Counsel for Petitioner (Reclaimer) — Brand. Agent—J. Watson Johns, L.A.

Counsel for the Trustee — Guthrie Smith — M'Kechnie. Agent—John Ronald, S.S.C.

Counsel for concurring Creditors — Scott — R. V. Campbell. Agents — A. Kelly Morison, S.S.C., and A. Kirk Mackie, S.S.C.

Friday, November 2.

FIRST DIVISION.

VINCENT, PETITIONER, *v.* LINDSAY (CHALMERS & CO.'S TRUSTEE).

Process—Petition for Recall of Arrestments—Competency of Proof.

A petition prayed for the recall of arrestments used by the respondent on the goods of a third party, the petitioner stating that the goods had become his property before the execution of the arrestment. It was averred by the respondent that there had been no real *bona fide* transaction between the parties, and that the alleged sale was a pretence to avoid the diligence. On a motion by the petitioner to allow the respondent a proof of his averments, the Court *held* that these being statements respecting the validity of the arrestments, must be tried in the action of furthcoming, and that no proof on such questions could be allowed in the petition.

Observed (*per* the Lord President) that under such a petition the Court must be able to say "either (1) that arrestments should never have been used at all, or (2) that they should be recalled upon caution being found."

Counsel for Petitioner—Trayner. Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for Respondent—A. J. Young. Agents—Wallace & Foster, solicitors.

Friday, November 2.

FIRST DIVISION.

[Lord Young.

CRAWFURD'S TRUSTEES *v.* BROWN AND OTHERS.

Succession—Residue—General and Special Bequest of Residue.

A truster in a settlement containing a destination of the residue of the estate, directed the trustees to make payment of a sum of £10,000 to an individual, and in a codicil recalled that direction and substituted for it a direction to pay out of that sum various legacies to the amount of £6700 to certain charitable institutions, and "the balance of the fee of the said principal sum of £10,000, being £3300," to A and B. One of the charitable bequests having failed, *Held* (*revg.* the Lord Ordinary, Young) that the sum thereby set free fell into the general residue dealt with by the original deed; *diss* Lord Deas, who held that it fell to A and B as being part of the balance of the fee of the £10,000.

Observed (*per* Lord President) that "where there is a general residuary legatee there is a presumption against the creation of a special residue."

This was a question arising out of the terms of a trust-disposition and settlement dated 12th January 1839, executed by Miss Janet Crawfurd, and a codicil thereto annexed, of date 3d February 1841. The trustees appointed under Miss Crawfurd's settlement raised an action of multiplepoinding against the Glasgow Emancipation Society, Alexander James Dennistoun Brown, and the trustees of the late Mrs Maclae, each of which three parties claimed a sum of £1000 under Miss Crawfurd's settlement and the relative codicil, under the following circumstances:—

Miss Crawfurd in her original settlement, amongst other legacies, directed her trustees to pay "to Mrs Jean Brown, otherwise Ewing Maclae, in liferent for her liferent use allenarly, and the foresaid Major James Dennistoun Brown in fee, the sum of £10,000 sterling; Declaring that in case the said Mrs Jean Brown shall die survived by the said Humphrey Ewing Maclae, her said husband, he shall be entitled to the liferent of one half of said sum during the period of his survivance."

The provisions of this deed as to the residue of her estate were these—"*Fifth*, In the event of the free residue of my estate, after paying or providing for the whole legacies and provisions hereinbefore mentioned, amounting to the sum of £5000, I direct my said trustees to lay out, mortify, and invest the said sum of £5000; and in case the residue of my estate shall not be sufficient to yield that sum, then the amount of said residue, whatever it may be, in the purchase of heritable property in Scotland, in one or more lots, as they may find necessary or judge most advisable and beneficial, and to take the titles thereof in manner and for behoof as aftermentioned; and in case the residue of my estate, after paying and providing as aforesaid, shall amount to more than the foresaid sum of £5000, to be mortified and invested as before and after mentioned, then I direct my said trustees, after mortifying and investing said sum, or providing for such investment, to pay over the whole of the remainder of such residue to the foresaid Mrs Jean Brown, otherwise Ewing Maclae, her heirs or assignees."

In the codicil Miss Crawfurd made this alteration on her settlement—"In exercise of my reserved powers, I do hereby recall the appointment upon my trustees therein named, and the survivors of them, to pay to the said Major James Dennistoun Brown and his heirs the sum of £10,000 sterling, by said settlement provided to Mrs Jean Brown, otherwise Ewing Maclae, in liferent, and the said Major James Dennistoun Brown and his foresaids in fee;" and "in regard to the said sum of £10,000, I direct my said trustees to hold the same in trust for the ends, uses, and purposes following: viz., in the first, place, for behoof of the foresaid Mrs Jean Brown, otherwise Ewing Maclae, in liferent, for her liferent use allenarly, whom failing, survived by the

foresaid Humphry Ewing Maclae, for behoof of the said Humphry Ewing Maclae, in liferent, for his liferent use and allenarly for behoof as hereinafter directed in fee: In the second place, at the first term of Whitsunday or Martinmas that shall occur six months after the death of the survivor of the said Mrs Jean Brown and Humphry Ewing Maclae, my said trustees shall dispose of the fee of the foresaid sum of £10,000 in manner hereinafter mentioned." Then followed a number of charitable bequests amounting to £6700, and among them one of £1000 "to the President, Treasurer, and other office-bearers for the time being of the Glasgow Society for the Extinction of the Slave Trade and for the Civilisation of Africa, for behoof of said Society." And thereafter the deed proceeded—"*Sexto*, I direct my said trustees to make payment of the balance of the fee of said principal sum of £10,000, being £3300, to Alexander Brown and Jemima Brown, children of the foresaid Major James Dennistoun Brown, equally between them, and their respective heirs."

Miss Crawfurd died on April 26, 1841, and upon her death her trustees paid the whole legacies and bequests made by her under her trust settlement, and regularly paid to Mrs Brown or Maclae the interest of the £10,000 till her death, which happened on the 27th November 1874, she having survived her husband.

On proceeding to distribute the legacies provided by the codicil, Miss Crawfurd's trustees could find no society answering to the description of the "Society for the Extinction of the Slave Trade and for the Civilisation of Africa." A claim was intimated on behalf of the Glasgow Emancipation Society, who were therefore called as defenders, but it was subsequently withdrawn.

The question therefore came to be between Mr Dennistoun Brown for himself and as representing his deceased sister, who had died in January 1843, on the one hand, and Mrs Maclae's trustees, appointed under her trust-disposition and settlement, on the other, whether this sum of £1000 was carried by the destination of the balance of the sum of £10,000 as expressed in the codicil, or fell into general residue, and was dealt with by the original settlement.

The Lord Ordinary sustained Mr Dennistoun Brown's claim, delivering the following opinion:—

"The question in this case is whether the residue or balance of the fee of the £10,000 liferented by Mrs Maclae, after satisfying the legacies directed to be paid out of it, is wholly disposed of by the codicil of 2d February, notwithstanding of the lapse of one of these legacies, viz., that in favour of a Slave Trade Extinction Society. The balance, after paying all the legacies, including this, is clearly so disposed of, and the contention that the lapse or failure of the particular legacy shall, instead of increasing that balance, go to increase the residue dealt with by the principal deed (the trust settlement) is founded on the circumstance that the codicil does not refer in general terms to the balance of the £10,000 which shall remain after the legacies are paid, but specifies the amount of it as "being £3300," which would no doubt have been its amount had all the legacies been effectual. One of them having failed, the true balance is larger by £1000 than was calculated and expressed; in other words, is £4300. The question is whether the balance so increased shall go as the codicil directs with respect to the smaller anticipated balance, or whether the £1000, forming the increase, is out of the codicil altogether, and under the general residue dealt with by the principal deed. I am of opinion that the general residue disposed of by the principal deed is exclusive of the £10,000 in question, and that the whole balance or residue of this sum is disposed of by the codicil, notwithstanding that, owing to the failure or non-existence of a legatee to whom a legacy was directed to be paid in the first instance, the amount of the balance has turned out to be so much larger than the testator anticipated and expressed. Being thus of opinion that the claim of Mr Alexander James Dennistoun Brown is good under the codicil, I think it unnecessary to direct that the testator's heirs *ab intestato* shall be called, or that any intimation shall be made to them."

Mrs Maclae's Trustees reclaimed, and argued that there was in the original deed a general destination of residue; that there thus was a presumption against the creation of any special residue; and that the addition of the parenthesis "being £3300" showed an intention to limit the bequest to that amount.

Authorities—*Page* v. *Leapingwell*, 18 Vesey 463; *Wright* v. *Weston*, 26 Beavan 429, and Jarman on Wills, 728; *Easum* v. *Appleford*, 5 Mylne and Craig, 56.

Argued for the claimant Mr Brown—There might be a particular as well as a general residue—*Malcolm* v. *Taylor*, 2 Russel and Mylne 416; *De Trafford* v. *Tempest*, 1826, 21 Beavan 564. The bequest of residue in the original deed must not be held to have any influence on this more special bequest in the codicil—*Hamilton* v. *Bennet*, February 14, 1832, 10 S. 330; *Chapman* v. *Chapman*, L. R. 4 Ch. Div. 800.

At advising—

Lord President—The late Miss Janet Crawfurd by a codicil appended to her settlement, dated 3d February 1841, made a special disposition of a sum of £10,000. This sum she divided generally into six parts. The first five parts, amounting to £6700, she gave to different charitable institutions in different proportions. With regard to the sixth part, she directed that her trustees should make payment of the balance, which is described as amounting to £3300, to Alexander Brown and Jemima Brown, children of the late Major Dennistoun Brown, "equally between them, and their respective heirs." One of the charitable legacies has lapsed, because there is no charity answering the description which was given in the codicil, and this question therefore has arisen—Does that sum, amounting to £1000, fall to the parties to whom the balance of £3300 was destined, or to the general residuary legatee appointed under her settlement?

Now, it is necessary, in order to answer that question, to consider the terms of the settlement and of the codicil. Part of these documents has been printed, but it is not easy to clear up the scope of the settlement without reading the whole of it. I have done so; and I am now clearly of opinion that that sum of £1000 falls to the residuary legatee under the settlement, and not to the parties to whom the £3300 is destined in the codicil.

In her original settlement Miss Crawfurd expresses herself in this way—"I direct my said trustees to make payment of the following legacies, being all sterling money, to the respective legatees after-named, or their heirs or representatives, except as aftermentioned, at the first term of Whitsunday or Martinmas that shall occur six months after my decease, with the legal interest thereof from said term till paid, viz., to Mrs Jean Brown, otherwise Ewing Maclae, in liferent for her liferent use allenarly, and the foresaid Major James Dennistoun Brown in fee, the sum of £10,000 sterling; declaring that in case the said Mrs Jean Brown shall die survived by the said Humphry Ewing Maclae, her said husband, he shall be entitled to the liferent of one-half of said sum during the period of his survivance." Then follows a large number of special legacies, amounting, I should judge, to some twenty or thirty, and then she proceeds to dispose of the residue of her estate in terms to which I shall allude presently. All these special legacies are bequeathed to the legatees, "their heirs or representatives," for these words which I have just read in the introduction apply to all the special legacies. There was therefore no fear that they would lapse, and that element therefore is out of the case. Further, this sum of £10,000, disposed of in the codicil was not any particular fund, nor was it the proceeds of any particular part of the estate of the testatrix. The reason why it was made the subject of a particular provision here and in the codicil is, that it is to be the subject of a liferent. Thereafter it became a simple bequest of £10,000 to Major Dennistoun Brown.

There is no real difficulty, I apprehend, as to the destination of the residue. No doubt at first sight there is, because there are three different destinations of it in three different events. If the residue amounts to £5000 and no more, or if it amounts to less, it is to be laid out in the purchase of heritable property in Scotland for behoof of a charity, and in both of these events there is, properly speaking, no residuary legatee at all. But there is a third alternative which is to be followed if it exceeds £5000, which is the event that has happened. In that case the testatrix directs her trustees, after investing the sum of £5000 "to pay over the whole of the remainder of such residue to the foresaid Mrs Jean Brown, otherwise Ewing Maclae, her heirs or assignees."

There cannot therefore be the slightest doubt that Mrs Maclae is the proper residuary legatee. There is no chance, as I said, of Mrs Maclae taking any benefit by the lapse of any legacy under the original settlement, but if Miss Crawfurd chose to recall any of these legacies, then Mrs Maclae would benefit; if Miss Crawfurd had recalled this legacy of £10,000, Mrs Maclae would have taken benefit to that amount.

Now it appears from the narrative of the codicil that Major Dennistoun Brown had died, and that induced Miss Crawfurd to make an alteration in the destination of the fee of this £10,000. She therefore recalls the appointment to pay to him and his heirs the fee of this £10,000, but the liferentrix is alive and to her she confirms her liferent and combines with it a liferent to her husband, extending the contingent liferent of the husband from one half thereof to the whole. Then she proceeds to direct her trustees to make payment of the fee six months after the death of the survivor of the liferenters, in manner mentioned by her. She makes charitable bequests under five different heads out of this sum of £10,000; all these are precise sums and amount to £6700; these bequests are contained in heads numbered *primo, secundo, tertio, quarto*, and *quinto*; then follow the words—"*Sexto*, I direct my said trustees to make payment of the balance of the fee of said principal sum of £10,000, being £3,300, to Alexander Brown and Jemima Brown, children of the foresaid Major James Dennistoun Brown, equally between them and their respective heirs."

The bequest here is a bequest of £3300, and the testator did not expect, I do not say at present, intend, that this sum should be either more or less, but the question comes to be whether, when one of the special legacies has lapsed by reason of there being nobody to answer the description of the legatee, the amount so set free enures to the legatees who are to get the £3300, in consequence of that being described as the balance of £10,000. I think in construing a deed of this kind, there is a presumption against the creation of a special residue, and where there is a general residuary legatee, that intention must be very clearly expressed before we can recognise it. It appears to me that the natural construction of this legacy is, that £3300, no more and no less, was intended to be given to these persons. The testatrix intended them to have it in any event, but her favour and affection did not extend beyond that sum; it would be very hard measure to say that if, in consequence of want of funds the special legacies had all to suffer abatement, any abatement that is to fall on this sum of £10,000 should all come off these two legatees, in place of being deducted proportionally from all these charitable bequests as well; and yet that would be the necessary consequence of holding them entitled to any excess that has arisen through failure of one bequest. I am therefore for recalling the Lord Ordinary's interlocutor and preferring the claim of Mrs Maclae's Trustees.

Lord Deas—It is highly unsatisfactory to decide a case of this kind on short extracts from a deed, and therefore I have found it expedient to read the whole of this settlement. The result has been to satisfy me that under the original deed Mrs Maclae was the residuary legatee of the estate, and therefore the question we have to consider depends entirely on the terms of this codicil. That question is—what did the testatrix mean in those passages of this codicil that relate to the disposal of this sum of £10,000 and the special legacies that were to come off it? These legacies were legacies of specific sums of money which were to come out of the £10,000, not special legacies in the proper sense of that term, viz., legacies of special articles, but they were legacies of specific amount. That £10,000 is directed to be held "for behoof of the foresaid Mrs Jean Brown, otherwise Ewing Maclae, in liferent for her liferent use allenarly, whom failing, survived by the foresaid Humphry Ewing Maclae, for behoof of the said Humphry Ewing Maclae in liferent for his liferent use allenarly." That this liferent is conferred on Mrs Maclae does not favour the supposition that she is to be also residuary legatee in any part of this sum of

£10,000. Then we find that the trustees are to dispose of the fee in this way, viz., certain specific legacies are to come out of this sum of £10,000, and then "the balance of the fee of the said principal sum of £10,000, being £3300," is to go to the children of Major Dennistoun Brown. The intention of the testator is to give these children the fee subject to the deduction of these legacies.

The only possible doubt is created by the words "being £3300," if it had not been for that parenthesis it would be perfectly plain that she intended the whole balance to go to these children. Now, I am disposed to think that she merely mentions an arithmetical balance—the balance that would have resulted if all these special bequests had taken effect. The question is a narrow one no doubt, but I think there is no reason to suppose that she intended the sum, for which no legatee could be found, to go to any one, but Major Brown's children. In short, the leaning of my mind is in favour of the Lord Ordinary's judgment.

Lord Mure—There are two questions here—(1) What is to become of the lapsed legacy of £1000? Does it fall to the two children mentioned in the codicil? (2) Is the sum to be dealt with as intestate succession, or dose it go to a residuary legatee named in the original settlement?

On the first question, I have come to the same conclusion as your Lordship in the chair. On the whole, although the question is a nice one, I think it ought not to be added to the amount of the balance, for where the testator has mentioned the amount of the balance I think the safe course for the Court to follow is to hold that it was not intended any more should go to that legatee.

On the second question, I am of the opinion that this comes within the scope of the destination of the residue in the original deed.

Lord Shand—All the legacies left to individuals in the original deed are left to their heirs if the original legatee should die; but there are also legacies to charitable institutions, and if any of them had lapsed the sum would have fallen into residue. This codicil accordingly is a codicil to a deed that provides for a residuary legatee. In this codicil we have provisions as to a sum of £10,000, the fruit of whic his to be enjoyed by liferenters, and the fee of which is thus dealt with—[*reads ut supra*]. These words do not constitute a gift of the residue of the sum of £10,000, but a specific gift of the balance of the £10,000 after deduction of £6700. I should have been disposed to hold that even if the words "being £3,300" had not been used, the word "balance" would mean the specific sum that remained after deduction of these legacies.

Accordingly, if there had been a deficiency, I think, with your Lordship in the chair, that Alexander and Jemima Brown would certainly not have been bound to stand aside and see this sum, destined to them, suffer deduction in order that the specific legacies destined to others might be satisfied in full. You must have very special words to create a special residue in a deed. My opinion goes this length, that, even if there had been no general residuary legatee, these words would not have been sufficient to carry a bequest of residue, and that, therefore, as regards residue there would have been intestacy.

The following interlocutor was pronounced—

"The Lords having heard counsel on the reclaiming-note for Mrs Maclae's trustees against Lord Young's interlocutor of 16th March 1877: Recall the interlocutor: Repel the claim for Alexander James Dennistoun Brown: Sustain the claim for Mrs Maclae's trustees to the whole fund *in medio*: Rank and prefer them accordingly, and decern against the real raisers, holders of the fund, for payment of same: Find the claimants Mrs Maclae's trustees entitled to expenses, and remit to the Auditor to tax the account of the said expenses and report."

Counsel for Claimants, Maclae's Trustees (Reclaimers)—Balfour. Agents—Pearson, Robertson & Finlay, W.S.

Counsel for Claimant A. J. Dennistoun Brown (Respondent) — Kinnear — Hunter. Agents—Melville & Lindesay, W.S.

Saturday, November 3.

FIRST DIVISION.

MACDONALD (THARP'S TRUSTEE)—PETITIONER.

Public Records—Transmission of Deeds to English Courts.

Where the production of a deed recorded in the Books of Council and Session was essential, in a suit in the courts of England and the party who asked the Court to authorise the Keeper of the Register to exhibit the deed was the executor under the deed, and so represented all parties interested in it, the Court *granted* the authority asked upon caution to restore the deed in six months, and on condition that an extract be deposited meanwhile in the record.

This was an application by John Macdonald, Treasurer of the Free Church of Scotland, to the Court praying them to authorise the principal Keeper of the Register of the Books of Council and Session, or one of the assistant keepers thereof, to proceed to London with the deed of settlement and codicils of the late Lady Hannah Charlotte Tharp, and to exhibit it in the High Court of Justice in England (Probate, Divorce, and Admiralty Divisions). Lady Tharp had died on 3d May 1876, and her deed of settlement, under which the petitioner had been appointed sole trustee and executor, had been recorded by him in the Books of Council and Session on 10th May 1876. A suit had been thereafter raised in the High Court of Justice in England, at the instance of William Montagu Tharp, committee of the estate of John Tharp of Much Wadham, in the county of Herts, a lunatic, the husband of the testatrix, against the petitioner, claiming —(1) that the Court should pronounce against the validity of the said deed of settlement and codicils thereto; and (2) that the Court should