Wednesday, May 23.

SECOND DIVISION.

SPECIAL CASE—POPHAM'S TRUSTEES AND OTHERS.

Succession—Legacy—"Vest or be Payable"—Postponement of Legacy till Death of Liferenter.

A testator in his trust-disposition and settlement declared that "no legacy left by me shall vest or be payable to the legatee till after the death of my wife, who during her life shall derive the benefit of all interest or income therefrom." In a memorandum written on this deed, and a codicil thereto, he declared that "no legacy shall be payable until after my wife's death." One of the legatees predeceased the testator's widow. *Held* (*diss.* Lord Rutherfurd Clark) that on a sound construction of the deed it was the testator's intention merely to postpone payment of all legacies till after his wife's death, and that the legacy vested in the legatee by her survivance of the testator.

Admiral Brunswick Lowther Popham of Cardean, Perthshire, died on 6th February 1878, leaving a trust-disposition and settlement dated 15th March 1876 conveying his whole property (with certain exceptions not material to the present case) to trustees for the purposes therein specified. By this deed the testator left to his wife all the money which might be lying in bank at his death, or invested by himself subsequent to 9th March 1875, subject to payment of his debts. He left her also his books, furniture, &c. The second purpose of the deed was as follows:—"I direct my trustees to pay all legacies which I may bequeath; but unless I otherwise expressly desire, no legacies left by me shall vest or be payable to the legatees till after the death of my said wife, who during her life shall derive the benefit of all interest or income therefrom." In the following purposes of the deed he bequeathed to his widow a preferable legacy of £3000; to two grandnephews the sum of £9000 each, payable on their "reaching twenty-five," the trustees having power to invest these sums and pay them the interest, and if need be a part of the principal, as they might deem expedient. The sixth purpose was—"As regards other legacies, I leave and bequeath the following, viz.—[*here followed a variety of legacies, including*] to my niece Miss Catherine Pakenham the sum of £500 . . . And if there be residue enough, to each of Edward Thomas Shiffner and Bertie Shiffner, sons of the late Rev. Sir George Shiffner, Baronet, and brothers of my dear wife, the sum of £250." Thereafter he appointed his nephew Home John Parker and the Hon. Richard Wogan Talbot his residuary legatees.

By holograph codicil to this deed, dated 15th March 1876, Admiral Popham declared with regard to his widow that "she is to enjoy for life the interest of all my money, and to have power to will away three thousand pounds. This legacy is to have priority over all other legacies left by me to be paid after my dear wife's decease." By another holograph codicil of same date he declared that "I further hereby will and declare that no legacy to whomsoever left by me shall be paid until after the death of my dear wife Frances Mary Popham." By holograph memorandum endorsed on the trust-deed, of date 25th March 1876, he declared that "no legacy whatever left by me shall be payable until after the decease of my dear wife Frances Mary Popham."

Admiral Popham died, survived by his wife, on 6th February 1878. Miss Pakenham died, unmarried and leaving a settlement, on 5th April 1878 survived by the Admiral's widow Mrs Frances Mary Shiffner or Popham, who died on 30th May 1881. In these circumstances a question arose as to whether the legacy of £500 bequeathed by Admiral Popham to Miss Pakenham had vested.

This Special Case was accordingly presented to the Court. The Admiral's trustees were the first parties; one of his residuary legatees who was alive at the date of the Special Case, together with the executors of the other, who had died between the date of Admiral Popham's death and that of this case, were the second parties; Miss Pakenham's executors, nominated by her last will and testament, were the third parties.

The first and second parties maintained that as the Admiral had declared in the second purpose of his trust-deed that there should be no vesting of any legacy bequeathed by him ("unless otherwise expressly desired") till after the death of his widow, and as Miss Pakenham predeceased the Admiral's widow, the said legacy did not vest in her so as to pass to her executors, but lapsed and fell into residue. They argued that where the testator had himself fixed the period of vesting by the terms of his deed effect must be given to his declared intention in that respect, unless there was some clear declaration that the words employed were not to have their ordinary meaning and legal effect—*Davidson's Trustees* v. *Davidson, &c.*, 15th July 1871, 9 Macph. 995. Further, the gift of £250 to the testator's brothers-in-law was against the view that there was any vesting in the legatees till after Mrs Popham's death.

The third parties maintained that on a sound construction of Admiral Popham's deed, particularly when read in the light of his relative holograph memorandum and codicils, the legacy did vest in Miss Pakenham by her survivance of the testator, payment only being postponed till the death of the Admiral's widow, and that the legacy therefore transmitted to them as her executors. They argued that all that the Admiral contemplated was that his wife's liferent should be intact. To effect this he declared that payment of the legacy should not take place till after her death. The words used, "vest or be payable," were not contradictory one of the other, the word "payable" being only intended to be explanatory of the word "vest." In effect he meant to say that the legacies should not "vest" in the sense of "be payable" till after her death. That construction being given effect to, the ordinary presumption of vesting *a morte testatoris* took effect—*Jackson, &c.* v. *Macmillan, &c.*, March 18, 1876, 3 R. 627.

The questions of law were as follows:—"Did the legacy of £500 bequeathed by Admiral Popham, in the sixth head of his trust-disposition and settlement, to Miss Pakenham, vest in Miss Pakenham prior to her death, and is it now payable to the third parties as her executors? or did the same lapse through her predecease of Mrs Frances Mary Shiffner or Popham, the testator's

widow, and become part of the residue of Admiral Popham's estate?"

At advising—

LORD JUSTICE-CLERK—The present is a case turning on the question, whether a declaration by a testator that a legacy shall not vest or become payable until a certain event takes place, suspends vesting, or only postpones payment? The general rule is that the postponement of the term of payment of a legacy does not prevent vesting, when the object of the postponement is to secure an intermediate benefit to a third party, the presumption always being that legacies vest *a morte testatoris*. In my opinion, the words "vest or become payable" in this case are used synonymously, seeing that a legacy which has not vested cannot become payable. It is certain that in this as in other clauses of his settlement the intention of Admiral Popham was to secure the full enjoyment of the liferent of his estate to his widow, and that he had nothing else in view in postponing the term of payment, and that the apparent postponement of vesting was not intended by him to produce any benefit to any other of the beneficiaries. The provision made for the special legacies of £250 to his brothers-in-law, which was referred to as indicating a regard for the residuary legatees, was only intended to postpone these legacies until the others were satisfied. I think we must answer the question in the Special Case in this sense.

LORDS YOUNG and CRAIGHILL concurred.

LORD RUTHERFURD CLARK—I wish I was quite as clear about this case as are your Lordships. It seems to me that the words in the principal deed "vest and be payable" are not explanatory, but rather are contradictory, one of the other. If I had been called on to give my opinion alone in the case, I should have been inclined to give effect to the ordinary meaning of the word "vest," and to hold that the period of vesting dated from the death of the liferenter. As, however, your Lordships are against my view, it is unnecessary for me to give my reasons.

The Court answered the fisrt question in the affirmative, and found that the legacy of £500 bequeathed by Admiral Popham under the sixth head of his trust-disposition and settlement to Miss Pakenham, vested in Miss Pakenham prior to her death, and was now payable to the third parties as her executors.

Counsel for First Parties—H. Johnston. Agents—J. & A. Peddie & Ivory, W.S.
Counsel for Second Parties—Dickson. Agents—J. & F. Anderson, W.S.
Counsel for Third Parties—Gillespie. Agents—J. & A. Forman & Thomson, W.S.

Wednesday, May 30.

SECOND DIVISION.

[Sheriff of Lanarkshire.

NELMES & COMPANY *v.* GILLIES.

Heritable Creditor — Diligence — Poinding — Inclusion in Schedule of Poinding of Goods belonging to Third Party—Relevancy.

The owner of goods which had been included in a poinding by a heritable creditor of the person to whom the owner had lent them on hire, after having interdicted the creditor from selling or disposing of them, brought an action against him in which he concluded for a sum of money as damages for the illegal use of poinding. It appeared from the pursuers' averments that the goods thus included in the poinding remained in the premises, and continued to be used by the tenant of the debtor. *Held* that the mere fact of their having been included in the schedule of poinding did not found an action of damages, and that the action was therefore *irrelevant*.

Maills and Duties.

The creditor having also obtained decree in an action of maills and duties against the debtor and his tenant, the owner of the goods also concluded against the creditor for the hire of the goods, alleging that he had uplifted and intromitted with the rent payable for them by the tenant in virtue of his decree of maills and duties. *Held* that this ground of action also was *irrelevant*, since the taking of the decree would not make the creditor liable for the rent payable by the tenant to the debtor for the use of the goods.

The pursuers in this case, Messrs Nelmes & Company, billiard table manufacturers in Glasgow, in November 1881 let on hire to Thomas Moore, auctioneer, three billiard tables and appurtenances at a weekly rent of thirty shillings. The tables were placed by Moore in certain premises of which he was proprietor, and which he had let as a billiard saloon to two tenants on a five and a-half years' lease. On 22d February 1882 Moore was sequestrated, but his trustee did not enter into possession of the premises nor adopt the lease. On 17th March following, Miss Gillies, who was a heritable creditor of Moore, holding a bond and disposition in security over property belonging to him of which the billiard-room formed part, the interest on which bond was then several terms in arrear, executed a poinding of the ground in virtue of decree obtained by her in an action in the Sheriff Court of Lanarkshire. In the schedule of poinding the billiard tables were included. She had also raised an action of maills and duties, calling *inter alios* the tenants of the premises, in which on 20th March she obtained decree in absence, ordaining the tenant of the billiard-room to pay to her the rent of £3 a-week due to Moore under the lease. The pursuers of last-mentioned date raised an action to interdict her from selling, removing, or in any way interfering with the billiard tables, on the ground that they belonged to them and not to Moore. In this process they obtained decree on 28th May. In consequence of the fact that Moore's proprietorship of the billiard tables was denied, and of her belief that the tenants had made certain disbursements which they were entitled to set against the rent, Miss Gillies did not uplift any rent from the tenants under her decree of maills and duties, and on 12th June her law agents intimated to the pursuers that they might, if they thought fit, remove their tables.