

done for a lump sum. In the third article of that agreement there is a reference to measurement, which I take to mean that anything over and above the work specified will be charged for as provided in the specification."

The pursuer appealed to the Court of Session.

Any question as to the competency of the appeal, which was brought under the Judicature Act, was waived by the defenders, and on that footing the Court allowed the case to proceed.

Argued for the pursuer—This was not a contract for a lump sum, but a "specification contract." The minute of agreement proceeded on the narrative of the specification, which it incorporated. The case fell within the rule of law laid down in the case of *Jamieson v. M'Innes*, October 19, 1887, 15 R. 17, 25 S.L.R. 32.

Argued for the defenders—The Sheriff-Substitute was right in holding that this was a contract for a lump sum. The case was distinguishable from the case of *Jamieson v. M'Innes*, October 29, 1887, 15 R. 17, relied on by the pursuer, and was governed by the case of *Seaton Brick and Tile Company, Limited v. Mitchell*, January 31, 1900, 2 F. 550, 37 S.L.R. 400.

LORD JUSTICE-CLERK—I think that this is a clear case. Supposing there had been no such case as *Jamieson* (1887, 15 R. 17), I should have held that this is a case where, there having been a specification with prices, there was not an acceptance of an offer for a contract to be performed for a lump sum. Here, most undoubtedly, if the figures put down had been a true summation, the figures brought out would have been very different, 1100 square yards having been carried out at 3d. per square yard in place of 3s. I think that that is a very clear case where the person who has done the work cannot be made to suffer and get only one-twelfth of the actual price he was entitled to get.

But apart from that the matter is made absolutely clear by the case of *Jamieson*. In that case there was a specification with prices, and an offer for a sum named at the end of the specification; there also an *error calculi* had been made, and it was distinctly held by the Court that it was not a contract for a lump sum. The only difficulty which has been suggested is that in this case there was a formal agreement, but that proceeds on the narrative that an offer had been made to execute the work conform to plans and specifications already prepared, and that that offer had been accepted. Upon the whole matter I have no doubt whatever, and as regards the other case before this Division (*Seaton Brick and Tile Company v. Mitchell*, 1900, 2 F. 550), it seems totally different from the present case and from *Jamieson*. In the case of *Seaton Brick and Tile Company* an offer was made without any prices at all being placed before the person to whom the offer was made. It turned out that in his private calculations the party making the offer had made serious mis-

takes, nevertheless he made the offer and was bound by it. That was a case absolutely distinguishable from the present. I am of opinion that the Sheriff-Substitute was wrong, and that his judgment should be recalled.

LORD YOUNG—That is my opinion also. I think this is a case of a manifest and serious error which ought to be corrected.

LORD TRAYNER—I come to the same conclusion. Had I been of opinion that the contract here was for a lump sum I would have hesitated before giving any effect to a statement that the lump sum had been by error stated at a smaller amount than the offerer intended. But I think the contract here was for specified and scheduled work, subject to be increased or diminished as the respondents might order, at scheduled rates. The amount for which the appellant offered to do the work is no doubt stated precisely, but that is just repeating the summation of the different items of the schedule. I think this case is substantially the same as the case of *Jamieson* cited to us.

LORD MONCREIFF was absent.

The Court recalled the interlocutor of the Sheriff-Substitute, repelled the second plea-in-law for the defenders, and remitted the case to the Sheriff-Substitute to proceed.

Counsel for the Pursuer and Appellant—C. N. Johnston, K.C.—Deas. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders and Respondents—W. Thomson. Agents—Alexander Morison & Co., W.S.

Thursday, July 3.

## SECOND DIVISION.

### MACDONALD'S TRUSTEES v. CORPORATION OF ABERDEEN.

*Succession—Legacy—Legacy Duty—Free of Legacy Duty—Pictures—Residue.*

A testator, *inter alia*, directed his trustees to "make offer to the Town Council of Aberdeen, on behalf of the community of that city, free of legacy duty, of my collection of oil paintings, . . . together with one-third of the residue of my estate for the purpose after mentioned." . . . Held that the words "free of legacy duty" applied to the bequest of paintings only.

*Observations on the competency of a bequest of residue free of legacy duty.*

By his trust-disposition and settlement, dated 11th December 1882, the late Alexander Macdonald of Kepplestone directed, *inter alia*, as follows:—"*(Fifth)* On the death of my said wife my said trustees shall make offer to the Town Council of Aberdeen, on behalf of the community of

that city, free of legacy duty, of my collection of oil paintings, pen and ink drawings, and etchings, together with one-third of the residue of my estate for the purpose after mentioned, but only on the conditions following, viz." . . .

The residue of the estate amounted to about £54,000, exclusive of payment of residue duty.

A question having arisen between the other residuary legatees and the Town Council of Aberdeen as to the extent to which the provisions in favour of the latter were to be free of legacy duty, a special case was presented for the opinion of the Court.

The parties to the case were (1) Mr Macdonald's trustees; (2) the Lord Provost, Magistrates, and Town Council of Aberdeen; (3) all the other beneficiaries who were entitled to a share of the residue under the settlement except two; and (4) the remaining two beneficiaries entitled to a share of the residue, who, at the request of the other parties interested, had become parties to the case, but did not desire to offer any argument.

The second parties maintained that, in terms of the fifth clause of said trust-disposition and settlement, they were entitled to receive from the first parties, not only the specific legacies, but also one-third of the residue of said estate free of legacy duty, payment of said duty falling to be made out of the remaining two-thirds of residue.

The third parties maintained that the fair reading of the terms of the bequest was that only the collection of paintings and others was to be offered free of legacy duty. They contended that it would require stronger evidence of intention than the terms of the bequest conveyed to throw upon the two-thirds of the residue destined to the trustor's relatives the burden of legacy duty due upon the one-third destined to strangers; and further, that residue could not be bequeathed free of duty.

The question of law was as follows:—"Are the second parties entitled to payment from the first parties of one-third of the residue of the trust-estate of the said deceased Alexander Macdonald, free of any deduction in respect of legacy duty?"

Argued for the second parties.—The words "free of legacy duty" applied both to the bequest of paintings and to the bequest of a third of the residue. The intention of the testator was that the legacy duty was to be borne by the rest of the estate. The bequest was a gift of a *unum quid*, and was meant to be free of duty—*Warbrick v. Varley*, 1861, 30 Beavan 241; *Hanson on Death Duties*, p. 466.

Counsel for the third parties were not called upon.

LORD JUSTICE-CLERK.—The first question is, how is the clause under consideration to be interpreted? Now it is expressed in a way which makes it doubtful whether the words "free of legacy duty" are applicable only to the bequest of paintings, or whether they are also applicable to the

bequest of one-third of the residue.

It is perfectly intelligible and natural that a bequest of paintings should be made free of legacy duty, but then the clause goes on "together with one-third of the residue of my estate."

Now, I think on a sound construction of this clause that that means that the bequest of residue is given on the footing that the legatee pays legacy duty.

If a share of residue is to be given free from legacy duty, that must be expressed in clear terms, as it is a thing which it is plainly difficult to do, because if you give a person one-third of the residue free from legacy duty it is not a true third, as the other residuary legatees would have to bear his share of the duty.

That such a bequest can be made effectual I have no doubt, as in the case of *Warbrick v. Varley*, 30 Beavan, 241, quoted to us, but I think the safer ground to go upon here is that it is not plain that the testator intended any such thing, but meant to give the collection of paintings only free from legacy duty.

LORD YOUNG.—I am of the same opinion. I think that we were told in the course of the debate that no case had occurred in Scotland of a bequest of residue or part thereof free of legacy duty. The intention imputed to the testator here leading to such a bequest is a thing unprecedented, and therefore presumably is not the intention of the testator. He might, I suppose, assuming he had entertained such an intention, have made such a bequest, but that is not to be presumed. Now, I think here, that when he has given a bequest of paintings, and has declared that it is to be free of legacy duty, he meant that it should be given effect to, and that the paintings should be handed over free of duty; but when he proceeds "together with one-third of the residue of my estate," without saying anything about legacy duty, I think the intention—unprecedented as far as I know—that this bequest is also to be free from legacy duty ought not to be imputed to him.

I therefore think with your Lordship that the share of residue in question is not bequeathed free of legacy duty.

LORD TRAYNER.—I agree with what has just been said as to the position of our law with regard to gifts of residue not being free from legacy duty.

No doubt a part of residue may be effectually bequeathed free of duty by imposing the burden on the remainder of the residue. But I am disposed to read the clause in question as a bequest of two separate and distinct subjects—one of paintings and the other of one-third of the residue.

Looking at the position of the words "free of legacy duty" I am of opinion that the proper construction of the clause is, that these words are applicable only to the bequest of paintings.

LORD MONCREIFF was absent.

The Court answered the question stated in the negative.

Counsel for the First and Fourth Parties—Dove Wilson. Agents—Alex. Morison & Co., W.S.

Counsel for the Second Parties—Dundas, K.C.—Hunter. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for the Third Parties—Lorimer—A. S. D. Thomson. Agent—Andrew Newlands, S.S.C.

Thursday, July 3.

## SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire at Glasgow.

### BATTY v. SCOTTISH LEGAL LIFE ASSURANCE SOCIETY.

*Friendly Society—Collector—Dismissal of Collector—Right of Nomination of Successor.*

The rules of a friendly society provided that a collector should have power, subject to the discretion and approval of the board of management, to nominate a successor, but that no collector should have any right of property in his collecting-book.

The society dismissed a collector for acting improperly, as they alleged, in the conduct of their business, and refused to allow him to nominate a successor. The collector brought an action against the society, in which he claimed damages for having been deprived of the right of nominating a successor to his book.

Held that as a collector had under the rules no right of property in his collecting-book, and as any nomination he might make was subject to the approval of the board of management, the defenders were entitled to absolvitor.

*Finlay v. The Royal Liver Friendly Society*, October 25, 1901, 39 S.L.R. 23, followed.

This was an action raised in the Sheriff Court of Lanarkshire at Glasgow by Joseph Henry Batty, Little Hulton, Bolton, against Malcolm Campbell and others, as trustees on behalf of The Scottish Legal Life Assurance Society, registered under the Friendly Societies Acts, and having their chief office at 86 Wilson Street, Glasgow.

The pursuer, who had been a collector for the society, claimed £350 as damages for their refusal to allow him to nominate a successor.

The facts were as follows:—In October 1897 the pursuer was appointed a collector for the defenders' society under the Bolton agency. At the date of the pursuer's appointment the society was managed in conformity with certain rules approved of under the provisions of the Friendly

Societies Acts. The pursuer's appointment was subject to these rules.

By rule 29 it was, *inter alia*, provided as follows:—"Interest in Books.—Subject to the discretion and approval of the board of management, a collector, or, in the case of his death, either his widow or legal representatives, in the option of the board, shall have power to nominate a successor or successors in accordance with and subject to the following general conditions:—1. That any man having served not less than two years as collector will at any time thereafter be entitled to nominate a successor to collect the premiums on the business created by him. . . . 5. In all cases of nomination of books or business the nominee or nominees shall be subject to the approval of the board of directors, and receive their appointments under and be subject to the whole rules of the society. This privilege shall in no way interfere with the full power and absolute discretion of the board of management to conduct the affairs of the society in such a manner as they may deem expedient for the interests of the society, and shall confer no property in any collecting-book on any collector or his widow or representatives."

On 12th June 1901 the pursuer was dismissed from his situation as one of the defenders' collectors, and thereupon called upon the defenders to allow him to nominate a successor to his book. On 19th July the secretary of the society intimated to the pursuer's solicitor that the society was not prepared to allow him the privilege of nominating a successor, and the pursuer thereupon raised the present action of damages against the defenders.

The pursuer averred that by the beginning of June 1901 the amount of weekly premiums collected by him in small sums of a penny and twopence came to £10, 19s. a-week, and that the number of policyholders embraced in his book reached nearly 1000; that his remuneration as collector ultimately reached the sum of £3, 5s. per week, and his collecting-book was a valuable piece of property to him, coupled with his right under the rules of the society to nominate a successor to collect the premiums on the business which he had created; that at any time after he had served two years as a collector he had a right to nominate a successor for his book, and this right was one for which he might obtain a considerable sum from parties wishing to acquire a collecting-book in the society; that in June 1901, looking to the number of policyholders in his book, and the weekly returns payable in respect thereof, the value of his book was not less than £350.

He pleaded, *inter alia*—“(1) The pursuer having been appointed collector to the defenders' society, and in virtue of such appointment having the right to nominate a successor to collect the premiums on the business created by him, and having been refused by the defenders to exercise this right, he is entitled to recover from them all loss sustained by him thereby. (2) The pursuer's right to nominate a successor to