereof fell into intestacy; and they claimed that the income of the whole estate, subject to the above-mentioned liferent rights of the second party, and to a burden of £10 a-year to be devoted towards providing a bursary in terms of the deed, should be paid over to them in perpetuity, to be applied towards Home Mission work in Dumfries, as directed by the testator. Alternatively, and in the event of it being held that Mr Henderson had failed to dispose of the whole of his estate, they main-

tained that in any case, with reference to the moveable estate, not more than one-half thereof, including therein the furniture in Ivy Bank house, fell into intestacy; and they claimed right to perpetual enjoyment of the proceeds of the whole estate not so falling into intestacy, similar in all respects to the above, except that the second party's liferent should be paid, as far as possible, out of the estate falling in intestacy. The division was tripartite not bipartite. "Remaining portion" was not equivalent to "the other half," but was a bequest of residue. The niece only got the liferent of half the estate to enable her to keep up the house. Her interest accresced to them. They were fiars of the whole estate subject to her liferent—*Playfair's Trustees v. Hunter*, July 18, 1890, 17 R. 1241. In any case, they were fiars of that half they liferented. They relied upon the authorities cited by the second party, but were in a stronger position as liferenters in perpetuity.

At advising—

LORD TRAYNER—The questions presented for the opinion and judgment of the Court by this special case have relation to the succession of the late Mr George Henderson of Nunholm, and the solution of these questions depends upon the construction of Mr Henderson's deed of settlement dated 27th December 1888. That settlement is holograph of Mr Henderson, and is expressed in terms which are certainly open to construction. By the said settlement Mr Henderson appointed certain persons (the parties to this case of the first part) to be his executors and trustees, and declared that all his effects at the time of his death should belong to them for the purposes there stated. After payment of all lawful debts or claims against the estate the trustees were directed "to appropriate my means and estate as follows." The directions which follow are the only parts of the deed to be construed, and they are thus expressed—[*His Lordship read the purposes given supra.*] The questions which arise on the construction of these provisions are practically two—1st, Does the testator dispose of the fee of his estate or any part of it? and 2nd, What are the rights conferred respectively on the beneficiaries named? It is convenient to deal with the second question first, because in answering it the solution of the first question is reached. The first of the provisions in question are those conceived in favour of Miss Andson, the truster's niece, and for her it is contended that the provision in her favour confers on her a right to a certain fee and also a certain liferent. Her alternative views are set forth in the special case, and do not need to be here repeated. In my opinion the right conferred on Miss Andson by the truster's settlement is a right of liferent merely. The words directing the trustees to give Miss Andson "one-half of the clear proceeds arising from heritable properties belonging to me," might certainly in some circumstances import a direction to pay to the beneficiary one-half of the value of such

properties—that is, one-half of the amount realised by their sale, which would be a right to the fee to the extent of one-half. But these words cannot be so read in the present case, regard being had to the context. The "proceeds" to be paid Miss Andson are to be given to her, not in one sum or at one time, but annually or half-yearly "for her maintenance and private uses," and are to be paid to her along with the "interest accruing from all my moveable property." Plainly, therefore, what is meant by "proceeds" is not price or value but revenue; one-half of the clear or nett revenue of the truster's heritable property is to be paid Miss Andson yearly or half-yearly. As regards the moveable estate, Miss Andson claims the liferent of the whole, founding on the words already quoted, "the interest accruing from all my moveable property." But this, I think, is qualified by the opening words of the provision—"one-half"—which dominate the whole clause. The liferent right in Ivy Bank is clear enough, but Miss Andson maintains that the words "with all the furniture and other effects therein" import a gift to her of the furniture in fee. I think this is not so. I read the provision not as conferring a different right to the furniture from that conferred in reference to the house, but as conferring a liferent of the house with the furniture therein as the same belonged to the truster at his death. The result of what I have said is that Miss Andson is entitled under the truster's settlement to one-half of the clear revenue of the truster's estate, both heritable and moveable, during her lifetime, and to the liferent use of Ivy Bank with the furniture and other effects therein belonging to the truster.

One-half of the revenue of his whole estate being thus disposed of, the truster then proceeds to deal with the other half. He directs his trustees out of it to devote £10 annually to provide a bursary, and "the remaining portion of the annual proceeds" of his estate (that is, what remains of this, the second half, after providing for the bursary) is directed to be devoted towards Home Mission work in Dumfries under the management of the office-bearers of a certain Free Church, which is named. It was contended on behalf of these last-named beneficiaries that the words "remaining portion" in the bequest to them was equivalent to a bequest of "residue," in respect of which they were entitled to claim the whole estate of the truster subject to the burden of the right conferred on Miss Andson, and the provision to be made for a bursary. I think this is plainly not the meaning of the deed, and the words which immediately follow the words relied upon show this. It is not the remaining portion of the truster's estate which is to be devoted to Home Mission work, but the "remaining portion of the annual proceeds," and that obviously from the context means what remains of the second half of the annual revenue of the estate after provision has been made out of that half for the bursary. The same beneficiaries further maintained that

as the "annual proceeds" directed to be placed under their charge and management were to be paid to them in perpetuity, the right conferred on them was by implication a right of fee, and that they were entitled now to payment or delivery of that portion of the estate out of which the perpetual payment was to be made. I think this claim cannot be sustained. There are cases no doubt where the payment in perpetuity of a certain sum may imply a right of fee, so as to entitle the beneficiary to payment of the money, or delivery of the subject out of which the perpetual payment is to be made. But this is not one of these cases. The Free Church in question, for example, is not a corporation; it might cease to exist, or might be merged in some other religious community, in which case the trustor's bounty could no longer be claimed by them. But, apart from that, there is no appearance of any intention or purpose on the part of the trustor to entrust the office-bearers of that church with anything more than the management of that part of the income of his estate which year by year should be handed over to them by his trustees. The right, therefore, of the fourth parties to this case seems to me to be limited to the one-half of the clear annual income derived from the trustor's estate, under deduction of £10 annually for the purpose of providing the bursary above mentioned.

The rights thus conferred on the several parties, as I have now stated them, exhaust the provisions of the deed with regard to the disposal of the trustor's estate. The deed, therefore, while it disposes of the whole income of the estate, gives no direction and makes no provision for the disposal of the fee. I am of opinion that as regards the fee of his estate the testator died intestate, and that such fee (subject to the burdens imposed by the trust-settlement) falls to the heir-at-law and heir *in mobilibus* according to the rules of intestate succession. The questions annexed to the special case will be answered in accordance with the views I have expressed.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD RUTHERFURD CLARK concurred.

The Court pronounced the following interlocutor—

"Find in answer to the first question annexed to the case, that the late George Henderson died intestate *quoad* the fee of the whole of his estate, and that the third party as heir-at-law and the second party as next-of-kin are entitled to such fee (subject to the burdens imposed thereon by the trust settlement executed by the said George Henderson, dated 27th December 1888) according to the rules of law regulating intestate succession: In answer to the second question, that the second party's right under the primary provision of said settlement is a right of liferent: In answer to the third question, that the second party is entitled (1) to the liferent of the house at Ivy Bank; (2) to the liferent of the furniture, &c., in

said house; and (3) to payment during her lifetime of one-half of the clear revenue or income derived from the remainder of the trustor's estate, both heritable and moveable: And in answer to the fourth question, that the fourth parties are entitled to payment of one-half of the clear revenue or income derived from the said remainder of the trustor's estate, both heritable and moveable (under deduction of the sum of £10 annually to found the bursary mentioned in said settlement), to be applied in the Home Mission work specified by the trustor in said settlement, . . . and decern," &c.

Counsel for First Parties—Clyde. Agents—J. & A. Hastie, Solicitors.

Counsel for Second Party—H. Johnston—W. Campbell. Agent—John Rhind, S.S.C.

Counsel for Third Party—Wilton. Agent—John Rhind, S.S.C.

Counsel for Fourth Parties—Ure—Constable. Agent—W. J. Johnstone, S.S.C.

Thursday, February 4.

FIRST DIVISION.

[Sheriff of Roxburgh,
Berwick, & Selkirk.

SMITH v. WILSON.

Bankruptcy—Election of Trustee—Appeal—Competency—Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. cap. 79), sec. 71.

It was objected to the affidavit and claim upon which a creditor had voted at a meeting for the election of a trustee in a sequestration, that part of it was vouched by a prescribed bill, and that an acknowledgment of indebtedness by the bankrupt endorsed upon the bill, which bore to be dated shortly prior to sequestration, being holograph, did not prove its own date. The Sheriff rejected the creditor's claim to rank and vote for the amount of the prescribed bill, on the ground that the acknowledgment did not bear to be holograph. The result of this decision was to leave the candidate for whom this creditor had voted in a minority, and the Sheriff accordingly declared the opposing candidate to have been duly elected trustee.

Held that the Sheriff had not exceeded his jurisdiction, and that his decision was final under the 71st section of the Bankruptcy Act.

Farquhar v. Sutherland, June 6, 1888, 15 R. 759, distinguished.

On 16th November 1891 the estates of Robert Neilson, draper, Lauder, were sequestrated by the Lord Ordinary on the Bills, and a meeting was appointed to take place at Lauder on November 27th for the election of a trustee and commissioners.

The minute of meeting of creditors held