

Friday, November 25.

FIRST DIVISION.

[Lord Moncreiff, Ordinary.]

RICHARDSON v. MACGEOCH'S
TRUSTEES.

*Agent and Client—Fraud—Common Agent
for Lender and Borrower—Liability for
Loss by Fraud of Common Agent.*

In order to pay off a bond and disposition in security for £200, R, the debtor, arranged with C for a loan of £250 on the security of the same subjects. On the 5th October C accordingly paid £250 in notes to S, a law-agent who acted for C, for R, and for M, the creditor in the bond. C got a receipt from S in these terms—"Received from C the sum of £250 to be lent on bond over subjects belonging to R." S prepared a discharge of the original bond, which was signed by M, and returned to S on 7th or 8th October.

On 12th October R called on S, when a settlement of the transaction took place. No money passed, but R signed the new bond in favour of C, and received a cheque from S for the difference between £250 and £200, less interest and expenses. The discharge of the original bond remained in the hands of S. On the 13th R sent S a receipt for £250, "being amount of bond received by me from C." In the books of S, R was credited on 5th October with £250, and debited on the 12th with £200 for the payment of M's bond.

S shortly afterwards absconded. It was proved that he had been for many years insolvent, and that between 30th September and 12th October he had appropriated considerable trust funds to his own use.

In a question between R and M, *held (aff. judgment of Lord Moncreiff)* that the bond in favour of M had not been discharged, in respect (1) that S had embezzled the sum paid to him by C on 5th October instead of applying it to discharge the bond, and that the subsequent settlement on the 12th was purely fictitious and ineffectual; and (2) that the discharge executed by M had never been delivered to R, but was held by S as M's writ pending the payment of the bond.

Samuel Dunlop Richardson, stockbroker, Kilmarnock, raised an action against the Reverend Robert M'Millan and Others (MacGeoch's testamentary trustees) to have it declared that the obligations undertaken by him in virtue of a bond and disposition in security granted by him in favour of the defenders had been duly implemented and fulfilled by him, and that the said bond had been validly and effectually discharged by him. There was also a conclusion to have the defenders ordained to deliver up to the pursuer the bond in question and the discharge thereof.

The facts of the case as averred on record and disclosed at the proof are thus set forth in detail by the Lord Ordinary—"In September 1896 the pursuer owed the defenders MacGeoch's trustees a sum of £200 for which they held a bond and disposition in security over certain heritable subjects belonging to him. Arthur Sturrock, solicitor, Kilmarnock, and agent there for the British Linen Bank, was agent for the defenders' trust, and he had also acted for the pursuer. Both parties had implicit confidence in him and apparently had had no reason to distrust him.

"By the desire, if not by the express instructions of the trustees, Sturrock on 11th September 1896 intimated to the pursuer that the bond was to be called up. The pursuer accordingly looked about for another lender, and a friend of the name of Currie agreed to give him a loan of £250 on receiving a bond over the pursuer's property for that amount.

"Currie instructed Sturrock to prepare the bond. Sturrock did so, and also prepared a discharge of the first bond by the defenders which he sent for signature to the trustees.

"On 5th October Currie paid Sturrock £250 in notes, for which Sturrock granted the receipt in these terms:—"Kilmarnock, 5th October 1896. Received from Charles Currie, Esq., the sum of two hundred and fifty pounds to be lent on bond over subjects in Hurlford belonging to Mr S. D. Richardson, at 4 per cent. (Signed) ARTHUR STURROCK. 5th October 1896."

"The discharge of the first bond was returned to Sturrock, signed by all the trustees on the evening of the 7th or morning of the 8th October. On 7th October Sturrock wrote to the pursuer—"I am now in a position to settle bond to Mr Currie. Enclosed is a note of debt, &c." The pursuer called at Sturrock's office on the 9th of October, but Sturrock was out. He again called on the 12th October, when a settlement or a pretended settlement of the transaction took place. Sturrock gave the pursuer two receipts, one being a state for settlement in which the pursuer is credited with the sum in bond £200, and debited with interest on that sum from 15th May to 17th October £3, 3s. 7d., less tax 2s. 1d., and expenses as per separate account, also receipted by Sturrock, £9, 12s. 7d. Deducting these sums from £250 left a balance of £37, 5s. 11d., for which Sturrock gave the pursuer a cheque. The pursuer thereupon signed a bond for £250 in favour of Currie. The discharge of the first bond remained in Sturrock's hands.

"On 13th October the pursuer gave Sturrock a receipt for £250 in these terms—"13th October 1896. Received from Arthur Sturrock, Esq., Solicitor, the sum of two hundred and fifty pounds sterling, being amount of bond received by me from Charles Currie, Esq., Hurlford, over subjects at Mauchline Road, Hurlford. (Signed) S. D. RICHARDSON. £250, 13th October 1896."

"No money passed at the meeting on 12th October. The pursuer never personally

received the £250 and never paid the £200 due to the defenders. In Sturrock's books the pursuer is credited with £250 on 5th October, and is represented to have paid the £200 on 12th October in settlement of the bond in favour of the defenders.

"During the proof the defenders at first endeavoured to establish that no meeting or transactions such as that spoken to by the pursuer took place on the 12th October. I am not much surprised at this, because the bond in favour of Currie is dated 29th September, and the cheque for £37, 5s. 11d. and the receipt are both dated 13th October. I am quite satisfied, however, that the pursuer's account of what took place on 12th October is substantially correct, and I abstain from stating my reasons for thinking so merely because at the debate the Solicitor-General, without giving any informal admission, did not seriously dispute this. I think I do not overstate what was said. On 23rd October Sturrock absconded without having paid any part of the £200 to the defenders. He was found to have been not only for long hopelessly insolvent, but to have misappropriated money intrusted to him by clients to a very large extent.

"These, with one important exception, which I shall presently notice, are the material facts of the case. The difficulty in disposing of it lies in the fact that Sturrock acted as agent for no less than three parties, the pursuer, the defender, and Currie; and the problem is to ascertain which of those three parties were defrauded. In some of the previous cases the Court have been enabled to decide the question of liability by evidence that one of the innocent parties has by remissness in supervision or misplaced confidence given the mutual agent facilities for defrauding the other. In the present case I see no evidence of remissness on the part of the defenders; on the other hand, I see no reason to doubt the *bona fides* of the pursuer, and I do not think that he was in any way personally negligent in regard to the transaction. There being therefore nothing to turn the scale between the pursuer and the defenders, the loss must lie where it fell unless the pursuer is able to demonstrate that he actually or constructively paid up the debt due to the defenders.

"The case stands thus—No part of the £200 was paid to the defenders; on the other hand, the pursuer did not get possession of the discharge of the first bond which was signed by the defenders, and it was not put on record. The pursuer is therefore in this unfortunate position that at present he appears on the record as debtor in two bonds for £200 and £250 respectively.

"If it had been proved that the pursuer at the settlement on 12th October paid, as averred on record, the £200 to Sturrock as the defenders' agent, Sturrock would have thereafter held the discharge for the pursuer.

"It is admitted, however, that no money passed at the settlement on 12th October, the pursuer never personally paid any part of the defender's debt to Sturrock,

"This is not by any means conclusive, because if money was at the time held by Sturrock to meet the debt, the transaction might have been carried through in the manner adopted. But there are serious grounds for holding that the money out of which the £200 due to the defenders ought to have been paid, viz., the £250 paid to Sturrock by Currie, on the 5th October, was appropriated by Sturrock before the meeting on the 12th. Currie paid £250 to Sturrock in notes on 5th October 'to be lent on bond,' &c. That money has not been traced; it was certainly not paid into bank. Sturrock himself says that it may have been paid away to one of his own creditors when it was received, and the state of Sturrock's affairs and bank account at the time and his utterly unscrupulous practice of dealing with trust funds make it, I think, certain that this was done. To look only at the entries for the fortnight beginning 30th September and ending 13th October 1896, we find that Sturrock was laying his hands on available trust funds and paying them away to his own creditors. On 30th September a sum of £2006, 12s. 6d. is paid into bank, converting a debit of £625, 19s. 9d. to a credit of £1380, 12s. 9d. It is proved that the sum so paid in was the proceeds of a deposit-receipt belonging to M'Gibbon's curatory in which Sturrock was curator. This sum was speedily drawn out and paid to creditors. In particular, on the same day £1400 was paid to a Mr Finlay, and by the 5th of October, the day upon which Currie paid him £250, we find that the credit balance had been turned into a debit balance of £267, 18s. 6d. I cannot believe that Sturrock having £250 in cash in his hands did not on 5th October apply it in payment of his own debts.

"On 12th October there was standing at Sturrock's credit a sum of £367, 15s. 10d., but that balance was created by Sturrock on 8th October appropriating a sum of £204, 19s. 11d., the proceeds of a deposit-receipt belonging to Mrs Gray, and on 10th October 1893 the proceeds of another deposit-receipt belonging to M'Gibbon's curatory. These sums were also exhausted by cheques to brokers. Without these two sums Sturrock's debit balance would have been over £500.

"As a jury question I am prepared to find that Sturrock on 5th October appropriated the £250 given by him to Currie to his own uses and purposes, just as he appropriated the funds which I have specified from other trusts, with this difference, that he paid away the £250 at once and did not pay it into bank."

The pursuer pleaded, *inter alia*—"(1) The pursuer having fully implemented the obligations incumbent upon him in respect of the foresaid bond and disposition in security for £200, is entitled to be discharged of all further liability thereunder."

The defenders pleaded, *inter alia*—"(2) The sums due to the defenders as trustees foresaid under the said bond for £200 never having been paid to the defenders or to anyone on their behalf, they are entitled to absolver."

On 25th January 1898 the Lord Ordinary (MONCREIFF) assoilzied the defenders.

Opinion.—“This is one of these painful and difficult cases in which the Court is called upon to decide which of two or more innocent persons must suffer on account of the fraud of a mutual agent. As I consider the case not only a hard one but also narrow, I shall state in some detail the facts which I hold proved and the grounds of my judgment—[*His Lordship then narrated the facts as above, and continued*—If this is so, what is the law of the case? As I have already said, I do not think that there was any personal fault or negligence on the part of the pursuer, but in deciding as between the pursuer and defenders it is of vital importance to ascertain for whom Sturrock held the money when he appropriated it. If the pursuer himself had paid the £250 to Sturrock on 5th October, and Sturrock had then and there embezzled it, the pursuer would, by the confidence which in the case supposed he placed in Sturrock by paying him the money before he received the discharge of the first bond, have given Sturrock the opportunity of defrauding him. I do not say that there would have been anything reprehensible in the pursuer paying the money to Sturrock to await settlement—few men would have hesitated to do so, dealing with a trusted agent. But anyone who does so runs a certain risk, as is clearly stated in Lord Fullerton's opinion in the case of *M'Intosh v. Pitcairn*, 14 D. 187-197—‘In these circumstances there was no absolute safety except by the simultaneous exchange between the parties of the money for the bond. And this risk is nothing unusual. I believe there are few cases of the kind in which, to a certain extent, some such risk is not run in the full confidence that if the money be first advanced to the borrower's agent, it will be followed by the delivery of the security, and if the delivery of the security to the lender's agent takes the lead, that it will be followed by the payment of the money. To the credit of professional men it may be said that this in general raises no question, because the confidence reposed is honourably responded to. But when confidence does happen, as in the present case, to be violated, and a loss is incurred, the question must always be—by whom the confidence was reposed—who, in short, performed his part through the intervention of the agent without getting the counterpart in return.’

“In point of fact, however, the £250 paid by Currie to Sturrock was Currie's money, and should have been held by Sturrock for Currie as Currie's agent until the pursuer signed the new bond in favour of Currie. If, as I hold, Sturrock appropriated the £250 on the 5th October, it would rather appear that the person who was defrauded was Currie. Suppose that Sturrock had absconded before the pursuer signed the second bond, could Currie have recovered the £250 from the pursuer? I take it that he could not; the pursuer's defence would have been that

Sturrock never held it as his agent. If so, when the pursuer came to settle with Sturrock on the 12th of October, there were in Sturrock's hands as his agent no funds which could be imputed in payment of the debt due to the defenders.

“Currie is not a party to this action, and in ordinary circumstances I should not have expressed any opinion as to his position. But the crucial question being at what time did Sturrock appropriate the £250, and in what capacity did he receive it, I have found it necessary to consider Currie's connection with the transaction, with the result that in my opinion the money never was in Sturrock's hands as agent for the pursuer, and that therefore upon 12th October the pursuer neither directly nor constructively paid anything to the defenders.

“In conclusion, I must say a word upon two points which were pressed in argument by the pursuer's counsel. First, he maintained that if any obligatory document is delivered by the granter to an agent who acts both for the granter and the grantee, the presumption is for delivery to the grantee. The presumption such as it is, is of the slightest, and yields readily to evidence of contrary intention to be proved or deduced as a matter of fact from the circumstances in which the deed is delivered. If nothing remains to be done by the grantee, the presumption may receive effect, but where the grantee has not performed his part of the bargain, the presumption will be displaced, and that if he has only partially fulfilled it, the deed will only be held to be delivered to that extent, if the nature of the contract admits of this view being adopted—*Mair & Sons v. Thoms' Trustees*, 12 D. 748. In the present case I think the inference from the circumstances is that the discharge was sent by the defenders to Sturrock, to be retained by him as their agent until he obtained payment of the debts due to them.

“Secondly, it was maintained that the pursuer must be held to have paid the £200 to the defenders, because on the 12th of October Sturrock had standing at his credit in bank a sum more than sufficient to pay the debt. If I had to deal with the case of an honest agent of undoubted credit who had received money for the settlement of such a transaction, and paid it into his own bank account on which there was an ample credit balance at the date of the settlement, I should be slow to say that such a settlement as we have here would not infer payment by the borrower to the lenders. Even if the agent had, on receipt of the money, used it for his own purposes, it would be a hard thing to say (though this is more doubtful) that he misappropriated it if he had an ample fund out of which to satisfy the purpose for which it was given. But the question could not well arise in the case of an honest and solvent agent, and the facts with which I have to deal are very different. On 12th October Sturrock was hopelessly insolvent. With marvellous skill he had up to that time managed to escape exposure, but he

had been able to do so only by misappropriating trust funds over which he had control. He could not move a step in liquidating his present debts without defrauding somebody, and the balance in bank—the fund which is pointed to as that out of which payment might have been made—was ear-marked as the remains of trust funds which he had recently misappropriated. In these circumstances I think that the necessary inference is, that when he used the £250 to pay his own debts he committed a fraud, and that on 12th October there were no funds which he could lawfully have applied in payment of the pursuer's debt to the defenders. I shall therefore assoilzie the defenders."

The pursuer reclaimed.

The arguments of parties sufficiently appear from the opinions. The following cases were cited in argument:—For the pursuer: *Cundy v. Lindsay*, L.R., 3 App. Cas. 459. For the defenders—*Mair v. Thoms' Trustees*, February 29, 1850, 12 D. 748; *Mackintosh v. Pitcairn*, December 16, 1851, 14 D. 187; *Kirkwood v. Bryce*, March 17, 1871, 8 S.L.R. 435; *Traill v. Smith's Trustees*, June 3, 1876, 3 R. 779; *Clydesdale Banking Company v. Paul*, March 8, 1877, 4 R. 626; *Henry v. Miller*, March 18, 1884, 11 R. 713; *Couper's Trustees v. National Bank*, February 6, 1889, 16 R. 412.

At advising—

LORD ADAM—The Lord Ordinary has stated very fully the facts which he holds to be proved in this case, and as I agree with him as to these it is unnecessary that I should repeat them.

From a consideration of these facts his Lordship states that on a jury question he is prepared to find that Sturrock on 5th October 1896 appropriated the £250 then given to him by Mr Currie to his own uses and purposes.

If the Lord Ordinary is right in this conclusion, as I think he is, I agree with him also in thinking that it necessarily leads to the absolvitor of the defenders.

In considering this question it appears to me to be necessary to have in view the position and conduct of Sturrock during the course of the transactions in this case, which extended over a period from about the 11th September till the 23rd of October 1896, when he absconded from Kilmarnock.

Sturrock, it appears, had been speculating largely on the Stock Exchange and had lost heavily, with the result that when he absconded he was £58,000 in debt. He had been hopelessly insolvent for many years, and had misappropriated money entrusted to him by his clients to a large extent. In particular, it appears that on 30th September 1896 he received a sum of £2006, 12s. 6d., which was the proceeds of a deposit-receipt belonging to M'Gibbon's curatory, in which he was curator. We see from the evidence of Mr Dunlop, the trustee on his sequestrated estate, that £1400 of this sum was paid away on the same day on which it was received, to a broker, Mr Finlay, and the remainder applied to extinguish an overdraft on his, Sturrock's, bank account.

On the 8th October he received a sum of £204, 19s. 11d., the proceeds of a deposit-receipt belonging to a Mrs Gray. That sum also was used to pay his own debts. Again, on 10th October he received the sum of £893, the proceeds of a second deposit-receipt belonging to M'Gibbon's curatory, and that also was applied in paying his own debts.

Now, with reference to the £250 paid by Mr Currie to Sturrock on 5th October, Mr Currie says that he paid it to him in large notes. No further trace of this money can be found. It was not entered by Sturrock in his bank account, and I agree with the Lord Ordinary that, looking to Sturrock's acts and conduct at the time, the conclusion is irresistible that he then and there applied this sum also to his own uses and purposes, and so defrauded Mr Currie.

It no doubt appears that Sturrock of the same date credited the pursuer Mr Richardson in his books with a sum of £250 as received from Mr Currie. But that appears to me to be a purely fictitious entry. Mr Currie's position at the time was this—he was entitled to get in return for his money a new bond for £250, signed by the pursuer, and a discharge from the defenders of the old bond for £200.

With reference to the discharge, Sturrock seems to have deceived Mr Currie, for Mr Currie says he gave him distinctly to understand that he had the discharge in his possession—which was not the fact. With reference to the new bond, Mr Currie seems to have been aware that it was not then signed, because he accepted a receipt bearing that the money was "to be lent on bond." It was he, therefore, who entrusted Sturrock with the money to be held for him till the new bond should be signed and delivered. Sturrock was not entitled to credit the pursuer with the money until he had signed and delivered the bond, so that the entry in question cannot possibly be treated as evidence of the payment of the money by Sturrock to the pursuer, and that he thereafter held the money for him.

The next matter for consideration is what passed at the meeting between the pursuer and Sturrock on 12th October. All that seems to have passed which is of any materiality was that the pursuer signed the new bond and received from Sturrock a cheque for £37, 5s. 11d. (that being the difference in amount between the old and new bond, less Sturrock's account of expenses for preparing the bond, &c.), and that Sturrock informed him that he had the discharge of the old bond by the defenders beside him (which was the fact), and that he would now have it recorded for him and get the matter completed.

On the same date he made entries in his books debiting the pursuer with the sum of £200, the amount of MacGeoch's bond and £3, 1s. 6d. of interest, and crediting MacGeoch's trustees with the like sums as received in payment of their bond.

Now, I agree with the Lord Ordinary that if we were dealing with the case of an honest agent, acting for all the parties, who had carried through the transaction in this

manner, and had recorded it in his books in the ordinary course of business, it might not be material, as affecting the respective liabilities of the parties, that no cash actually passed, and if that had been the nature of the transaction I think that probably there would have been good grounds for holding that the defenders must be held to have received payment of their bond, and that the discharge was thereafter held by Sturrock for the pursuer.

But if, as I think, Sturrock had previously fraudulently applied Mr Currie's money to his own uses and purposes, then the settlement which took place on the 12th October was not a *bona fide* settlement. Sturrock had in that case no money of Currie's in his hands which he applied, or can be held to have applied, in payment to the defenders for the discharge of their bond. The entries in his books were therefore merely fictitious entries made for the purpose of enabling him to carry out and conceal the fraud he had already committed, and recorded no real transaction or settlement.

Mr Currie not being a party to the process, it is to be regretted that the Court have had to consider his position in the matter in his absence, but it could not be avoided. Of course anything that may be said in this case is not *res judicata* against him should there be any further proceedings.

LORD M'LAREN concurred.

LORD KINNEAR—I am of the same opinion. I think with Lord Adam that there is a disadvantage in our being compelled to consider this case in the absence of Mr Currie. But that is the necessary consequence of the procedure which the pursuer has thought fit to adopt. He has brought his action against MacGeoch's trustees alone to determine a question between him and them, with which, according to the assumption on which the action proceeds, Mr Currie has nothing to do. The assumption on which the pursuer's demand is to be considered must therefore be that Mr Currie has a good bond, and that may be a perfectly correct assumption for anything we can tell. We cannot consider in this case whether it is right or wrong, because as Lord Adam has observed, nothing said in this case can possibly affect the right of Mr Currie. But then I think it is an assumption which the pursuer is entitled to make as between himself and Mr Currie, but which he could not make the basis of a demand against the defenders without being prepared to establish its soundness, if it were a necessary consequence of the validity of Mr Currie's bond that the defenders' bond must be held to be discharged. Therefore if I thought that that was the necessary consequence of the pursuer's assumption, I confess I should have been very unwilling to dispose of this case in Mr Currie's absence.

But then that difficulty is removed, because I agree with Lord Adam and the Lord Ordinary that it is not a necessary consequence of the assumption at all. The pursuer maintains, irrespectively of any

interest that Currie may have in the matter, that it should be found and declared that his debt to MacGeoch's trustees has been paid, and his property freed of their bond, and that is to be found notwithstanding he has not paid a farthing to the defenders, and they have not received a farthing from him or on his behalf. The ground on which it is to be found that he is free of their debt is this, that in consequence of a fraud which was perpetrated by the agent of both pursuer and defenders in carrying out a transaction which was intended to result in the payment of the defenders and the discharge of their bond, the defenders must be deemed to be paid. I think we must all agree with what is said by the Lord Ordinary, that it is always a difficult and disagreeable task to determine which of two innocent parties must suffer for the fraud of an agent in whom they have both reposed unmerited confidence. But the rule which has been laid down for the determination of that question is that the Court can do nothing but apply rigorously the settled rules of law to the state of facts brought before them. I confess I am unable to see any rule of law by which in consequence of the fraud perpetrated by Sturrock we can hold that the defenders have been constructively paid without having actually received any money. No doubt Sturrock deceived all the parties who trusted him. But I think the material point is, as Lord Adam has pointed out, that the actual fraud consisted in the first place in embezzling the money of Mr Currie. Sturrock therefore defrauded Currie. He defrauded him by assuring him that the bond was discharged, and by embezzling his money. In the second place, Sturrock defrauded the pursuer by inducing him to execute a bond in Currie's favour without giving him the money or the benefit of it. But he did not in fact perpetrate any actual fraud upon the defenders by formally altering their right in any way. He did hold a discharge of the pursuer's bond executed by them. But then the defenders says that he retained this discharge as their writ. He did not deliver it to the pursuer or put it on record, but when he absconded it was found in the hands of the defenders' agent, and therefore there is no formal alteration of their right in consequence of the transaction between the pursuer and the defenders. The result of that is that the pursuer has been induced to execute a bond without having paid a prior bond or obtained its discharge. Why is that to operate as a discharge of the defenders' bond which has not been in fact discharged? It may be, and no doubt it is, extremely hard for the pursuer to have executed a second bond over his property although the first was not paid. And it would be very hard upon Mr Currie if he were to have lost his money without getting his bond. But whatever may be the rights of those two persons *inter se*, I can see no ground whatever for bringing in the defenders and for discharging their bond for which they have not been paid. It seems to me that the practical result of the pursuer's demand would be this, that we should

be asked to interfere and carry out to its completion a fraud which Sturrock would probably have perpetrated on the defenders in time. But then he has not done so. The position in which he has left matters is this, that their bond stands upon record, and they have not got the money. In these circumstances I am unable to see any ground for altering the position of the defenders to their prejudice by relieving the pursuer of his obligation to them, or by depriving them of their security over his bond. I do not think it necessary to go further into a consideration of the facts of the case, because I entirely agree with Lord Adam, and accept his view that the crucial point is the perpetration of the fraud upon Currie by the embezzlement of his money.

LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer—A. S. D. Thomson—Kemp. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders—Sol.-Gen. Dickson, Q.C.—J. Wilson. Agents—Morton, Smart, & Macdonald, W.S.

Friday, November 25.

FIRST DIVISION.

WOOD (MENZIES' JUDICIAL FACTOR) v. WOOD AND OTHERS.

Succession—Joint Bequest or Separate Bequests—Accretion.

Terms of a bequest to a plurality of persons named which held (*dub.* Lord Kinnear) to import an intention that there should be accretion, and to displace the rule of construction laid down in *Paxton's Trustees v. Cowie*, July 16, 1886, 13 R. 1191.

The circumstances which gave rise to this special case are thus stated in the opinion of Lord Adam—"The late Captain William Menzies left a trust-disposition and settlement and relative codicil dated respectively 4th February 1856 and 12th November 1858, by which he left his whole estate, heritable and moveable, to trustees. The judicial factor on his estate is the party of the first part. By the thirteenth purpose of the trust he directed his trustees, after the death of the longest liver of his wife and his daughter Emily, afterwards Mrs Simpson, to hold a sum of £10,000, which was liferented by them, in trust for the child or children of his daughter, but in the event, which happened, of his daughter dying without issue, he declared that it should be lawful for her to bequeath the sum of £1000 out of such fund to such person or persons, or for such purposes, as she should by will or codicil direct, and that in the same event the remainder of said fund should be held on the same terms and conditions as the residue of his means and estate. This sum of £1000 which his daughter was thus

entitled to bequeath was, by codicil dated 12th November 1858, increased to the sum of £3000.

"The daughter, Mrs Simpson, died without leaving issue, on 8th August 1897. She left a trust-disposition and settlement dated 21st July 1891, by which she conveyed her whole estate to trustees, who are the parties of the second part. By the second purpose of the trust she bequeathed various legacies, and, *inter alia*, one in these terms—"To the grandchildren of my brother William Menzies, who are William Bradford Hardinge Campbell Menzies, merchant and farmer at Old Fort, M'Dowall County, North Carolina, United States, America; Miss Sarah Catherine Menzies, Kenneth Campbell Menzies, Henry Charles Menzies, Edward Bruce Menzies, and Annie Beatrice Menzies, all residing at Hickory, North Carolina aforesaid, the sum of two thousand pounds equally among them, share and share alike."

"She further bequeathed legacies to the amount of £1000 to the grandchildren of her brother Kenneth Menzies in the following terms—"for payment to Miss Jessie Louise Menzies, only child of my nephew Bruce Hardinge Menzies, the sum of £330; and to Frederick James Furlong and William Leo Furlong, sons of my niece who was the daughter of my brother Kenneth Menzies . . . equally between them, and to the survivor of them after the death of either, the sum of £670."

"After bequeathing a variety of other legacies the deed proceeds—"That whereas by the settlement or last will and codicil executed by my late father Captain William Menzies, he directed that the sum of three thousand pounds Consols should be at my disposal after my death and be paid to any one I might appoint, therefore in pursuance of that power I direct and appoint that the said sum of three thousand pounds Consols, or the value thereof, shall form part of the fund to be applied in paying the legacies of two thousand pounds and one thousand pounds bequeathed to the grandchildren of William Menzies and the grandchildren of Kenneth Menzies."

"The residue of her estate she directed to be divided equally among the daughters of her aunt Emily, Lady Hardinge, who are the parties of the fourth part.

"Miss Sarah Catherine Menzies, one of the six grandchildren of William Menzies above named, predeceased Mrs Simpson, having died unmarried on 22nd May 1896. It is admitted that the legacy of two thousand pounds did not vest until the testatrix's death."

The opinion of the Court was desired on the following questions, *inter alia*:—" (1) Did the one-sixth equal share of the said legacy of £2000, which the said late Miss Sarah Catherine Menzies would have taken had she survived the testatrix, lapse by her predecease? or (2) Did said share of legacy accrete to the surviving grandchildren of William Menzies *secundus*?"

Argued for the first parties—Miss Sarah Catherine Menzies' share of the legacy lapsed into residue, and accretion did not