deed must, I think, be read as a whole, as one connected document. What occurs to me is, that the testator intended that if the estate of Hoddom should be found not to belong to him in fee-simple, then at all events he would make a provision for Sir Thomas Kirkpatrick as well as for the other brothers; but that if, on the contrary, the disposal of the estate was really in the power of the testator, Sir Thomas getting his half of the residue would not be a special legatee under the clause, his right being extinguished by his becoming a residuary legatee. I cannot arrive from a full consideration of the deed at any such conclusion as that Mr Sharpe intended Sir Thomas Kirkpatrick to receive both his half-share of the large residue and this £1000 special legacy.

LORD GIFFORD—This is a matter which does not bulk much pecuniarily to the parties in this large succession. It is not a *quæstio voluntatis* enabling the Court to guess what the testator's intention may have been; but it is a matter to be made out from the deed before us, which must, I think, be read continuously. A bequest to "each of the brothers" of a person named means, in my opinion, the same as one "to all the brothers," and Sir Thomas Kirkpatrick is certainly one of the brothers. There may possibly be some other intention, but it is not shown. I think that to hold that there was such an intention would be to make a will for the testator, and although I may perhaps think that what has occurred has been the result of an oversight, I cannot go so far as this, nor can I help reading this deed in the sense that Sir Thomas Kirkpatrick was under it to receive this legacy of £1000 besides his residuary rights.

On the second and third questions—

LORD JUSTICE-CLERK—I am very far from thinking that where a testator directs the sale of his estate the legatees are not as a general rule entitled to interest on their legacies, but in the present instance it is quite manifest that the trustees could not pay interest until (1) their right to sell had been established, and (2) the sale had been actually effected. The only interest due is from Martinmas 1877, when the property was sold, and that will be allowed at the rate of 5 per cent.

Then as to the marginal note. The question as to its intrinsic validity has not been raised, but I think it was only intended to apply to the legacies opposite to which it was written.

LORDS ORMIDALE and GIFFORD concurred.

Counsel for Sharpe's Trustees—G. R. Gillespie. Agents—Gillespie & Paterson, W.S.

Counsel for Sir Thomas Kirkpatrick—Balfour—Low. Agents—W. & J. Cook, W.S.

Counsel for Rev. W. K. R. Bedford—Lord Advocate (Watson) — Kinnear. Agent — T. Hamilton Gillespie, W.S.

Counsel for C. T. Bedford and C. R. Bedford—M'Laren—Readman. Agents—J. & J. Milligan, W.S.

Thursday, December 20.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

DAWSON'S TRUSTEES *v.* DAWSON AND OTHERS.

(*Vide ante*, November 10, 1876, vol. xiv. p. 71, 4 R. 597.)

Succession—Real Burden—Right to a Lapsed Bequest which was a Real Burden on a Special Part of Estate.

Where a legacy in favour of a daughter in liferent and her issue in fee was made a real burden on a portion of an estate which was the subject of special bequest, and afterwards lapsed by the failure of issue—*held* that the burden being thus removed, the benefit of the legacy fell (1) by presumption of law, and (2) by the terms of the testamentary deed, to the beneficiary of the subject originally burdened, and not to the residuary legatees appointed by the testator under the deed.

This was a sequel to the Special Case, John Dawson and Others, reported *ante*, November 10, 1876, vol. xiv. 71, 4 Rettie 597.

Adam Dawson, *primus* of Bonnytoun, in his settlement disponed his estate of Bonnytoun to his eldest son William Dawson, under the real burden of the sum of £6000, payable in the following manner, viz.:—"*First*, £2000 thereof shall belong to my son James Dawson, to whom the principal shall be payable upon his attaining the age of twenty-one. . . . *Secundo*, £1500 shall, under the conditions and restrictions after mentioned, belong in liferent to each of my daughters Frances and Margaret, viz., £3000 betwixt them, and to their children in fee, the interest at 4 per cent. being payable to them respectively, as alimentary provisions, from the term of Whitsunday or Martinmas immediately preceding my death, the principal sum in each case to be divided among the children of each: Providing always, as it is hereby expressly provided and declared, that any husband whom the said Frances or Margaret Dawson may respectively marry shall in no event have any right, either of property, liferent, courtesy, or administration, or any other right or interest whatever, in and to the sums of money above provided to them respectively, or in and to the lands and sums of money hereinafter provided to them, or any part thereof, or the rents, annualrents, or profits of the same, in virtue of the *jus mariti*, or otherwise, nor shall the same be affectable by the debts or deeds of such husband, but the said Frances and Margaret Dawson shall have power to uplift and dispose of the whole subjects and sums of money hereby conveyed to them respectively, and rent, annualrents, and profits of the same, in any manner not inconsistent with the provisions of this deed, without the consent of any such husband or husbands; and that every deed to be done by them, or either of them, in relation to the premises, though without the consent of any husband whom either of them may have, shall be as valid and effectual as if they had

continued unmarried, or their husbands had consented thereto; as also that in case the said Frances or Margaret Dawson, or either of them, shall have occasion to lend out any sums to which they shall succeed in virtue of these presents, or to purchase therewith any lands or other subjects whatever, the conveyances or securities to be taken by them, or either of them, shall contain an express exclusion of the *jus mariti* of either."

By a residuary clause in this disposition Mr Dawson further disponed to his sons, the late Adam Dawson *secundus*, and the pursuer John Dawson, all and sundry lands and heritages other than those specially thereby conveyed, of which he should die possessed, or to which he might have right, and also all debts, heritable and moveable, corns and cattle, gold and silver, bank stock, bank notes, laying money, and in general all his goods, means, and estate not thereby otherwise disponed, of whatever denomination, heirship as well as others, which then belonged, or which should belong to him at the time of his death, with certain exceptions therein mentioned, and with and under the provisions and conditions therein specified; and he thereby nominated and appointed the said Adam Dawson *secundus* and John Dawson to be his sole executors.

On the death of Adam Dawson *primus* his eldest son William entered into the possession of his heritable estate under the settlement and became subject to its provisions. In 1844 he sold Bonnytoun to his brother Adam *secundus*, under the real burden of the above-mentioned sum of £6000, which the latter was thereby taken bound "to pay to and apply for behoof of the parties to whom the same was so bequeathed, all in terms of the directions given in the said deed of settlement."

Frances Dawson died unmarried on 27th March 1867, survived by her brother William Dawson, leaving a trust-disposition and settlement, in which she conveyed all her heritable and moveable estate to certain trustees.

In a Special Case, brought for the purpose of having that amongst other matters decided, the First Division of the Court held that the fee of the £1500 had not vested in Frances Dawson, and had not transmitted by her settlement to her trustees.

John Dawson and others, the accepting and surviving trustees and executors of Adam Dawson *secundus*, then brought an action of declarator against (1) John Ramage Dawson, as sole surviving trustee and executor of Miss Frances Dawson; (2) against him as sole surviving trustee of William Dawson; and (3) against himself John Dawson as an individual, to have it found that the real burden of £1500 upon the estate was discharged, and that none of the defenders had any *jus crediti* therein, and that a title made up to it by Frances Dawson's trustees fell to be reduced.

The Lord Ordinary gave decree in terms of the conclusions of the summons, decree in absence being granted against John Ramage Dawson. He added the following note:—

"*Note.*—The Lord Ordinary has decided this case in favour of the pursuers, because the legacy of £1500 in favour of Frances Dawson in liferent and her issue in fee was made a burden on the estate of Bonnytoun, and because the lapse of this legacy by the failure of her issue has merely the effect of freeing the estate from the burden which was contingently charged upon it. The Lord Ordinary cannot see how the residuary legatees have any right to the legacy."

John Dawson reclaimed.

The question was, Whether the benefit of the lapse of the bequest of £1500 fell to the estate or to the residue?

Respondent's authorities—*Cooke* v. *Stationers' Company*, 3 Milne and Keen 262; *Cairns* v. *Cairns*, March 11, 1829, 7 S. 571.

At advising—

Lord President—I agree with the Lord Ordinary in this case, and very much on the grounds stated in his note. The right of Frances Dawson was to a share of a burden of £6000 created over the lands of Bonnytoun by the deed of 1820, but her right was a bare liferent for alimentary use only, and the fee of her share of the real property was given to her children if she had any. Of course if she had married and had issue the liferent would have been in her, and the fee would have remained with the children. But never being married, at her death all right of fee necessarily lapsed.

The question now is, What is the effect as regards the real burden? It is created in very simple and clear terms. The estate is conveyed to the truster's eldest son William "under the express and real burden of the sum of £6000." Then comes a provision to pay to each of the truster's two daughters the sum of £1500. There is no personal obligation on William Dawson to pay this. The daughter's right is a real burden, and nothing more. Had the truster intended to make a right against the disponee, it would have been very easy to have done so. It is odd enough to compare the disposition of William Dawson to his brother Adam, dated 27th April 1844, with the original disposition of Adam *primus* to which I have referred. When William sells the property, he not only keeps up the real burden, but he keeps his brother bound to it in these terms—"To pay to and apply for behoof of the parties to whom the sum was so bequeathed, all in terms of the directions given in the said deed of settlement." That is of course an obligation only between the disponee and the disponer, but it shows the difference between a real burden and a mere personal obligation to pay.

Now, that being the nature of Frances' right, the question is, When she died without issue what became of her share of the provision? It is almost a mistake in language to ask that, for the sum had really no separate existence. So far as Frances was concerned, it only represented a right to an income corresponding to the amount of the interest; the fee only came into play in the eventuality of a child being born. Till then it had no existence, and in that sense there was in fact no debt due by or to anybody. It was simply a portion of a real burden, and where there is no one to represent that portion of the beneficiary interest the clear result is that the estate is to that extent disburdened.

It is said that we gather from other parts of the deed the intent of the testator that if this £1500 lapses it is to go to the residuary legatees. There is a residuary clause conceived in the most comprehensive terms. The residuary legatees are to

get everything belonging to the testator not specially conveyed by the settlement. Now, is this £1500 part of the estate of the testator? Did it ever really belong to him? It never did. It was not a debt due to him, but by his estate, and by a special part of his estate. If the burden had been laid on the general estate, the lapse would have gone to the benefit of the residuary legatees, but the burden having been laid on a special legatee, naturally the benefit of the lapse goes to that legatee.

But it is further said that it was contemplated by the testator that his daughters should have the power of dealing with these two sums of £1500, and that the £3000 must be held to be an estate vested in them, and that it was for that reason it was made to assume a definite form apart from the estate on which it was made a burden. As I read the clauses, they are meant merely to exclude the husbands of the daughters from having power over the bequest. It was so framed in terms that it might come into the daughters' hands if they married and had children. For if these events had happened the £1500 would have vested in the children of each. It was for the purpose of excluding the husbands, and of making the daughters administrators of the money that these clauses were made, and I do not think any other inference can be drawn from them.

It is also said that power was given to William Dawson to disburden the estate, and that from that we may gather that the truster did not intend that the lapse of the burden should be for the benefit of the estate. This is not so. The clause provides that if William Dawson should wish to disburden the estate, he may "obtain another heritable security for the same, to the satisfaction of such of my children as are interested therein, such securities to be taken in the same terms (except as to the interest, which shall be legal interest) and under the same conditions as are herein expressed." Now, it seems to be contended that if any heritable security other than this real burden had been procured for the £6000, the result would have been to shut out the claim of William Dawson to this part of the lapsed beneficiary interest of £6000. But that is not so, for surely it would not have been impossible to substitute a different heritable security without altering its form. Put it that William Dawson did buy another heritable security for the payment of £6000—then if he said that he had a chance (and he had a very good chance) of succeeding to the fee of the £1500, he would have taken very good care that he paid less for his heritable security than if there had been no chance of a lapse. But in whatever way he constituted the security, he would have taken care that he should retain the whole rights to which he was entitled under the deed in the case of a lapse of the legacy left to Frances. But observe the importance of the words of the clause which I have quoted. If the residuary legatees are entitled to the £1500 in the event of Frances dying without issue—then they are contingent fiars of £1500. But the truster does not provide that the residuary legatees are to be consulted on the question of the change of security, but only "such of my children as are interested therein," clearly not referring to the residuary legatees. So the other provisions of the deed, so far from assisting the residuary legatees, are against them. If you take away the special circumstances from the case, the question is merely this—"If a special fund is given to A B, charged with a burden to C D, and the provision to C D fails, then the provision lapses to A B." On these grounds I concur with the Lord Ordinary.

Lord Deas—By this deed of 1820 Adam Dawson *primus* disponed the lands of Bonnytoun to his eldest son William Dawson, under the real burden of £1500, which is the only sum we have to deal with. This sum was to be liferented by his daughter Frances, and the fee was to go to her children, if she had any. Now, on the face of this disposition there is a presumption that in case of the failure of issue the benefit should accrue to William Dawson, but before we can give effect to it we must read the whole deed and see what was intended by the truster. There is no doubt that although the truster made this £1500 a real burden on the estate, he had power to dispose of it in the event of the daughter having no children. The contention of the defenders is that the testator did do so by a residuary clause, and gave the fund to Adam and John Dawson, two of his sons, and that John is in that way entitled to half of the fund, and the children of Adam *secundus* to the other half.

That question depends on the wording of the residuary clause. *Prima facie* the argument is worthy of some attention, but when I come to look at the words I cannot find any reason for believing that the testator intended, in the case of there being no issue of his daughter, to give the fee to Adam and John. Had he said expressly, "In so far as I have not disposed of the fee I give it to Adam and John," it would have been quite clear, but there are no such words. It is plain that in giving all his debts, heritable and moveable, he meant all debts of whatsoever kind due to him. But when he gives "All and sundry lands and heritages other than those specially conveyed," it is obvious that he meant all lands, &c., the fee of which was not otherwise disposed of. I cannot find any words in the clause favouring the view that the testator meant that the fee of this £1500, failing issue to Frances Dawson, should form part of the residuary estate. That the truster might have done this is clear, but I can find nothing to prove that his intention was to do so. I therefore concur with the Lord Ordinary in the result to which he has come, though I do not go on the ground that he does, namely, that his was a real burden on the estate which has lapsed. I go on the reading of the whole deed.

Lords Mure and Shand concurred.

The Court adhered.

Counsel for Pursuers (Respondents)—Scott—M'Laren. Agents—Wotherspoon & Mack, S.S.C.

Counsel for Defender (Reclaimer)—Asher—Moncreiff. Agent—A. Morison, S.S.C.