

say they did. That being so, I cannot agree with the Sheriff in thinking it is necessary for the bankrupt before suing his debtor to make a relevant averment of abandonment by the creditors. If it were necessary to make that averment, it must also be necessary to prove it; and it would be out of the question to require such a proof in an action to which the creditors are no parties. Whether the creditors may have a good claim against the pursuer in case he should succeed is a question with which the defenders have no concern.

The LORD PRESIDENT concurred.

The Court recalled the interlocutors complained of, found that the pursuer was entitled to sue without finding caution for expenses, and remitted the case to the Sheriff-Substitute.

Counsel for Pursuer and Appellant—A. S. D. Thomson—Cullen. Agents—Patrick & James, S.S.C.

Counsel for Defenders and Respondents—Macfarlane. Agents—Morton, Smart, & Macdonald, S.S.C.

Thursday, July 6.

SECOND DIVISION.

SUTHERLAND'S TRUSTEES v. CHALMERS.

Trust—Special Trust Created by Letter—Subsequent General Trust-Disposition—Settlement—Revocation not Expressed or Implied.

A by letter intimated to B his intention of leaving some of his means to certain persons, by sending B a certain sum and writing out "a kind of will or assignation" giving the names of the parties he had in view. He added—"I want this to be a separate thing from my general will."

Thereafter A wrote a letter of instructions to B, in which he committed to his charge £1150, and requested him to pay over this amount in various fixed sums to persons named. The interest of the sum was to be paid by B to A till the latter's death, after which the division was to be made. A reserved power to withdraw the whole or any part of the sum, or vary the division as he might at any future time be disposed.

Nine years after, A, by trust-disposition and settlement, disposed and made over, for the purposes therein mentioned, to trustees, the whole estate, heritable and moveable, belonging to him at his decease, "but excluding from the fore-said conveyance such heritable or moveable property as may have been, or may be specially conveyed by me, under a separate deed or writing, such excluded property being at present"—[Here followed a description of two heritable properties]. No reference was

made in the deed to the £1150 made over to B by the letter of instructions. After A's death—held that the trust created by the letter of instructions had not been revoked by the general trust-disposition or settlement.

Succession—General Settlement—Bequest of Residue to Trustees, to be Disposed of as they thought Proper—Invalid Disposal of Residue—Intestacy.

A truster conveyed the whole estate, heritable and moveable, belonging to him at the time of his decease to trustees. The trust-disposition, after containing bequests of various legacies, provided in the last place with regard to the residue of the estate, "I leave and bequeath the same to be disposed of by my said trustees in such manner as they may think proper, subject to such instructions and directions as I may hereafter make."

After the death of the truster without leaving any instructions and directions regarding the disposal of the residue of his estate—held that the clause applicable to residue was not a valid disposal thereof.

On 1st February 1882 John Sutherland, fish-curer, Wick, wrote to Condie Stevenson Chalmers, 9 Bonnington Terrace, Edinburgh, as follows.—"It has been in my mind for years back to leave some of my means to some of the young people whose parents I hold and held in the greatest respect, those who have been my best friends and of a very long duration. I had intended to have mentioned a certain sum in my will, p. deposit-receipt in your name, and a letter from me attached to the D.-receipt with the names of those mentioned in letter, and the sum I wanted each to get.

"I have now altered my mind, and as you know having full confidence in yourself that I would send you a certain sum in your name, and you could get some one to do it for you, or you are able enough to do it yourself.

"*Private.*—I mean to write out a kind of will or assignation, and I would sign it and I would give you the names of the parties I have in view. Now, my dear sir, give your opinion on this matter. I hope you fully understand what I mean. I want this to be a separate thing from my general will."

Thereafter Mr Sutherland sent to Mr Chalmers the following letters of instruction:—

Leith, 26th April 1882.

"My dear Friend,—Having entire confidence in your integrity, and being desirous in the event of my death to show the great regard I have to the name of our old respected and deceased friend Mr James Methuen senior, and having a tender regard, esteem, and attachment to my oldest friends, Mr George S. Seater, Leith, and yourself, I wish to evince it, and in the event of my predeceasing you both, to give token of this esteem, and desire that my memory be held in kind remembrance in the three families after my decease. I now, therefore, commit to your charge the sum of eleven hundred and fifty pounds sterling, and request you will pay over the sums

mentioned to the persons following, namely, to Elizabeth Methuen or Mackenzie, wife of John Robertson Mackenzie, now residing at Adelaide, South Australia, three hundred pounds; and to Jane Methuen or Graham, wife of Captain Dugald Graham, in the Northern Lighthouse Service, to Grace Methuen or Ross, wife of the Rev. William Ross, Free Church minister, Dundonald, to Catherine Methuen and to Jemima Methuen, residing at Trinity, Leith, each of these (ladies) four ladies, the sum of one hundred pounds; and further, to George Seater, the son of the aforesaid George S. Seater, shipowner, Leith, one hundred and fifty pounds; and lastly, to your daughter Catherine Cecilia and to your son David Robertson Chalmers, each one hundred and fifty pounds, amounting in all to the sum I have left with you, namely, eleven hundred and fifty pounds.

"The interest of the sum I now leave with you, you will remit to me yearly, leaving the principal sum with you in bank for the purpose aforesaid; these payments to be made by you after my decease.

"I hereby reserve power to myself at any time to withdraw the whole or any part of said sum, and to alter or vary the division of the sum to the parties by reducing or increasing the amounts, or by suppressing or substituting other names, as I may at any future time be disposed.

"This money is only left with you in trust, and I am at liberty to name one or more persons to act along with you, or instead of you, as I may desire.

"A simple receipt from the several individuals aforesaid, when payment is made to them, shall be a sufficient discharge for you, and the money shall be made to the ladies personally, and they are to receive and make use of it exclusive of the *jus mariti* of the husbands they may then have.

"In the event of your death before myself, I hereby empower your son David to carry out this my request and desire in the same way and with the same powers as I herewith have committed to you.—I am, yours truly, JOHN SUTHERLAND,

of Breadalbane Crescent, Wick."

Leith, 28th September 1882.

"In the event of the death of any of the children of the late Mr James Methuen senior, I hereby desire you to pay her or their shares of the money to Mrs Mackenzie in addition to her own share—that is, provided I do not leave you any other directions on this subject.

"JOHN SUTHERLAND."

Mr Sutherland paid the said sum of £1150 to Mr Chalmers on or about the date of the said letters of instruction. No part of the said sum was ever withdrawn by Mr Sutherland, and no nomination of any other party to act in the trust along with or instead of Mr Chalmers was ever intimated to him. No alteration was made in the division of the capital of the said sum except what was directed by the said post-script to said letter of instructions. Mr Chalmers remained in charge of the said sum as sole trustee.

John Sutherland died at Pulteneytown on the 7th day of September 1892, aged seventy-four, unmarried, and predeceased by his brothers and sisters, none of whom left issue. He left a trust-disposition and settlement dated 20th April 1891, and two codicils dated 9th October 1891 and 4th December 1891.

By said trust-disposition and settlement the testator gave, granted, assigned, disposed, conveyed, and made over to and in favour of trustees, for the purposes of his said settlement, "All and sundry my whole estate, heritable and moveable, real and personal, owing and belonging to me at my decease, with the rents, interest, profits, and produce, and writs, titles, and vouchers thereof, but excluding from the foresaid conveyance such heritable and moveable property as may have been or may be specially conveyed by me under a separate deed or writing, such excluded property being at present (first) the heritable property in Bank Row, Pulteneytown, which belonged to my father, and (second) the heritable property in Shore Place, Pulteneytown, which belonged to the late Donald Donaldson, merchant, Pulteneytown, and thereafter to his widow Janet Sutherland or Donaldson, my sister, also now deceased."

The trust-disposition and settlement, after containing bequests of numerous legacies to various persons and charities and other specified objects, provided for the disposal of the residue as follows—"In the last place, with regard to the residue of my means and estate hereby conveyed, and after satisfying the legacies and bequests before mentioned, together with the legacy and other duties and expenses of discharges connected with my whole estate, I leave and bequeath the same to be disposed of by my said trustees in such manner as they may think proper, subject to such instructions and directions as I may hereafter make."

By the two codicils further legacies were left to various persons named. With the exception of these two codicils the said John Sutherland left no "instructions and directions" dealing with the disposal of the residue of his estate.

The whole estate falling to be administered by the trustees under the settlement, and excluding the £1150 paid by Mr Sutherland to Mr Chalmers, amounted to over £19,000, and after fulfilment of the whole prior purposes of the trust-disposition and settlement, and payment of the legacies mentioned in the codicils, the residue of the estate amounted to over £3000, or to over £4150 if the letter to Mr Chalmers was revoked by the trust-disposition and settlement, and the funds at present held in trust by him consequently fell into residue.

In these circumstances questions were raised whether the trust-disposition and settlement, which contained no express clause of revocation, but which did contain a conveyance of the testator's whole estate under specific exceptions, which, however, did not include or refer to the funds held by Mr Chalmers, acted as a revocation of

the letter of 26th April 1882, and so made the sum of £1150 held thereunder part of the general estate to be administered by the trustees under the settlement. The trustees maintained that they were entitled to the whole fund, and that the letter of 26th April 1882 was duly revoked by the testator's trust-disposition and settlement. Mr Chalmers, on the other hand, maintained that Mr Sutherland did not intend to recal the trust created in him by said letter, and for that purpose did not withdraw the said £1150, or any part thereof, from him, or expressly revoke it in his settlement, and that (1) in respect he did not withdraw it during life, and *separatim*, (2) as on a sound construction of his testamentary writings the said letter remained still in force, he (Mr Chalmers) was bound to administer the said £1150 in accordance with the terms thereof.

A further question was raised, whether the provision applicable to the residue was a valid disposal thereof. If it was not, the residue would require to be divided among the next-of-kin of the deceased.

For the decision of these questions a special case was presented by (1) Mr Sutherland's testamentary trustees, (2) Mr Chalmers, and (3) William Henderson, cooper, Pulteneytown, one of Mr Sutherland's next-of-kin.

The questions of law were—“(1) Has the trust-disposition and settlement of the said John Sutherland the effect of withdrawing from the second party, as trustee under said letter of 26th April 1882, the £1150 therein conveyed to him in trust; and does the said sum of £1150 fall to be transferred by the second party to the first parties as part of the trust-estate falling under their management? (2) Is the clause in the said trust-disposition and settlement applicable to residue a valid disposal thereof?”

Argued for the first parties—(1) The letter of instructions was recalled by the general settlement. The trust-deed was a conveyance of the testator's whole estate with the exclusion of special subjects not including the £1150 contained in the letter of instructions. The letter was therefore impliedly revoked. (2) The bequest of residue was not void on account of uncertainty—*Kelland v. Douglas*, November 28, 1863, 2 Macph. 150. The case of *Gibbs v. Ramsey*, December 6, 1813, 2 Ves. & B. 274, was on all fours with the present. The case of *Fowler v. Garlyke*, February 16, 1830, 1 R. & M. 232, did not apply, as in that case there was no beneficial gift to the trustees, “upon trust” being repeated in the residuary clause.

Argued for the second party—(1) The trusts created under the letter of instructions still stood, and had not been revoked by the general trust-settlement. The trustor had distinctly stated that it was to be a separate thing from his general will. The letter of instructions was holograph and delivered, and had never been recalled expressly or by implication. There was nothing inconsistent with it in the general trust-settlement, and a special disposition

of this kind, followed by a general trust-settlement with which the former was not inconsistent, stood—*Thomson v. Lyell*, November 18, 1836, 15 S. 32; *Scott v. Sceales*, July 20, 1865, 3 Macph. 1130; *Kenmore's Trustees*, May 18, 1869, 7 Macph. 771; *Sibbald's Trustees v. Gray*, January 13, 1871, 9 Macph. 399; *Glendonwyn v. Gordon*, May 19, 1873, 11 Macph. (H. of L.) 33; *Fraser v. Hogg's Trustees*, June 18, 1875, 12 S.L.R. 495. (2) Even if the trust-disposition was held to revoke by implication the trust created by the letter of instructions it could only do so if the disposition of the residue was valid. But the residue clause failed on account of its vagueness, and therefore no intention to revoke could be implied from a universal settlement which was held to be invalid—*Kirkpatrick's Trustees v. Kirkpatrick*, June 23, 1874, 1 R. (H. of L.) 37.

The third party concurred with the first party's argument regarding the letter of instructions, but contended that the residue clause was ineffective.

At advising—

LORD YOUNG—I am clearly of opinion that the residue clause is ineffectual to give the property of the residue to the trustees, and also ineffectual to give it to them in trust or for the purpose of declaring a trust.

The only question remaining is, whether the letter of 26th April is in respect to the money therein referred to, and the trust therein created, impliedly revoked by the general will? I am of opinion that I should arrive at that conclusion quite satisfactorily to my own mind without reference to the letter of 1st February. But that letter is instructive, as it refers to the special trust which Mr Sutherland was then contemplating as not a will regulating the disposal of his estate, but “a kind of will or assignation” giving the names of the parties among whom the sum is to be distributed, and he adds, “I want this to be a separate thing from my general will.” It is this intention which he carried out when he prepared and signed the letter of instructions handing over £1150 to a trustee to be divided among the persons therein named. In order to revoke this letter it would require something in the testator's settlements indicating that he intended to do so. As no such indication appears in the will, my opinion is that this letter of instructions must have effect according to its terms.

LORD RUTHERFURD CLARK—I am of the same opinion. With respect to the first question in the case, I do not require to enter into the intricate questions discussed before us, because the testator has left sufficient directions for our guidance. He deposited a certain sum of money in the hands of Mr Chalmers, and says, “I want this to be a separate thing from my general will.” We cannot hold that that has been revoked impliedly by the general will.

LORD TRAYNER—I have nothing to add. I concur.

The LORD JUSTICE-CLERK was absent.

The Court answered both questions in the negative.

Counsel for the First Parties—George Watt. Agent—Adam W. Gifford, W.S.

Counsel for the Second Party—Sym—C. D. Murray. Agents—J. & R. A. Robertson, S.S.C.

Counsel for the Third Party—Jameson—Crole. Agent—S. F. Sutherland, S.S.C.

Saturday, July 8.

FIRST DIVISION.

[Lord Low, Ordinary.]

STIRLING STUART v. CALEDONIAN RAILWAY COMPANY.

Railway—Compulsory Acquisition of Land—Application of Purchase Money—Expenses—Lands Clauses Consolidation Act 1845 (8 Vict. cap. 19), sec. 79—Entail.

In a petition by an heir of entail for authority to uplift money consigned by a railway company as the price of lands acquired under compulsory powers, and to apply it *pro tanto* in payment of a bond and disposition in security over the entailed estate, the Court (approving judgment of Lord Manor in *Pollok v. Glasgow Waterworks Commissioners*, 41 Scot. Jur. 325), held that the railway company was not liable for expenses incurred in connection with the preparation, execution, and recording of a partial discharge and deed of restriction by the creditor in the bond.

The following narrative of the case is taken from the opinion of the Lord Ordinary (Low):—"The petitioner is heir of entail in possession of the estate of Milton. In 1892 the Caledonian Railway Company acquired a portion of the estate, and consigned the price, which was fixed by valuation, in bank. The petition is for authority to uplift the consigned sum, and to apply it in repayment *pro tanto* of a large debt upon the entailed estate constituted by bond and disposition in security in favour of the Scottish Widows Fund and Life Assurance Society. The authority craved has been granted, but a question has been raised as to the liability of the railway company for the expenses of preparing, executing, and recording a partial discharge and deed of restriction by the insurance company, disburdening the entailed estate to the extent of the uplifted money, and wholly disburdening the portion of the estate acquired by the railway company. The Auditor has disallowed these expenses as a charge against the railway company, and the petitioner objects to the Auditor's report in that respect."

By section 67 of the Lands Clauses Consolidation Act 1845, it is provided that the purchase money or compensation payable in respect of any lands taken by the pro-

motors of an undertaking from any heir of entail or other party having a limited interest shall, if it amounts to or exceeds £200, be consigned in bank, to the intent that it may be applied under the authority of Court to one or more of the following purposes—"In the purchase or redemption of the land tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith on the same heirs, or for the same trusts or purposes, or affecting succeeding heirs of entail in such lands whether imposed and constituted by the entail, or in virtue of powers given by the entail, or in virtue of powers conferred by any Act of Parliament. In the purchase of other lands to be conveyed, limited, and settled upon the same heirs, and the like trusts and purposes, and in the same manner, as the lands in respect of which such money shall have been paid stood settled; or if such monies shall be paid in respect of any buildings taken under the authority of this or the special Act, or injured by the proximity of the works, or in removing or replacing such buildings, or substituting others in their stead, in such manner as the Court shall direct; or in payment to any party becoming absolutely entitled to such money."

Section 79 provides that in all cases of monies deposited in the bank (with certain excepted cases) "it shall be lawful for the Court of Session to order the expenses of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking—(that is to say), the expenses of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such expenses as are herein otherwise provided for, and the expense of the investment of such monies in government or real securities, and of the reinvestment thereof in the purchase of other lands, and of re-entailing any of such lands, and incident thereto, and also the expense of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such monies shall be invested, and for the payment of the principal of such monies, or of the securities upon which the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants." . . .

On 23rd June the Lord Ordinary reported the case to the First Division.

"*Opinion.*—The same question was raised in the case of *Pollok v. The Glasgow Waterworks Commissioners*, 41 Scot. Jur. 325, which was decided on 5th March 1869 by Lord Manor, who held that the expense of the partial discharge could not be awarded against the promoters. That judgment was acquiesced in, and the Auditor informs me that it has ruled the practice ever since its date.

"The question depends upon the construction of certain sections of the Lands Clauses