of its fall. It is not enough to say that this gable fell in a gale of wind or in a very high gale of wind, and it is not enough to say that but for the gale of wind it would not have fallen. It must be shown, in order to establish *vis major*, that it was the gale of wind and nothing else that caused the disaster, because if any fault on the part of the contractor has contributed to produce the disaster, it is quite plain that the contractor must be liable. Therefore it seems to me that the result of this rule is that the *onus* is on the contractor, to show that the gale of wind was the only cause, and that is a question of fact. I agree with Lord Ardmillan and Lord Mure as to the import of the evidence, and especially in the remarks of the latter as to the stretchers and headers. The contractor may certainly be said to have committed a breach of contract, but I entirely adopt Lord Mure's opinion as to the consent by the employers to his doing so, and I think that by that consent they have barred themselves from insisting in that claim. The result I come to is that the contractor has proved that the gale of wind was the sole cause of the accident, and that consequently the employers, and not the contractor, are responsible.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for David Clow & Company, defenders, against Lord Mackenzie's interlocutor of 30th June 1874, adhere to the said interlocutor, and refuse the reclaiming note; find the defenders liable in additional expenses, and remit to the auditor to tax the amount of the said expenses and report."

Counsel for Pursuer—Dean of Faculty (Clark) and Asher. Agents—J. & R. D. Ross, W.S.

Counsel for Defenders—Solicitor-General (Watson) and Balfour. Agents—Macgregor & Ross, S.S.C.

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*Saturday, January 9.*

## FIRST DIVISION.

### SPECIAL CASE—RODGER AND OTHERS.

*Husband and Wife—Liferent of Furnished House—Assessment—Gas and Water Rates.*

A truster provided that his widow should have the liferent use of his house "free of rent, feu-duty, ground-annual, taxes, and all other deductions." *Held* that this did not include gas and water-rates.

*Husband and Wife—Succession—Income Tax—5 and 6 Vict., cap. 35, § 103.*

A husband directed his trustees to pay to his wife, if she survived him, "a free yearly annuity" of £1200, and he further provided that if she accepted this annuity it should be in full satisfaction of all her rights, legal and conventional. The wife survived and accepted the annuity. *Held* that it was unnecessary to decide whether the bequest of a free annuity was equivalent to the bequest of an annuity free of income tax, as the widow by accepting the annuity had entered into an agreement of the nature struck at by Act 5 and 6 Vict., cap. 35, § 103.

*Husband and Wife—Succession—Annuity—Term of Payment.*

A husband directed his trustees to pay to his wife, in case of her survivance, an annuity "payable half-yearly, at the terms of Whitsunday and Martinmas, by equal portions, beginning the first payment at the first term of Whitsunday or Martinmas immediately succeeding my death, for the proportion of said annuity corresponding to the period from the date of my death to the said first term of payment, with the interest of each term's payment at the rate of 5 per cent. per annum from and after such term of payment." *Held* that the payment of annuity was back-handed, and that the husband having died within four days of the term, the widow was only entitled at that term to payment of the proportion of the annuity due for the four days.

This Special Case was brought by the trustees of the deceased James Rodger, of the first part, and Mrs Rodger, his widow, of the second part.

Mr Rodger died in May 1873, leaving a trust-disposition and settlement of date 31st December 1872.

The third and fourth purposes of the deed were as follows:—"In the third place, I direct and appoint that the said Mrs Janet Smith or Rodger, my wife, shall, in the event of her surviving me, have the liferent use and enjoyment of the house in which I reside at the time of my death, free of rent, feu-duty, ground-annual, taxes, and all other deductions, together with the whole household furniture and plenishing, bed and table-linen, books, paintings and engravings, silver-plate and plated articles, jewels and other valuables belonging to me at my death; declaring that my said wife shall not be obliged to keep any inventory or list of the said household furniture and plenishing, and other articles to be so liferented by her, nor shall she or her heirs be accountable for the same, or any part thereof, to any persons or person, either during her life or after her decease, my wish and intention being that my said wife shall be entirely uncontrolled in the use and disposal of said furniture and others during her life, but only that she shall not have power to dispose of the same by any deed or writing to take effect at her decease: And further, I direct my trustees to make over absolutely to my said wife, in case she shall survive me, the whole wines and liquors which may be in my dwelling-house at the time of my death, and any carriages, harness, and stable furnishings that may then belong to me; declaring that my said wife shall have full power to present or give away during her lifetime, or to leave or bequeath by will at her death, to any of my neices that she may select, all or any of the articles of jewellery presented to her by me; but in the event of the said articles of jewellery, or any of them, not being so disposed of, they shall form part of the residue of my estate after her death; declaring, as it is hereby expressly provided and declared, that the liferent of the said house hereby provided to my said wife is intended to be exclusively for her own residence, and therefore she shall not be entitled nor have power to let or give the use of it to any person or persons, either furnished or unfurnished; and in the event of her giving up the use and occupancy of said house, her liferent of the same shall cease, and it shall then form part of the residue of my estate: In the fourth place, I

direct and appoint my trustees to pay to my said wife, in the event of her surviving me, a free yearly annuity of £1200 sterling during all the days and years of her life, payable half-yearly at the terms of Whitsunday and Martinmas, by equal portions, beginning the first payment at the term of Whitsunday or Martinmas immediately succeeding my death for the proportion of said annuity corresponding to the period from the date of my death to the said first term of payment, with the interest of each term's payment at the rate of £5 per centum per annum from and after such term until payment, and one-fifth part of each term's payment further in name of liquidate penalty in case of failure in the punctual payment thereof, besides the same itself and the interest thereof as aforesaid; which annuity to my said wife shall be strictly alimentary, and shall not be affectable by her debts or deeds, or attachable by the diligence of her creditors."

Mrs Rodger was duly put in possession of the house and furniture, but a question arose as to whether she or the trust-estate was liable—(1) For the various burdens, taxes, and assessments payable in respect of the occupancy of the said house, and in particular for the police assessments and poor and school rates, which are levied partly on owners and partly on occupiers, and inhabited house-duty, which is levied on occupiers alone. (2) For the property-tax on the house, payable under schedule A of the Act 5 and 6 Victoria, cap. 35, and subsequent statutes. (3) For the public water-rate on the said house levied by the Corporation of Glasgow on owners, and also for the domestic water-rate on the said house, levied by that corporation on occupiers in respect of water supplied from the Glasgow Corporation Water-Works. (4) For the amount paid for gas consumed in said house, the same being payable to the Corporation of Glasgow, and being charged according to the quantity of gas consumed as indicated by meter. (5) For the premiums of fire insurance payable for said house and furniture therein. (6) For the proportion of the expense effeiring to said house of the annual cost of keeping in order the pleasure-ground attached to the houses in Park Gardens, Glasgow, which, by the titles, is imposed on the proprietors of the houses. (7) For the cost of repairs on said house, and in particular for a sum of £13, 13s. recently paid for painting, and a sum of larger amount payable for renewing the hot and cold water pipes throughout the house. A question also arose as to whether Mrs Rodger was entitled to receive her annuity free of income-tax; and farther, whether she was entitled to receive a half-year's annuity at the term of Whitsunday 1873, in addition to a sum proportioned to the period of four days between her husband's death and that term. Mrs Rodger maintained the affirmative on both questions. The trustees maintained the negative. In these circumstances, the parties, being agreed as to the facts, submitted for the opinion and judgment of the Court the following questions:—(1) Do the various charges set forth in article 4 hereof, or any, and which of them, fall to be paid by Mrs Rodger, or do they all, or any, and which of them, fall to be paid by the trustees? (2) Is Mrs Rodger entitled to receive her annuity from the trustees free of income-tax? (3) Was Mrs Rodger entitled to receive payment at Whitsunday 1873 of a full half-year's annuity for the half-year following, and also of a proportion of her annuity corresponding to the period between her husband's death and said term, or was she entitled to either and which of said payments?

Argued for the first parties—(1) The provision in the deed was that Mrs Rodger should have the house "free of rent, feu-duty, ground-annual, taxes, and all other deductions." Under that there was certainly not included such burdens as water-rate or payment for gas, neither of these being taxes in the proper sense of the word, but payment for an article actually consumed. (2) The bequest of a free yearly annuity was not a bequest of an annuity free of income tax, and, even if it were so, the provision was illegal under section 103 of 5 and 6 Vict. c. 35. This was such an agreement as was struck at by the Act, for the widow was only entitled to accept the annuity if she agreed to accept it in lieu of her legal provisions. (3) Mrs Rodger was only entitled to receive a proportion of her annuity corresponding to the period between her husband's death and Whitsunday 1873. The annuity was to begin at the death of the testator, and the payment was backhanded.

Argued for the second party—(1) Mrs Rodger was entitled to have the house free, not only of taxes proper, but of such payments as water and gas rates, these being covered by the words, "all other deductions." (2) There was no other interpretation which could be put upon the words "free yearly annuity," than an annuity free of income tax; and it was quite competent for the testator to make such a provision. This provision was not struck at by the 103d section of the Act 5 and 6 Vict. c. 35, for what was contemplated there was not such a stipulation as there was in this case, but a specific bargain. (3) It was evidently the intention of the testator that his widow should receive payment for the half-year following the first term after his death, at that term, as well as for the proportion between his death and that term. The wording of the deed was blundered, but it was capable of bearing that meaning, and that was the meaning which, in doubt, it must be presumed to bear.

At advising—

Lord President—As to the first question, I think that there is no real difficulty. The provision in favour of the wife is the following.—[*His Lordship read the 3d purpose of the deed*]. This is not unlike the provision in the case of *Clark*, 9 Macph. 435. The right of the widow here is not a right of tenancy. It is a life-rent use of the house so long as she shall reside in it, and no longer; and she is to have that use "free of rent, feu-duty, ground-annual, and all other deductions." Now, the word "deductions" here is unfortunate, as having no meaning, but it is clear that what the granter intended was, that his widow should take the house free from all taxes and payments of the same nature. So, except in regard to two, I think she is entitled to have the house free of the burdens mentioned in article 4. These two are—1st, the water-rate and 2d, the amount paid for gas. The first of these, although a compulsory payment, is a payment for water actually consumed in the house. The matter of the gas payment is still more clear, for it is not a rate or tax at all, but merely a payment proportionate to the amount of gas consumed.

As to the second question, I am not prepared to

say that the bequest of a free annuity to the widow is equivalent to saying that it is to be paid free of income-tax. But it is not necessary to determine that question here, for it is clear that the non-deduction of income-tax is illegal in terms of section 103 of the Income-tax Act. It is in the trust-deed stipulated as a condition of the acceptance by the widow of the provisions therein made for her that she should be thereby barred from claiming her legal rights. Now, when the widow accepted the provisions on that condition she concluded an agreement with her deceased husband or his trustees. That being the case, the agreement is void by the 103d section of the Act.

As to the last question, I am not quite sure that I agree with Lord Ardmillan in an opinion which he expressed, that it is clear that there has been here a blunder, the clause is so distinctly expressed. If it is a blunder, it is a very singular one, as it arises not from the adoption of a style inapplicable to the case, but from the mixing up of different styles; and when that happens it is usually designedly done. In short, the annuity is back-handed, and, if that is assumed, the deed reads perfectly well. The annuity is to commence from the date of the truster's death, the first payment to be at the term of Whitsunday or Martinmas immediately after that event; but that payment is only to be for the interval between the death and the term. I cannot see that it is possible to construe that deed in any other way, and I am not prepared to say that that was not the intention of the testator.

LORD DEAS concurred.

LORD ARDMILLAN—On the two first points I agree with your Lordships. On the third point, although I cannot say that your Lordship's view is not the law, I think that it is very hard law. The allowance for the aliment of a human being is presumed to be payable in advance, and that presumption can only be overcome by the plain words of the deed. It would have been so here but for the word "for." I think that is a blunder, the word "for" having been inserted where the word "with" was intended. As the deed stands, however, I cannot dissent from the opinions expressed by your Lordships.

LORD MURE concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the Special Case—1st, Find and declare that the various charges set forth in article 4 of the case fall to be paid by the trustees, parties of the first part, with the exceptions of the domestic water-rate therein mentioned and the money paid for gas consumed in the house, also therein mentioned, which fall to be paid by the party of the second part.

"2d, Find and declare that the party of the second part is not entitled to receive her annuity from the trustees, parties of the first part, free of income-tax.

"3d, Find and declare that the party of the second part was entitled at Whitsunday 1873 to payment of a proportion of her annuity corresponding to the period between her husband's death and the said term, and was not entitled to any other payment on account of the said annuity at the said term of Whitsunday 1873; authorise the trustees to pay the expenses of both parties, as taxed, out of the fund in their hands; and decern."

Counsel for the First Parties—Dean of Faculty (Clark), and Mackintosh. Agents—C. & A. S. Douglas, W.S.

Counsel for the Second Parties—Solicitor-General (Watson) and Balfour. Agent—John Stewart, W.S.

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*Saturday, January 9.*

## FIRST DIVISION.

[Lord Curriehill, Ordinary.

## STEVEN *v.* NICHOLL AND OTHERS.

*Process—Proof—Diligence—Competency.*

In an action by the trustee on a sequestrated estate for reduction of a trust-assignation of certain policies of insurance on the life of the bankrupt granted by him in 1868, on the ground that at the date of the deed he was, and knew himself to be, insolvent, and granted the deed fraudulently to defeat the rights of his creditors; the defence was that at the date of the deed the bankrupt was solvent. *Held* that with a view to prove this defence the defender was not entitled to a diligence to recover documents belonging to the creditors, these documents, apart from the examination of the creditors, not being evidence.

This was an action at the instance of William Steven, accountant in Dundee, trustee on the sequestrated estate of Charles Denoon Young, against Alexander Nicholl and Others, for reduction of a trust-assignation, dated in 1868, of three policies of insurance upon the life of the said Charles Denoon Young, two for the sum of £2000 each, and the other for the sum of £1000.

It appeared that Charles Denoon Young was sequestrated in 1856, when the creditors received a dividend of 2s. 6d. in the pound; and again, in 1862, when the creditors received 3s. 6d. in the pound. He was again sequestrated in 1874. It was further averred that Mr Young was insolvent in 1867. The trust-assignation under reduction bore to be granted by certain parties on the narrative that they stood vested in the policies of insurance assigned in trust, and the purpose of the trust was for behoof of Mrs Young (wife of the said Charles Denoon Young) in liferent and the children of the marriage in fee. The pursuer averred that the persons mentioned in the trust-assignation were not aware of their names having been used in such a transaction, or that the trust-assignation had been granted, until 1873, and that at the date of the trust-assignation the policies belonged in property to the said Charles Denoon Young, who at that time was insolvent.

The defenders alleged that Mr Young was solvent when the trust-assignation was granted, and generally denied the averments of the pursuers. They also alleged that the deed was granted in implement of the obligations in Mr and Mrs Young's marriage-contract.

The pursuers pleaded:—"(1) The trust-assig-