COURT OF SESSION.

Saturday, October 19.

FIRST DIVISION.

ANNE LOWE AND HUSBAND, PETITIONERS.

Factor—A. S., 13th February 1730.

Held, under the Act of Sederunt, that a factor failing to lodge accounts is liable in a half year's salary for each year in which he so fails.

This was an application which was originally made to Lord Mackenzie, setting forth that the factor on a trust-estate had, *inter alia,* failed to lodge any accounts in terms of the A. S., 13th February 1730, from the date of his appointment, 2d June 1855, till on or about 14th February 1868, and thereafter that he had failed to lodge annual accounts of his intromissions for the two years ending 14th January 1870. An interim audit of his accounts had been made, embracing the period ending 14th January 1868, and he had then been allowed to remain in office; but, in regard to the subsequent period, the Lord Ordinary was moved, under the 4th section of the said A. S., to impose a penalty on the factor of not less than half a year's salary for each of the two last years in which he had failed to lodge accounts. That section is in these terms, viz.:—"Such factor shall once every year give in a scheme of his accounts, charge and discharge, to the clerk aforesaid (the clerk to the process), that all concerned may have access to see and examine and provide themselves with proper means of checking the same, wherein, if the said factor fail, he shall be liable to such a mulct as the Lords of Session shall modify, not being under an half year's salary."

The Lord Ordinary reported the matter to the Court.

The petitioners moved the Court to impose a penalty, in terms of the Act of Sederunt, on the factor, and contended that, according to the proper construction thereof, he was liable in at least half a year's salary for each of the two years wherein the failure had occurred. In support of his contention, he referred to the cases of *Lambe* v. *Ritchie,* Dec. 14, 1837, 16 S. 219, and *Nairn,* March 4, 1863, 1 M. 515.

There was no appearance for the factor, and he had previously been removed from office.

At advising—

Lord President—This argument having been *ex parte,* we were naturally anxious to be quite sure whether the point were settled.

It is now clear that it has been decided in several cases that the *minimum* fine is one-half of each year's salary during which the accounts are not lodged. It is unnecessary to go into the previous cases. In that of *Nairn,* Dec. 4, 1863, 1 Macph. 515, I delivered the judgment of the Court. Though from the report in Macpherson there appears to be a doubt as to whether the factor was mulcted for one year only or for each year, I was strongly of opinion that it was for each year, because the Lord Ordinary says so very distinctly in his note, and if I had differed from him I should have remarked upon it. My recollection is justified by the report in the Scottish Jurist, vol. xxxv, p. 312, from which it appears distinctly stated that the fine was to be for each year; and upon reference to the Session Papers, I find that the Jurist report must be correct. I am satisfied therefore that the case of *Nairn* is a direct authority on this point, and following as it does a series of previous decisions, there can be no doubt as to the construction of the section of the Act of Sederunt.

It is plain that Simpson must suffer loss of one-half of his commission for each of three years from 1865.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Finds that the said James Yates Simpson failed to lodge his account for each of the two years ending 14th January 1870, in terms of the Act of Sederunt of 13th February 1730; therefore mulct the said James Yates Simpson in the sum of £11, 9s. 10d., being one-half of his commission for the said two years, in terms of the said Act of Sederunt: Find that the balance due by the said James Yates Simpson on his intromissions, in terms of the Accountant's report, No. 114 of process, is £3, 1s., which, with the said mulct of £11, 9s. 10d. makes the sum due by him to the trust-estate mentioned in the proceedings amount to £14, 10s. 10d., and decern against the said James Yates Simpson for payment to Robert Cameron Cowan, the present judicial factor on the said trust-estate, of the said sum of £14, 10s. 10d. sterling: Find the said James Yates Simpson and his cautioner liable in the expenses of the petition, in so far as not already found due; allow an account thereof to be given in, and, when lodged, remit the same to the auditor to tax and report."

Counsel for Petitioners — Brand. Agents — M'Caul & Armstrong, W.S.

Friday, November 1.

FIRST DIVISION.

SPECIAL CASE—ROBERT TAYLOR TRAQUAIR AND HIS CURATORS, AND MISS AGNES MARTIN.

Testament—Mutual Settlement—Revocation, Power of—Legatum rei alienæ—Surrogatum.

Two sisters, by a mutual settlement bearing to have been granted from their affection to one another, conveyed each their estate, heritable and moveable, to the other in liferent, if she should survive her, and to a nephew of the granters in fee. The granters reserved the liferent of the estates respectively conveyed by them, and also power "at any time during our joint lives, to alter, innovate, or revoke these presents, in whole or in part." After the death of one of the sisters, the survivor executed a disposition, by which she conveyed the household furniture, which was her own, and a house of which the titles stood in the joint names of her sister and herself, to M. in liferent, and the nephew in fee. *Held,* in a question between M. and the nephew, that the destination of the fee of the respective estates in the mutual settlement was purely testamentary, and that the survivor could alter the same in so far as regards her own

estate, and that, consequently, M. was entitled to the liferent of the household furniture, and to the liferent of one-half *pro indiviso* of the house, but that she was not entitled to the liferent of the other half *pro indiviso* of the house, which belonged to the deceased sister. *Held*, further, that M. was not entitled to any *surrogatum* out of the surviving sister's general estate, in consequence of the partial failure of her bequest.

Mrs Janet Taylor or Stewart, widow of Thomas Stewart, Esq., of Clunie, Perthshire, and her sister Miss Joan Taylor, executed a mutual disposition and settlement, dated 4th March 1852. By this deed, which bears to be granted "from our affection for each other, and other good causes," each sister conveys to the other in liferent, for her liferent use allenarly, and to their nephew Robert Taylor Traquair, and his heirs, executors, and assignees in fee, her whole heritable and moveable estate. The deed contains the following clause—"reserving always to us, and each of us, our respective liferents of the estates and effects above conveyed, with full power to us, at any time during our joint lives, to alter, innovate, or revoke these presents, in whole or in part, as we may see proper; but declaring always that the same, in so far as not altered, innovated, or revoked as aforesaid, shall be effectual though found lying by either of us at the time of her predecease, or in the custody of any other person for our behoof, with the delivery whereof we hereby dispense for ever."

Mrs Stewart's husband died in 1813, and after that event she and her sister Miss Joan Taylor resided in Edinburgh together. In 1854 Mrs Stewart purchased the house 20 Dublin Street, in which she and her sister resided. The price was paid by Mrs Stewart, but the conveyance was taken in favour of her and her sister.

Miss Taylor died on 13th February 1859.

In August 1863 Mrs Stewart executed a holograph writing in favour of Agnes Martin, who had been long her servant, in which she bequeathed a quantity of furniture in the house 20 Dublin Street, and a number of articles particularly described, including a gold watch and some silver plate. On 30th July 1867 Mrs Stewart executed a disposition, by which she conveyed her whole household furniture, described in an inventory, and also the house in Dublin Street, to Agnes Martin in liferent, and Robert Taylor Traquair in fee. The furniture bequeathed by the holograph writing of 1863 was included in the inventory, but not the gold watch and silver articles. The deed was delivered by Mrs Stewart to her agent for behoof of the liferenter and fiar respectively.

Robert Taylor Traquair is now dead, and is represented by his son Robert Taylor Traquair, who, with his curators, is the party of the first part to this case, and Miss Agnes Martin is the party of the second part.

Mrs Stewart died on 29th December 1869. In her pocket-book after her death was found a deposit-receipt for £346 in the name of Agnes Martin. This sum was deposited by Mrs Stewart out of her own funds, but parties were agreed that she had deposited it as a donation to Agnes Martin, and that she had so stated both to Agnes Martin and her own agent. The estate left by Mrs Stewart amounted to about £4000.

The questions submitted to the Court were the following:—

"1. Is Agnes Martin, the party hereto of the second part, entitled to the gold watch and silver articles bequeathed by the holograph writing, No. 2 of the Appendix?

"2. Is she also entitled to the liferent of the house and household furniture, in terms of the disposition No. 3 of Appendix?

"3. Should the foregoing question (2) be answered in the negative, is she entitled to a *surrogatum* out of Mrs Stewart's general estate, equivalent to the value of her liferent of said house and household furniture?

"4. Is she entitled to the said sum of £346, and interest thereon, contained in the deposit-receipt before quoted?"

In regard to question (2) (which was the most important), it was argued for R. T. Traquair and his curators, that Mrs Stewart had no power to execute the disposition of 1867, on the ground that the power of revocation contained in the mutual settlement executed by her and her sister in 1852 could only be exercised by the granters in their joint lives—*Macmillan*, Nov. 28, 1850, 13 D. 187; *Craich's Trustees*, June 24, 1870, 8 Macph. 898.

For Miss Agnes Martin, it was argued that the destination of the fee of Mrs Stewart's estate to her nephew by the deed of 1852 was purely testamentary, and could therefore be altered by her after her sister's death. Otherwise, Miss Martin was entitled to a *surrogatum* out of Mrs Stewart's general estate, on the principle of *legatum rei alienæ*.

At advising—

LORD PRESIDENT—The answers to the questions in this Special Case depend on certain testamentary papers left by Mrs Stewart, an old lady who lived in Edinburgh with an unmarried sister, Miss Joan Taylor, and survived her for some years.

The second question is the most important, and it is most convenient to take it first. It depends on a disposition executed by Mrs Stewart, by which she conveyed to Agnes Martin in liferent, and to Robert Taylor Traquair in fee, her whole household furniture, as also a dwelling-house, consisting of a flat in No. 20 Dublin Street. The granter reserves her own liferent, and the deed is obviously intended to come into operation only after the death of the granter. Upon this deed registration has taken place in favour of Agnes Martin as liferenter, and Robert Taylor Traquair as fiar, which puts them in the same position as if they were infeft.

As regards the moveables contained in the deed, their identity is ascertained by an inventory which forms part of the deed. These moveables were undoubtedly in the possession of the granter at the time of her death, and unless there was some restraint on her power of disposing of them, there is no doubt of the validity of the conveyance. The house stands in a somewhat different situation.

The first argument maintained for the party of the first part, who is son and heir of the Robert Taylor Traquair mentioned in the deed, is that Mrs Stewart was not in a condition to execute this deed at all, in consequence of a mutual settlement executed in 1852 by her and her sister Miss Taylor. In this deed it was set out that the two sisters "from our affection for each other, and other good causes, have agreed to grant these presents." That is the narrative or inductive clause of the settlement. Mrs Stewart, in the first place, conveys to her sister Joan Taylor, in case she shall survive her, in liferent, her whole heritable and moveable estate; Miss Taylor, in like manner, conveys her whole estate in liferent to Mrs Stewart if she shall

survive her; the deed provides for the payment of debts and legacies, and the fee of the entire estate is destined to Robert Taylor Traquair, a nephew of both ladies. The deed also contains a clause reserving to each of the ladies their respective liferents of the estates conveyed; then follow the words—"with full power to us, at any time during our joint lives, to alter, innovate, or revoke these presents, in whole or in part, as we may see proper; but declaring always that the same, in so far as not altered, innovated, or revoked as aforesaid, shall be effectual though found lying by either of us at the time of her predecease, or in the custody of any other person for our behoof, with the delivery whereof we hereby dispense for ever."

It is said that after the death of Miss Taylor it was not in the power of Mrs Stewart to alter this deed, and that her estate, heritable and moveable, necessarily fell to the person designed as fiar; in short, that after the death of Miss Taylor she could not dispose of any part of her estate which she had conveyed to her sister in liferent and her nephew in fee.

It is beyond dispute that two persons may so contract by mutual settlement as to bind one another in the way contended for. Such a deed puts the survivor in a very peculiar and unenviable position. But if they contract in such terms as to leave no doubt of their meaning, there is nothing illegal in such a contract, and the Court will give effect to it. The Court, however, will not readily presume from ambiguous words such a very unusual and extraordinary intention, and in this case I am quite unable to gather from the deed that the two sisters entertained any such purpose. It was very natural that, living together as they did, and having the same intentions with regard to a favoured nephew, they should embody their testamentary intentions in one deed. It will be observed that the inductive clause of the deed is the affection they bear to one another—a circumstance to show that its main purpose was that the survivor should enjoy the liferent of the entire estate belonging to both. But, in regard to the destination of the fee, the deed appears to me purely testamentary as regards the estate of each of them, and effectual to convey the estate of each sister *mortis causa* to the favoured nephew in fee. But as there is no express exclusion of the power of revocation of each sister in regard to her own estate, I cannot infer any such exclusion. I think that Mrs Stewart was quite entitled, after the death of Miss Taylor, by any proper testamentary paper, to dispose of her own moveable estate. It therefore appears that the disposition of 30th July 1867 must receive effect as a disposition to Agnes Martin in liferent of the moveables contained in the inventory referred to.

The heritable property stands in a different position. The house in Dublin Street did not belong to Mrs Stewart alone. It is admitted that the existing title was a disposition by Mr Graham Stirling "to and in favour of the said Mrs Janet Taylor or Stewart, and Miss Joan Taylor, her sister, in conjunct fee and liferent, and their heirs and assignees whomsoever, heritably and irredeemably." The disposition, no doubt, bears that the price was paid by Mrs Stewart alone. But still the title was taken to the two sisters jointly, and they were in fact joint proprietors.

Reading the mutual disposition in the manner most favourable to the party claiming under the will of the survivor, I cannot hold that Mrs Stewart had any power to convey more than one-half of the house. The other half, belonging to Miss Taylor, was effectually conveyed to her sister in liferent and the nephew in fee. So far as regards Miss Taylor's half, the party of the first part is entitled to that. The other half passed in terms of Mrs Stewart's subsequent disposition to Agnes Martin in liferent, and Robert Taylor Traquair, the younger, in fee. This enables us to answer the second question.

In the third question we are asked to say Whether, in the event of the foregoing question being answered in the negative, Agnes Martin is entitled to a *surrogatum* out of Mrs Stewart's general estate, equivalent to the value of her liferent of the house and furniture? Now, the question, as put, does not require to be answered, because to a very large extent the disposition to Agnes Martin in liferent is effectual, but, in so far as regards the one-half of the house, it may require to be answered. I entertain no doubt that Agnes Martin is not entitled to any equivalent out of the general estate. It is not a case of *legatum rei alienæ*, where it is assumed that the testator knew that he was conveying the property of another. Mrs Stewart thought that the house belonged to her, and that she had power to convey it.

As regards the first question, it depends on the consideration of the holograph writing and subsequent disposition. The holograph writing conveyed a quantity of furniture and a gold watch, and certain other articles particularly described. The date of this holograph writing is August 1863. By the subsequent disposition of 1867 the whole of the household furniture belonging to Mrs Stewart is embodied in the inventory, and conveyed in liferent to Agnes Martin. To that extent the bequest of household furniture is altered, and instead of Agnes Martin receiving a portion absolutely as her own, she receives the whole of that contained in the inventory in liferent. But certain things are mentioned in the holograph writing which are not in the inventory of 1867. The question is, Whether the holograph writing receives effect as regards these? On that I have no doubt. The holograph writing is ineffectual only so far as it is superseded by the subsequent disposition. The first question must therefore be answered in favour of Agnes Martin.

As regards the sum of £346 there is no doubt. The deposit-receipt was in favour of Agnes Martin herself, though it was found in the repositories of Mrs Stewart, and was, so to speak, purchased with Mrs Stewart's money. But then it is admitted on behalf of Robert Taylor Traquair and his curators, that Mrs Stewart deposited the sum as a donation to Agnes Martin, and that she stated that she had done so both to Agnes Martin and also to her own agent Mr Skinner. I have no doubt that the sum belongs to Agnes Martin.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Find and declare, in answer to the first question, that Agnes Martin, the party of the second part, is entitled to the gold watch and silver articles bequeathed by the holograph writing, No. 2 of the Appendix: Find and declare, in answer to the second question, that the said Agnes Martin is entitled to the liferent of one-half *pro indiviso* of the house, and

to the liferent of the whole household furniture, in terms of the disposition No. 3 of Appendix; But find that she is not entitled to the liferent of the other half *pro indiviso* of the said house, which belonged to the deceased Joan Taylor, and was conveyed by her to her sister Mrs Stewart in liferent, and Robert Taylor Traquair in fee, by the mutual deed of settlement No. 1 of the Appendix: Find and declare that, in answer to the third question, the said Agnes Martin is not entitled to any *surrogatum* or equivalent for the one-half of the house provided by the said disposition, No. 3 of Appendix, and to which she has been found not entitled: Find and declare, in answer to Fourth question, that the said Agnes Martin is entitled to the said sum of £346, and interest thereon, contained in the deposit receipt set forth in the case: and find no expenses due to or by either party."

Counsel for R. T. Traquair and his Curators—Balfour and Macdonald. Agent—William Skinner, W.S.

Counsel for Agnes Martin—Millar, Q.C., and Hall. Agents—J. & R. D. Ross, W.S.

Wednesday, November 6.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

CHARLES BRAND & SON *v.* BELL'S TRUSTEES.

Relief—Agreement.

A, a proprietor of land, entered into an agreement with a railway contractor, by which the latter was allowed to take building stone from any part of a piece of ground at a certain price per superficial yard of rock wrought, of whatever depth, the contractor to settle all surface damages, and fill up the ground to the satisfaction of the proprietor. The contractor carried on his operations in such a way that water from a river found its way through the quarry which he had opened into an old coal waste and thence into the going coal workings. The lessee of A's minerals took legal steps to protect his rights, the result of which was that the contractor was ordained by the Court to perform certain expensive operations for the due protection of the mineral tenant, and found liable in expenses of process to him. *Held*, that in the circumstances of the case, the contractor had no right of relief against A for the sums which he had been compelled to disburse.

The pursuers, Messrs Charles Brand & Son, carry on business as railway contractors, and in 1868 they were employed by the Glasgow and South-Western Railway to construct certain branch lines in Ayrshire, and, *inter alia*, to erect a large viaduct across the river Ayr at Knockshoggle Holm, on the estate of Enterkine, belonging to the late Mr Bell, the original defender in this action.

Finding that there existed in Knockshoggle Holm, close to the intended viaduct, stone which could be used in its construction, Mr James Brand, who acted for Messrs Charles Brand & Son, entered into an agreement with Mr Bell, which was executed on 11th and 15th December 1868, as follows:—"Whereas the said Charles Brand & Son are to be allowed to open up a quarry at Knockshoggle and Craufurdstone Holms, in order to obtain building stones, to be used towards the execution of their contract for the formation of certain branch railways of the Glasgow and South-Western Railway, and it is proper that the arrangement made for the said quarries be reduced to writing: Therefore it is hereby witnessed as follows:—*First*, The said Charles Brand & Son are to be allowed to open quarries in these farms on either side of the river Ayr, in the property of the said John Bell, and to work the same during the period of the formation of said railways. *Second*, The said Charles Brand & Son are to pay to the said John Bell 6s. for every square yard of rock wrought out, of whatever depth, payable at the following times and in the following proportions—viz., £50 at the first day of January 1869, and the remainder by quarterly settlements thereafter. If the lordship on the quantity of rock wrought out at 1st January 1869 shall not amount to £50, they shall be entitled to credit for the balance at next settlement. *Third*, The said Charles Brand & Son are to settle all surface damages of every kind, until the ground shall have been restored as hereinafter provided. *Fourth*, The said Charles Brand & Son are also to preserve carefully the top soil, fill up said quarry, and restore and make up the ground after their operations are completed, in every respect as good as before they commenced operations, to the satisfaction of the said John Bell and his tenants. In witness whereof," &c.

Messrs Brand selected a spot very near the river for opening their quarry. In consequence of the quarry not being sufficiently protected from the river, which is very liable to floods, water found its way through porous strata from the quarry into an old coal waste, and thence in the going coal workings, which abounded in the neighbourhood. In December 1869 Mr G. A. Jamieson, C.A., trustee for the creditors of Mr Taylor Gordon, the lessee of the minerals on Mr Bell's estate, presented a note of suspension and interdict to the Court of Session against Messrs Brand and Mr Bell, praying the Court to interdict the respondents from excavating the quarry at Knockshoggle Holm, and to ordain them, at the sight of an engineer, to fill up the quarry with such materials as would have the effect at all times of keeping out the water of the river from the complainers' coal workings as completely and effectually as before the quarry was opened.

Answers were lodged both for Messrs Brand and Mr Bell. Before lodging their defences, they intimated to Mr Bell that they would hold him liable for all loss, damage, and expenses which might be incurred by them through the interdict being granted, or otherwise in connection with the interdict proceedings.

On 19th July 1870 a minute was put in for the complainer and Mr Bell, stating that the expenses of process incurred by Mr Bell had been settled by the complainer, and abandoning the case against Mr Bell, and on the same day the Lord Ordinary pronounced an interlocutor allowing the complainer to abandon the note of suspension and interdict, in terms of the minute, and dismissing the same so far as directed against Mr Bell.

The action proceeded against Messrs Brand. In terms of a joint minute for them and the complainer, the Lord Ordinary remitted to Mr James M'Creath, mining engineer, Glasgow, to inspect the quarry. Mr M'Creath returned a report giving a detailed statement of the operations he considered