due under the guarantee. Why should Watson & Campbell's insolvency put him in a better position?" In the case of *Melrose* v. *Black*, Mr Melrose held bills for debts of another party, and he claimed to rank on the estates of each party to the extent of getting the full debt. These parties were no parties to the arrangement by which Mr Melrose held the bills; for in fact he only held them in pledge, and the argument there turned very much on the question, if Melrose holding the bills in pledge was the same as a cautioner. It was found he was not. Now, if the cases were the same that case would rule this. But the difference is that Melrose was solvent and in right of the debt. Here all are bankrupt, and, as your Lordship observes, not in right of the debt except in so far as they have been compelled to refund. The bills had been in fact sold to the bank. It seems plain enough they can only rank to the extent of the dividend paid.

As regards the second point, I think it would be a double ranking.

As regards the third point, the argument for Crawford's trustee comes to this, that accounts must now be made out between the two estates. But the fallacy lies in this, that the sequestration is the *punctum temporis inspeciendum*, and no account can be made out subsequently.

LORD ARDMILLAN concurred.

LORD MURE—The first question resolves itself into these—For what sum was Crawford indebted to Watson & Campbell under the guarantee, and when that is fixed, for what sum are they to be ranked? Under the letter they are entitled to be relieved from whatever is paid. The loss sustained is clearly the dividend paid. For that sum they are entitled to be ranked, but simply as the other creditors of Crawford. If he had been solvent the whole would have been paid, but he being a bankrupt, they must just take a dividend, for there is no law that a creditor under a letter of guarantee should be in a more favourable position than the creditors.

On the second and third points I also concur.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff-Substitute of 17th January 1876: Find that the trustee on the sequestrated estate of Watson & Campbell is entitled to rank on the sequestrated estate of Alexander Crawford for the dividends actually paid from Watson & Campbell's estate on the bills referred to in his claim, and for no more: Find that the trustee on the sequestrated estate of Alexander Crawford is not entitled to retain the dividend payable to the trustee on Watson & Campbell's estate in security or satisfaction of the sum of £666, 13s. 4d. claimed by him, and that he is not entitled to be ranked on Watson & Campbell's estate for the said sum of £666, 13s. 4d., or any part thereof: Find that the trustee on the sequestrated estate of Alexander Crawford is not entitled to require the trustee on Watson & Campbell's sequestrated estate to give any relief to the sequestrated estate of Shaw & Company in respect of the dividend paid from that estate on bills accepted or drawn by Shaw & Co. for the accommodation of Watson & Campbell, or to state the amount thereof, or of any dividend paid thereon by Shaw & Co.'s estate as an item to the debit of Watson & Campbell in balancing accounts between the two estates: Remit to the trustee in Alexander Crawford's sequestration, being the appellant in this process, to give effect to the above findings, and to rank Watson & Campbell's trustee accordingly: Find the said appellant entitled to expenses in this Court, modified to two-thirds of the taxed amount thereof: Allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Appellant — Asher — Pearson. Agents—Mason & Smith, S.S.C.

Counsel for Respondent—Dean of Faculty (Watson)—Balfour. Agents—Hamilton, Kinnear & Beatson, W.S.

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*Saturday, March* 18.

## SECOND DIVISION.

[Lord Curriehill.

### JACKSON & MACFARLANE *v.* M'MILLAN AND ANOTHER.

*Succession—Provisions to Children—Vesting.*

A testator declared his wish to be that his wife, should she survive him, should have the liferent of his house and the interest of his money, and that at her death all his personal property should be divided amongst his younger children, or, if dead, their nearest lawful heirs, share and share alike. Trustees were appointed for carrying his will into effect.—*Held* that these shares vested in the children upon the death of the testator.

*Observations* (*per* the Lord Justice-Clerk) upon the practical tests to be applied to such cases.

Thomas Sproat of Kirkcudbright, by will dated 15th November 1853, declared his wish to be that his wife should "have her lifetime of the whole of the house and premises now occupied by me, as well as the interest of all monies that may be due me, or lying in the bank, or lent out on bills or receipts, and that during her natural life; and that at her death my said cash, property and all other effects (with the exception of my dwelling-house, offices, and field of ground, which I wish to be given to my eldest son William, or his heirs lawfully begotten) shall be equally divided between my other children, or, if dead, their nearest lawful heirs, share and share alike, and should their respective shares prove of more value than the house and property to be William's, my wish is that a portion of cash, to make his share equal to the others, be added to his property, so as all my children may receive an equal share in value, and that the bills for lent cash to William and John be counted as part of

their respective shares, or paid up to their mother, as she has a life interest in the whole of my effects, and as my son David has been assisting me in my trade these many years, is very likely to carry it on after my decease, and to take up my vessels at a valuation, and seeing that he has had no fixed salary, and received nothing from me except his bed and board and clothing, and the sloop 'Friends' already in his name, but the profits of her has been regularly received by me, my wish is that he should have £200 sterling as well as the sloop 'Friends,' over and above his equal share of my effects with his brothers and sisters. The above is the substance of my will and testament, and to see the above testament put into effect I do hereby appoint the Reverend John M'Millan of the Free Church, and Mr Thomas Whitewright, druggist of this town, my executors and trustees for carrying out my wishes as stated above."

Mr Sproat died in July 1854, survived by his widow and several children. Three of the children died during the life of their mother, who survived until 1874. One of these children, John, died in 1865, and after his death his estates were sequestrated. The present action was brought by the trustee upon his estates, along with a creditor to whom the trustee's right had been assigned, against Mr Thomas Sproat's testamentary trustee, for the purpose of recovering the share of his father's estate which the pursuers maintained had vested in John. The defender maintained, that as he had predeceased the liferentrix he had taken no vested right under his father's will.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, *15th November* 1875.—The Lord Ordinary having heard the counsel for the parties, and considered the closed record and whole process, Finds that according to the sound construction of the will and testament of the deceased Thomas Sproat, dated 16th November 1853, and recorded in the Register of Deeds and Probative Writs kept for the stewartry of Kirkcudbright, the 25th day of July 1854, the provisions made in the said will in favour of the children of the said Thomas Sproat vested in them at the death of the testator: Finds that the share of the testator's estate to which the deceased John Sproat, one of his sons, was entitled, passed to the pursuer Thomas Jackson, as trustee on the sequestrated estate of the deceased John Sproat, and that the same has been assigned by the said trustees in favour of the other pursuer George Macfarlane, to the effect and extent set forth in the assignation, dated 4th, 8th, and 12th June 1875, mentioned in the condescendence: Finds that the defenders, as executors of the said Thomas Sproat, are bound to account to the pursuers for their intromissions with the means, estate, and effects of the said Thomas Sproat, and to pay to the pursuers the share of said means, estate, and effects effeiring to the said John Sproat, but under deduction of such sums as the defenders shall establish to have been lent by the testator to the said John Sproat on bill, and interest thereon from the date of the testator's death, in so far as the same was not paid by the deceased John Sproat to his mother or to the defenders, and of such sums of principal and interest as they shall establish to have been advanced by them to the said John Sproat, and to be still resting-owing to them; and before farther answer appoints the cause to be enrolled, in order that the necessary steps may be taken for having the amount of the said John Sproat's interest in his father's estate, and of the defenders' counter claims, ascertained, reserving all questions of expenses."

The following is the important portion of the Lord Ordinary's note:—

"The defenders, who are the executors and testamentary trustees of Thomas Sproat, maintained in opposition to the pursuers, the trustee on John Sproat's sequestrated estate and his assignee, that the shares of Thomas Sproat's estate provided to the children did not vest in any of them at the death of the testator, or until the death of the liferentrix. I am of opinion that the defenders' construction of the settlement of Thomas Sproat is not the sound one, and that the shares of the children vested at the death of the testator, and that only the payment was postponed until the death of the liferentrix. The settlement was executed by the father, and purports to deal with his whole estate, and to divide the same equally among all his children, subject to the liferent of their mother, and without any destination to survivors or any ulterior destination except to the 'lawful heirs' of the children themselves. I think that there is here no reason for holding that the vesting was suspended until the period of distribution, or that the payment was postponed for any other purpose than to secure the widow's liferent. The cases of *Marchbanks*, 14 Sh. 521, and *Cochrane*, 17 D. 103, particularly the latter, appear to me to resemble the present in all essential particulars, and in both the interposition of a liferent was, in the absence of a survivorship clause or destination over, held insufficient to suspend vesting.

"Various other considerations strengthen the view which I have taken of the meaning of the present settlement, and, in particular, the declarations—(1) That the bills for lent cash to William and John, two of the sons, should be counted as part of their respective shares; and (2) That David, another son, should receive (obviously at the testator's death) a payment of £200, and possession of the sloop 'Friends' 'over and above the equal share of my effects with his brothers and sisters,' all tending to show that the testator regarded the liferent of the mother as merely a burden upon his children's shares, and not as postponing the vesting of their interest until her death. In short, the 'lawful heirs' of the children, 'if dead,' were merely conditional institutes appointed to take in the event of the children themselves predeceasing their father, the testator.

Sproat's trustees reclaimed.

Argued for them—The period contemplated by the testator was the death of the liferentrix. It was then that the trustees were to realise the estate and divide it among the children in life and the heirs of those who had predeceased. There was in this case no direct bequest or gift to the children, and in this respect it differed from the cases in which it had been decided that vesting took place *a morte testatoris*.

Authorities—*Provan* v. *Provan*, Jan. 14, 1840, 2 D. 298; *Learmonth* v. *Miller*, May 3, 1875, 2

Ret. (H. of L.) 60; *Young* v. *Robertson*, Feb. 1862, 4 Macq. 314.

At advising—

Lord Justice-Clerk—I am of opinion that the provisions contained in this settlement to the younger children of the testator vested from his death. The instrument which we have to construe is an informal document, in which the testator says that he "notes down and subscribes the following particulars as to my affairs after my death." He first provides to his wife, should she survive him, the liferent of the whole of the house and premises occupied by him, and the interest of all money that may be due to him, or lying in the bank, or lent out on bills, and then he directs that "at her death my said cash, property, and all other effects (with the exception of my dwelling-house, offices, and field of ground which I wish to be given to my eldest son William, or his heirs lawfully begotten) shall be equally divided between my other children, or, if dead, their nearest lawful heirs, share and share alike." The question is whether a share of one of the children, John Sproat, who survived the testator and predeceased the liferentrix, vested in him and passed to the trustee on his sequestrated estate. I entertain no doubt that it did, and that the postponement of payment until the death of the widow had no effect in postponing the vesting of the share. I do not intend to go over authorities which have been so frequently analysed, but to say a few words on the practical tests to be applied in such cases. The object is to ascertain what the testator meant from what he has said; and any general rules are not technical, but merely canons to be applied as the words may seem to require.

In *mortis causa* settlements, legacies and provisions are presumed to take effect and vest from the testator's death; and in the case of provisions to the testator's immediate children this presumption is unusually strong. The postponment of the term of payment has of itself no effect in overturning this presumption. In every executry estate some time must elapse before the funds of the deceased can be realised, and sometimes from the nature of the investments the interval may be considerable. But this does not prevent vesting from taking immediate effect. A postponed term of payment only affects vesting when it is adjusted as a condition of the gift itself, and is not merely a burden or a qualification of the right. Thus, when a testator postpones payment of the fee in order to provide for a temporary and intermediate interest in the income or produce of the estate, such as a liferent or an annuity, vesting takes place notwithstanding *a morte testatoris*, because the interposed interest is only a burden on the gift. The legacy is unconditional, although the enjoyment of it is qualified. The legacy vests, but only under the qualification that the legatee shall not be entitled to demand payment until the specified time arrive. The other class of cases, which is entirely distinct, includes those in which survivance of the term of payment is a condition of the legacy itself, and in which there is no legacy unless the condition be fulfilled. In these cases survivance of the term of payment is of the essence of the gift. In order, therefore, to determine in any given case whether survivance of such a term be a condition of the gift, or the postponement be only a burden on it, it is of the last importance to ascertain what is the primary object of the testator in postponing payment, and if the words indicate that the primary object was to secure an interposed interest, especially if they disclose no other, the presumption is strong that the legacy is not conditional, and that its enjoyment only is qualified.

It is this consideration which gives importance to any ulterior destination which may be adjusted to the gift, for if there be any separate and independent interest contingently favoured, it will then be easier to presume that favour to that interest was in part at least the reason for postponing payment. But to have this effect the interest must be substantially separate, and such as to indicate special favour on the part of the testator. But a legacy to A and his heirs, or A and his children, is not the separate institution of a new and independent object of the testator's bounty, but the expression of a derivative interest favoured by the testator only out of regard to the legatee, whose children or heirs are mentioned. They only find a place in the destination through the relation which they have to the *persona predilecta*, and in cases like the present, in which the gift is only inferred from the direction to divide, the instruction to the trustees to pay to the heirs of the legatee if he predecease the period of division may be regarded more as the natural result of the legacy having vested than as an indication of the postponement of vesting.

There may of course be words used by the testator in fixing a postponed period of division, which, without any destination over, indicate a postponement of vesting also, as for instance considerations personal to the legatee himself, or relative to the property bequeathed. But in the present case no such elements occur. The sole object for the postponement of the term of payment which is disclosed in this writing is the protection of the widow's liferent. The case of *Marchbanks*, referred to by the Lord Ordinary, is precisely in point.

I should have held, therefore, from the words I have read, that this provision vested in John Sproat. It is true that there are no words of gift or bequest apart from the direction to divide. But in an informal memorandum of the testator's testamentary wishes, such as the present, I consider this element as of no consequence.

The rest of the document entirely confirms this view. There follows a provision in regard to certain bills for lent cash due by William and John, as to which he provides that they "be counted as part of their respective shares, or paid up to their mother, as she has a life-interest in the whole of my effects." The plain meaning of this is, that the share devolving on the two sons shall at once be imputed in extinction of these bills, but that if their mother survives the testator the sons shall account to her for the interest during her life. I think it is plain that it was not intended that William and John should pay up the principal to the executors and trustees, who are afterwards named.

The provision in regard to his son David, which immediately follows, leads to the same inference. He is to be entitled to the sloop "Friends," which stood in his name, and that plainly from the death of the testator, as the

executors manifestly were given no concern with it. The sum of £200 he is to have over and above his share of the residue, as in lieu of wages which he had previously earned. It would be out of the question to hold that this sum vested in any one but himself, and on the whole matter I entertain no doubt that the conclusion at which the Lord Ordinary has arrived is right.

Lords Ormidale and Gifford concurred.

Lord Neaves was absent.

The Court adhered.

Counsel for Pursuers — Gloag — M'Laren. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for Defenders—Asher—Keir. Agent —David Milne, S.S.C.

*Saturday, March* 18.

## SECOND DIVISION.

[Lord Shand.

### SCHOOL BOARD OF DUNBAR *v.* THE PROVOST, MAGISTRATES, & TOWN COUNCIL.

*School — School Board — Burgh — The Education (Scotland) Act* 1872, *section* 62.

*Held* that the amount which the town council of a burgh must pay yearly to the School Board in terms of the provisions of the 62d section of the Education Act 1872, is the fair average of what the school has, prior to the passing of the Act, cost the burgh, and that in computing this average retiring allowances and expenditure upon the maintenance of school buildings must be taken into account.

This was an action at the instance of the School Board of the royal burgh of Dunbar against the Provost, Town Council, and Magistrates, of the burgh. The summons concluded for declarator "that the Provost, Magistrates, and Town Council of the royal burgh of Dunbar were, at and prior to the passing of 'The Education (Scotland) Act 1872,' in the custom of contributing to the burgh school of Dunbar out of the common good of the burgh, or from other funds under their charge, the sum of £102 sterling annually, or such other sum, more or less, as our said Lords shall ascertain and determine, and that the defenders and their predecessors and successors in the offices of Provost, Magistrates, and Town Council of the said burgh of Dunbar have been, since the passing of the said 'Education (Scotland) Act 1872,' are now, and in all time coming be, bound to pay to the pursuers, the School Board of the said burgh of Dunbar, at the term of Martinmas yearly, the said sum of £102, or such sum as our said Lords shall ascertain and determine that the Provost, Magistrates, and Town Council of the said burgh were, at and prior to the passing of the said 'Education (Scotland) Act 1872,' in the custom of contributing to the said burgh school out of the common good of the burgh, or from other funds under their charge: . . . . And in the event of its being found and declared by our said Lords that the defenders the, Provost, Magistrates, and Town Council of the burgh of Dunbar are not bound to pay to the pursuers the sum of £102, or at all events the sum of £92 annually, it ought and should be found and declared, by decree of our said Lords that the pursuers have not been, are not, and will not be bound, and that the defenders have been, are, and will be bound, to pay to Lyon, sometime schoolmaster in Dunbar, the retiring allowance of £42 annually, agreed to be paid to him by the Provost, Magistrates, and Town Council of Dunbar in or about the year 1851."

It appeared that for upwards of two hundred years there had been a burgh school in Dunbar supported by the Provost, Magistrates, and Town Council, out of the common good of the burgh, aided since 1852 by grants from Government. Between 1730 and 1823 the school was divided into three departments, the English, the Latin or grammar, and the mathematical, taught by separate masters, and practically separate schools. In 1823 the Latin and English schools or departments were conjoined, and in 1851 the mathematical school or department was abolished, and from that year until the passing of the Education Act there was only one teacher in the school. From 1819 until 1872, with the exception of the years between 1839 and 1851, the burgh funds had always been burdened with the payments of one or more retiring allowances. Thus, from 1819 to 1824 there were three teachers receiving salaries to the amount of £69, and there was a retiring allowance then paid of £19. Between 1824 and 1839 there were two teachers, receiving salaries to the amount of £78, and the same retiring allowance of £19 still continued to be paid. In 1839 the recipient of the retiring allowance of £19 died, and from that year until 1851 the burgh was only burdened with the payment of the two salaries, amounting to £78. In 1851 both the teachers then in office resigned, Mr Lyon with a retiring allowance of £42, and Mr Morton with a retiring allowance of £12, while Mr Dick was appointed sole teacher, with a salary of £30.—these retiring allowances and salary amounting in all to £84. In 1862 Mr Morton died, and Mr Dick's salary was then raised to £50, and a sewing mistress was appointed with a salary of £8, which in 1865 was increased to £10. Thus, from 1862 to 1865 the salaries and retiring allowance amounted to £100, and from 1865 to 1872 to £102. The pursuers further averred that considerable sums had been yearly expended upon the maintenance of the school buildings, and they claimed that these sums should yearly be paid to them.

The defenders averred that in 1851 a complete change had been made in the character of the school. It had previously been a school in which the higher branches of education had been taught, but owing to the number of other schools which were established in the burgh it was found necessary to limit the teaching in the burgh school to elementary education. About 1851 a sum of nearly £600 had been expended on school buildings, for which the burgh had granted a bill, which they had since paid. The defenders, both judicially and extrajudicially, made a tender of £60 a-year in full of the pursuer's claims.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 16th November* 1875.—Having con-