

Thursday, October 22.

FIRST DIVISION.

[Lord Dundas, Ordinary.]

SMITH'S TRUSTEES v. SMITH'S
TRUSTEES AND OTHERS.

Succession—Trust—Construction—Vesting—Contingent Share of Estate—Destination Governing such Share on Contingency not being Purified—Direction to Trustees to Divide amongst All Children, with Exclusion of One Son, save on his Recovering Sanity, with Vesting of Shares at Term of Payment.

A testator in his trust-disposition directed—“(4) My trustees shall out of my personal estate maintain and support my son A, at present a patient in the lunatic asylum at Perth, in a comfortable manner and as his situation may require, and that during all the days of his life; but declaring that if he shall permanently recover his reason the said obligation on my trustees to support him shall cease, and he shall be at the same time entitled to payment of the provision in his favour hereinafter mentioned. (5) The residue of my said personal or moveable estate shall (under the declarations, reservations, and exceptions after mentioned) be divided among all my sons and daughters equally between and among them, share and share alike; declaring that their proportions thereof shall be payable to them if daughters on their respectively attaining majority or being married, whichever of these events shall happen first, and if sons on their attaining majority; with power, nevertheless, to my trustees to advance to any son or sons such parts of his or their provisions as to my trustees shall seem proper for fitting him or them out in life, and also to apply for the support and maintenance of my said children, until their provisions become payable, the profit or interest of their respective shares, or such part thereof as may be necessary for these purposes; but declaring that the said provisions (except to the extent paid to them under the power to that effect hereinbefore given) shall not become vested interests in them until the respective terms of payment thereof, but on the death of any one of them before such term of payment the provision to any one of them so dying leaving lawful issue shall be divided equally among his or her issue alive at the period of my death, and failing such issue shall belong to my surviving children or their issue equally among them *per stirpes*; but declaring that the share of my son A shall not be payable unless in the event of his recovering his reason, the provision hereinbefore made for him being all that is necessary on his account during his illness. . . . (6) Upon the death of my

spouse, M. S., my trustees shall sell the whole of my heritable estate . . . and shall divide the price among and between my whole surviving children equally among them, share and share alike, in like manner and subject to the exceptions and exclusions, regulations and provisions, above prescribed for the division among them of the residue of my personal estate, including the conditional exclusion of my son A. . . .”

On the death of the lunatic son, who had survived the testator and his spouse, but had remained continuously an inmate of the asylum, held (1) that the bequest to him was a contingent bequest which never took effect, and about which, therefore, the question of vesting or not vesting could not arise, and (2) that the portion of the estate retained to meet this contingent bequest was carried by the original destination to the testator's children and not by a destination from the lunatic son.

On 4th April 1907 Henry Constable Smith, manufacturer, London, and others, the testamentary trustees of the late Lewis Smith, wholesale stationer in Aberdeen, acting under his trust-disposition and settlement dated 13th March 1860 and registered with relative codicils 15th December 1880, raised an action of multiplepounding and exoneration. The fund *in medio* was the portions of the trust estate which the trustees under the trust-disposition and codicils had retained in their hands on account of Frederick Smith, a son of the testator, who—a lunatic—had been an inmate of Murray's Royal Asylum, Perth, and had died on 27th December 1906 unmarried and intestate.

Claims were lodged by (1) the trustees of Alexander Rae Smith, and others—these claimants were the children of the testator who survived him and were still alive (other than Lewis Smith, another lunatic son), and the heirs in moveables of such surviving children who had since died, or their assignees; (2) by William Fiddes Smith and others—these claimants were the issue (surviving Frederick) of five children of the testator who had survived him but predeceased Frederick; (3) by Henry Vagliano Smith, executor-dative of the said deceased Frederick Smith; (4) by the testator's trustees, claiming to retain a portion of the fund *in medio* in the interest of Lewis Smith, the other lunatic son.

The facts of the case are given in the opinion (*infra*) of the Lord Ordinary (DUNDAS), who on 15th December 1907 pronounced this interlocutor—“Finds upon a sound construction of the settlement and codicils of the deceased Lewis Smith referred to upon the record (1) that the shares of the truster's moveable estate and of the proceeds of his heritable estate destined to his son Frederick did not vest in him prior to his death on 27th December 1906; and (2) that the said shares vested as at that date in the children of the truster then surviving and the issue of children who had predeceased leaving issue, equally among them,

share and share alike, *per stirpes* . . . Reserves all questions of expenses, and grants leave to reclaim."

Opinion.—"Mr Lewis Smith, wholesale bookseller and stationer in Aberdeen, died on 24th October 1880, leaving a trust-disposition and settlement dated in 1860, and two codicils thereto, dated respectively in 1875 and 1879. The pursuers and real raisers of this action of multiplepounding are the trustees surviving and acting under the settlement and codicils. The testator was survived by his widow, and by ten children, all of whom had attained majority prior to their father's death. A daughter, Elizabeth, died in 1883, unmarried and intestate. The widow died in 1884. The fund *in medio* is the part of the truster's estate which has been retained by the trustees for behoof of one of the sons, Frederick Smith, who died on 27th December 1906, unmarried and intestate, and who had for a period of years prior to his death been an inmate of James Murray's Royal Asylum at Perth. At Frederick's death there survived, and there still survive, three children of the testator, and families of five other children who had died between 1884 and 1906 leaving issue. By the settlement the truster disposed to his trustees all and whole the estate, heritable and moveable, which should belong to him at his death. By the second purpose, the trustees were directed to pay to the truster's widow the whole free annual proceeds of the heritable estate during her life. By the third purpose they were directed to pay to her one-third part of the free residue of the personal or moveable estate. The fourth purpose directed the trustees . . . (*narrates purport, v. sup. in rubric*) . . . It may be noted, for what it is worth, that the testator at some subsequent period wrote and initialed on the margin opposite this fourth purpose the following words—"I also direct my trustees to make similar and equal provision for my son Frederick, being of weak mind and requiring to be protected in his just rights." The fifth purpose contained, *inter alia*, the following provisions:—" . . . (*quotes, v. sup. in rubric*) . . ." By the sixth purpose the trustees were directed . . . (*narrates, v. sup. in rubric*) . . . Later on these clauses occur—"And which provisions above written conceived in favour of my said children shall be accepted of by them in full of all legitim, portion natural, bairns' part of gear, executry, or others whatsoever, which they or any of them can ask or demand by and through my decease, or by and through the death of their mother, or in any other manner of way: And further, I do hereby provide and declare that in case any of my said children shall repudiate this settlement, and claim their legal provisions in place of the sums hereby provided for them respectively, or shall by any means prevent this settlement from taking effect in whole or in part, then such of my said children as shall so repudiate this settlement shall thereby forfeit all right to any share or shares of those parts of my estate and effects which I may freely dispose of by

law, and they shall have right only to their legal provisions, exclusive of the dead's part and my heritable estate, which shall in that event accresce and belong equally to my other children who shall abide by this settlement and accept of the provisions herein contained." The testator's second codicil explains, *inter alia*, 'that as regards my son Frederick, the provisions for him I direct my trustees to make the same as the provisions made by me for my son Lewis in all respects, and I recal my settlement as to Frederick *quoad ultra*.' It is stated that the trustees set aside a share of the truster's moveable estate, and of the proceeds of the sale of the heritage, for behoof of Frederick Smith, and applied the income thereof and part of the capital towards his maintenance until his death.

"In these circumstances competing claims are made to the fund *in medio*. It is claimed, in the first place, by the executorial of Frederick Smith. This claimant maintains that the fee of one-tenth share of the truster's moveable estate vested in Frederick *a morte testatoris*, and that the fee of one-ninth share of the proceeds of the heritable estate vested in him upon his mother's death in 1884, his sister Elizabeth having predeceased Mrs Smith unmarried and intestate. The theory of the claim, as presented by Mr Lippe, was that Frederick had attained majority prior to his father's death; that the 'period of payment' of the shares of moveable estate was, in the case of sons, majority; that Frederick's share therefore became a vested interest in him at the said 'period of payment'; and that similarly, as regards the proceeds of the heritable estate, Frederick's share vested in him by his survival of the date of his mother's death. I think these arguments are unsound. It is true that in the normal case each son's share vested in him on his survival of the appointed period of payment, viz., the death of his father as to the moveable estate (he being then major), and that of his mother as to the heritable estate. But a special code was expressly provided for the case of Lewis, and made applicable by the codicil to Frederick, by which the share was not to become payable unless in the event of his recovering his reason. Frederick died without having recovered his reason. I think, therefore, that no right vested in Frederick, because he died before the period of payment, and therefore of vesting applicable to his case, had arrived. If this view is correct, a question next arises as to the period at which the beneficiaries entitled to Frederick's share fall to be ascertained. Mr Chree, on behalf of one set of claimants [*the claimants first mentioned in this report*], argued that Frederick's share of moveables vested *a morte testatoris*, and his share of the proceeds of the heritable estate vested on his mother's death in his brothers and sisters who were surviving at those dates respectively, subject only to possible defeasance in the event of Frederick recovering his reason. Mr Kemp, for a different set of claimants [*the claimants second mentioned in this report*], main-

tained that vesting in Frederick's share did not take place until his death, when his shares both of the moveable and the heritable estate of his father vested in his brothers and sisters surviving at that date, viz., 27th December 1906, and the children of predeceasers, *per stirpes*. I am of opinion that the latter contention is well founded, and that the former is erroneous. The difference between them in practical result is not great. It is only, as I understand, that in the one view the representatives of Miss Elizabeth Smith would, and in the other view would not, be participants in Frederick's share of the moveable estate. But I consider that Mr Kemp's argument is to be preferred, because I think the words 'my surviving children' ought, according to ordinary canons of construction, to be read as referring to the event, viz., the death of a son before the term of payment of his share, upon the occurrence of which the division of his share amongst other persons was to take place. In reaching this conclusion I have not left out of view that in the case (which has not occurred) of a son dying before the term of payment leaving issue, his provision is directed to be divided equally among his issue 'alive at the period of my death.' It seems to me that this direction might have created considerable difficulty, supposing, for example, that a son of the trustor had married after his father's death and died in minority leaving issue. By the strict terms of the settlement that issue would apparently have been excluded from any share of the residue; while, on the other hand, the share could not, I apprehend, have been claimed by the surviving children of the testator, who are only called in default of issue. But I think that speculation as to events which might have occurred, but have not in fact happened, ought not to affect my construction of that part of the clause which has, as events have turned out, come into operation. . . . [His Lordship here dealt with another matter upon which the case is not reported.] . . .

"Counsel for the parties desired that I should at this stage do no more than make findings expressive of my opinion upon the various points raised at the debate, and this I shall accordingly do."

The claimants John Rae Smith's trustees and others reclaimed, and argued—The share of moveable estate conditionally destined to Frederick vested in his brothers and sisters on their surviving the testator, and similarly the share of heritable estate conditionally destined to him vested on the death of the liferentrix in those of his brothers and sisters who survived that event, subject in each case to defeasance in the event of Frederick recovering his reason. Frederick never had a share that came into existence. The only provision for him (other than that providing for his maintenance) was a contingent burden upon the other children's shares and the contingency never occurred.

Argued for the claimants William Fiddes Smith and others—Vesting of Frederick's

share did not take place until his death, on which event the shares, both of the heritable and moveable estate of the testator, destined to Frederick vested in his brothers and sisters surviving at that date, and the children of predeceasers *per stirpes*. The testator himself described Frederick's share as a share.

¶ LORD PRESIDENT—This, I am afraid, is the old story of a blundered clause. There are certain difficulties in whichever way you read it, but I confess I have not very much doubt as to the meaning in the testator's mind, and I am constrained to take a different view from the Lord Ordinary. It seems to me, when you read the fourth and fifth purposes together—I mean the fourth purpose and the beginning and operative part, the principal part, of the fifth purpose—to express them in plain language would be to say as follows:—"I direct that when I die my estate shall be equally divided among my children, but I say that as regards my sons Lewis and Frederick, who are in a feeble state of health, they shall not share unless they recover." Their recovery at any time during their lifetime would enable them to come among the equal dividers. That necessitated a share of the estate being, so to speak, kept up so long as it was still *in dubio* as to whether Lewis and Frederick would recover. But once the matter was cleared by those two having died without recovering, then I think that such share would be set free and would go to the other children, not by virtue of a destination, however, from Lewis and Frederick, but by virtue of the original bequest in favour of all the children—the condition upon which Lewis and Frederick were to take a share not having been purged. That really ends the whole matter. I do not think it convenient, and it is not a correct expression, to speak of this particular share vesting or not vesting. The point is—Did Frederick ever take a share at all? I do not think he ever did. The money was set free by Frederick's death, when it appeared that it could never be subject to the contingency which alone would have conveyed it to Frederick. It goes as part of the original shares which were taken by the other children, which original shares it is conceded on all hands went to them at the death of the testator, because they had survived the period of payment, namely, majority or marriage. Accordingly, I think the first and second findings of the Lord Ordinary ought to be recalled, and findings pronounced to the effect I have just indicated.

LORD KINNEAR—I am entirely of the same opinion. I think the effect of this will is to give the trustees the same power over this contingent bequest to Frederick, which never took effect in his favour, because the condition was never satisfied, as they have over the rest of the estate. The bequest remained contingent during his whole life, and therefore the trustees were bound to keep money in hand sufficient to meet the contingency. As

soon as it was certain (by his death without having recovered his health) that the contingency cannot be performed, the sum set aside fell back into the general estate to be divided according to the directions of the testator among the other children.

LORD SALVESEN—I concur.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court pronounced this interlocutor—

“Recal the first two findings in said interlocutor” (*i.e.* of 15th November 1907), “and in lieu thereof find that the bequest to the truster's son Frederick Smith of a share of the residue of the truster's personal or moveable estate and of a share of the price of the truster's heritable estate was contingent on Frederick's recovery of reason, and that Frederick having died without having recovered reason, the said bequests never took effect; and further, that the share of the residue of the personal or moveable estate set aside in respect of such contingent bequest falls to be divided among the remaining children of the truster who survived him, and their heirs in moveables and assignees, and that the share of the price of the heritable estate set aside in respect of the said contingent bequest falls to be divided among the remaining children of the truster who survived the truster's widow and their heirs in moveables and assignees, but subject always, in the case of the portions of such shares of moveable and heritable estate respectfully destined to the truster's son Lewis, to the contingency of his permanently recovering his reason.”

Counsel for Claimants and Reclaimers
John Rae Smith's Trustees and Others—
—Chree. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for Claimants and Respondents
William Fiddes Smith and Others—Kemp.
Agents—A. & A. Campbell W.S.

Saturday, October 24.

SECOND DIVISION.

THE SCOTTISH QUEENSLAND MORTGAGE COMPANY, LIMITED, PETITIONERS.

Company—Reduction of Capital—Petition for Confirmation—Cessation of Business—Return of Capital to Shareholders—Issue of Debentures.

A company, with no outside creditors, considering it undesirable to continue business, with a view to its ultimate liquidation and the division of its assets among the members, presented a petition to the Court for confirmation of a special resolution for reduction of capital. The petition was unopposed.

The reporter to whom it was remitted suggested that the competent and proper method of procedure was a winding-up, and, in particular, objected to (1) the confirmation of a repayment already made by the directors at their own hand to various members of sums paid up by them in advance of calls, (2) a return to members of capital to the extent of 15s. per share, of which only 3s. was to be paid in cash and the remainder by an allotment of new debenture stock.

The Court, without expressing opinions, granted the petition.

In July 1908 the Scottish Queensland Mortgage Company, Limited, presented a petition to the Court under section 2 of the Joint Stock Companies Arrangement Act 1870, section 24 of the Companies Act 1900, and section 38 of the Companies Act 1907, for sanction of a proposed scheme for reduction of capital, the ultimate object of the company being to wind up its affairs and divide its assets among its members. There were no outside creditors.

The petition stated—“The capital of the company was £500,000, divided into 100,000 shares of £5 each. Of the said shares, 35,000 were subscribed and £2 each called up thereon, of which 4668 were afterwards forfeited on account of failure of the holders to pay the calls, or a portion thereof, leaving the amount of shares subscribed and outstanding 30,332, upon which there was paid up £60,664. On the shares forfeited as aforesaid the sum of £4037, 2s. 11d. was paid up.

“In terms of the powers conferred upon them by article 24 of the articles of association of the company, the directors received from various members moneys due upon the shares held by them beyond the sums actually called up. The total amount so received was £18,709.

“In terms of the memorandum and articles of association, the company borrowed money on debenture to an amount not exceeding the uncalled capital for the time being. For a considerable number of years the company was successful, but some years ago, owing to the financial conditions in Australia, it was considered undesirable to continue the business of the company, and accordingly a policy of realisation of the company's assets was adopted, and the whole sums borrowed by the company on debenture were in due course repaid. In further pursuance of that policy the directors thereafter repaid the said sum of £18,709 (with the exception of £12, which has been placed on deposit—receipt pending production of title) received from members in advance of calls, with all interest due thereon, and the directors are of opinion that it is desirable in the interests of the company that the remaining assets should be judiciously realised, the proceeds distributed among the shareholders, and the company ultimately liquidated. The directors are of opinion that a gradual realisation will produce sufficient to repay at least 16s. per share, and it is desirable that 24s. per share should