and were suffering loss and damage owing to this refusal. They therefore prayed the Court to recal the arrestments on consignation of £176, 11s. 8d.

Service of this petition was dispensed with of consent.

The petitioners argued that the sum offered by them for consignation was more than sufficient. The sum sued for in the action was illiquid, and they intended to dispute the amount of the claim. No prejudice would be caused to the pursuers in that action by recalling the arrestments, as the petitioners were resident in Scotland, and always within the jurisdiction of the Court. The petitioners, on the other hand, had been suffering loss and damage as averred.

The respondents maintained that there should be consignation of a sum to meet the expenses of the action as well as the amount sued for—*Stewart* v. *Macbeth*, December 19, 1882, 10 R. 382.

The Court, following the case of *Stewart* v. *Macbeth*, *supra*, pronounced the following interlocutor:—

> "The Lords of consent dispense with service of this petition, and having heard counsel for the petitioners and for the respondents, and considered the petition, Recal the arrestments therein mentioned, and prohibit and discharge the use of further arrestments as prayed for, upon the petitioners finding caution to the extent of £200, or upon the consignment of that sum in the hands of the Clerk of Court, and decern."

Counsel for the Petitioners—Deas. Agents—Fodd, Simpson, & Marwick, W.S.

Counsel for the Respondents—C. S. Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, October 31.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

M'ELMAIL *v.* LUNDIE AND OTHERS.

Succession—Vesting—Term of Payment—Husband and Wife—Divorce for Adultery—Wife's Legal Provisions.

A testator directed his trustees, *inter alia*, in particular events, to hold certain shares of his estate in trust for behoof of his son, and to pay the said shares to him by such instalments, or in such portions, and at such times, as they might think fit; but so long as the said shares, or any part thereof, remained unpaid, to pay to him the interest or annual produce of such shares, or part thereof, so remaining unpaid, half-yearly, until the shares should be wholly paid over to him and discharged. He declared further that the various provisions of his settlement should not become vested interests till the respective terms of payment thereof. The trustees accordingly took possession of the son's shares, and held them for his behoof, with the exception of several instalments which were paid to him. His wife having obtained decree of divorce against him in respect of his adultery, in an action at her instance against the trustees under his father's settlement and himself, *held* that the shares of his father's estate had vested in him, and fell to be regarded as part of his estate in computing the pursuer's legal rights.

This action was raised by Mary M'Elmail against Robert Stark Lundie and others, the surviving and acting trustees under the trust-disposition and settlement of John Lundie senior, pawnbroker in Glasgow, and against John Lundie junior. The pursuer sought to have it found and declared that by dissolution of the marriage between her and the defender John Lundie junior by decree of divorce in respect of his adultery she became entitled to her legal provisions of terce and *jus relictæ* out of the estate then belonging to him, and that his estate included his share in the trust-estate of his father John Lundie senior.

The pursuer was married to the defender John Lundie junior on 10th February 1870, and on 22d February 1887 she obtained decree of divorce against him on account of his adultery.

John Lundie senior died in July 1869. By his trust-disposition and settlement, dated 23d and recorded 30th July 1869, he conveyed his whole means and estate to Robert Stark Lundie, his son, and certain other trustees, chiefly for the following purposes—(1) Payment to his widow of an annuity of £60, to meet which a capital sum was to be set apart. Upon her death this sum was to be "divided into six equal shares or portions, and my said trustees shall pay over one share thereof to my son the said Robert Stark Lundie, and one share thereof to my son James Buchanan Lundie; and my said trustees shall hold one share thereof in trust for the use and behoof of my son John Lundie junior, and shall retain the same, or such part thereof as they may think proper, in their own hands, for such period after the death of my said spouse as they may deem expedient, and they shall pay the said share to him by such instalments, or in such portions, and at such times, as they may think fit; but so long as the said share, or any part thereof, shall not be paid over to my said son, my trustees shall pay to him the interest or annual produce of such share, or part thereof, so remaining unpaid up, and that half-yearly by equal portions, at the terms of Martinmas and Whitsunday in each year, aye and until the said share be wholly paid over to him and discharged." The other three shares the trustees were directed to hold in trust for the testator's three daughters in liferent, and their children in fee, and upon the death of each of his daughters who should leave lawful issue, they were directed "to pay over to such issue equally amongst them, if more than one, share and share alike, the fee and capital of the said share liferented by their parent." (2) He directed his trustees to apportion and divide the whole residue of his estate, after payment of expenses, into six equal shares, and to deal with them in the same manner as he had directed with respect to the payment of the capital sum payable upon the death of the widow. It was further provided—"Declaring that the foresaid provisions to my said three sons, and to the issue of my said three

daughters, shall not become vested interests in them until the respective terms of payment thereof, and accordingly upon the death of any of my said sons or daughters without leaving lawful issue the said provisions of such of them so dying without leaving lawful issue shall accresce and be paid to and divided equally amongst my surviving sons in fee, and my surviving daughters in liferent, aad their issue respectively in fee."

On the death of the testator his widow claimed her legal rights out of his estate, and the claim was admitted and settled by the trustees, and one of the daughters claimed her legal right of *legitim*, and was also settled with. In these circumstances John Lundie junior became entitled to compensation out of the funds thereby set free, and the whole interest of his father's estate, as at the date of the testator's death, amounted to upwards of £6000. The trustees paid over to John Lundie junior the income of his share, and also paid to him in instalments about £2000 of the capital sum, but still retained in their hands at the time of the decree of divorce about £4700.

The trustees declared themselves willing to pay over the half of the income of this sum to the pursuer, but refused to let her participate in the capital.

The defender John Lundie junior averred his willingness to pay to her year by year one-half of his income, "not being able to obtain funds from the said trustees to settle with the pursuer."

The pursuer pleaded, *inter alia*—"(1) The pursuer having become entitled, on the dissolution of her marriage with the defender John Lundie in respect of the latter's adultery, to terce and *jus relictæ* out of his estate, including his interest in his said father's estate, is entitled to declarator as craved. (2) The share or shares of the defender John Lundie in the trust-estate held by the other defenders under the provisions of the trust-deed, and also in respect of the funds set free by legal claims as aforesaid, being vested in him at the date of dissolution of his said marriage, are subject to the legal rights of the pursuer as if the said marriage had been then dissolved by his death.

The defenders the late John Lundie's trustees pleaded—"(3) The share of the defender John Lundie in the trust-estate administered by the present defenders not having vested, they are entitled to absolvitor. (4) The pursuer having no higher right than the defender John Lundie in the trust-estate administered by the present defenders, they ought to be assoilzied. (5) The present defenders being bound to exercise the discretion conferred on them by the settlement, and having resolved to retain the balance of capital of the other defender's share, are entitled to absolvitor from the conclusions for count, reckoning, and payment."

The defender John Lundie pleaded—"(2) The defender not having been able to obtain money from his father's trustees to settle with the pursuer, but having offered to account to her for one-half of his income, and one-half of the value of said furniture, and to allow her to retain the said sum of £500, should be assoilzied, with expenses, from the conclusions of the summons, in so far as directed against him."

The Lord Ordinary (KINNEAR) pronounced the following interlocutor:—"Finds and declares in terms of the declaratory conclusions of the summons, and appoints the defenders, Lundie's trustees, to lodge an account showing the amount in their hands of the defender John Lundie's share of the trust-estate of the deceased John Lundie, and that *quam primum*, &c.

"*Opinion.*—I do not understand it to be disputed that on the divorce of a husband for adultery the wife has right to her legal or conventional provisions in the same manner as if the husband had died. It follows that the pursuer is entitled to claim her share of the defender's moveable estate in name of *jus relictæ*. The only question is, whether the defender John Lundie's share of his father's estate, in the hands of the other defenders, his father's trustees, is vested in him so as to form part of his moveable estate.

"It is maintained that nothing vests in him under his father's will except such portions of his share as the trustees may from time to time think fit to pay to him in the exercise of their discretion.

"I do not think this a sound construction. The trustees are directed to divide the estate on the death of the widow, and to hold one share 'for the use and behoof' of John Lundie from the period of division. They are to retain John Lundie's share for such time as they may deem expedient, and to pay it by such instalments as they may think fit. But the interest of the portion retained by the trustees is to be paid to him 'until the said share shall be wholly paid over to him and discharged.' Sooner or later, therefore, the whole is to be paid to him and to him alone. There is no destination-over with regard to any part, and in the event of his death before the whole had been paid, the unpaid portion must go to his representatives. No one could take it except through him. It is true that it is declared that the provisions to the testator's sons and daughters shall not become vested interests in them until the respective terms of payment. But that must in my opinion be referred to the term of payment fixed by the testator himself. The trustees are empowered to pay to John Lundie at the same time as to the other sons. They are also authorised for his benefit to retain his share, or a part of it, and pay it by instalments. But that cannot be construed into a power to withhold it absolutely from him and his representatives. It is unnecessary to consider whether the discretion of the trustees could be effectually exercised against creditors during the lifetime of the beneficiary. It is certain that if the right has vested it can be of no effect against his representatives after his death, and the pursuer is placed by the divorce in precisely the same position as if she were a widow claiming *jus relictæ* on the death of her husband. The principle laid down in *Beattie* v. *Johnston*, 5 Macph. 340, and in the later case of *Harvie*, appears to me to be directly applicable."

The defenders, the trustees, reclaimed, and argued—The pursuer could not claim as *jus relictæ* any part of the share held for John Lundie under the terms of his father's settlement. By the terms of the deed vesting was postponed till "the respective terms of payment." These were in the discretion of the trustees as regarded John Lundie, and thus the share held for him only vested by instalments as paid. The trustees were directed to "hold" the share, and

therefore there was no force in an argument based on the appropriation of the shares. By an exercise of their discretion they could make him a liferenter. The widow was in no better position than a creditor who had attached a share. Yet the latter as an assignee of John Lundie could no more than John Lundie himself enforce payment against the trustees. Even if there had been vesting it was of such a qualified type, that no payment could follow upon it. *Smith* v. *Chambers* was *a fortiori* of the present, because there a power to retain was superinduced upon a general vesting; here the power to retain came first—*Smith* v. *Chambers' Trustees*, November 9, 1877, 5 R. 98, H. of L. April 15, 1878, 5 R. 151; *Smith's Trustees* v. *Smith* July 11, 1883, 10 R. 1144.

The pursuer argued—But for the clause postponing vesting till the respective terms of payment, there could have been no question that John Lundie's share had vested. That direction was satisfied without referring it to the payment of the instalments of John Lundie's share. The different terms of payment in the deed were—(1) the death of the widow; (2) the realising of the estate (3) the respective dates of the daughters' deaths. There was no distinction between the share of John Lundie and his brothers, save the discretion in the trustees to hold for his behoof. The very fact that it was set apart to be held for him implied vesting. The direction to pay was as strong as to hold, and the trustees might have paid at once. Their power to hold threw no doubt on the amount of the share. It was not a familiar idea that a share should vest by instalments. The Court also had always been anxious to avoid leaving to trustees a discretion as to the term of payment. *Smith* v. *Chambers* differed *toto cœlo* from the present case, in respect that the deed there empowered the trustees to cut down the fee. Any discretion to withhold was personal to John Lundie, and as he was now to be looked upon as dead so far as the pursuer was concerned, it must have ceased—*Leighton* v. *Leighton*, March 8, 1867, 5 Macph 561; *Hunter's Trustees* v *Hunter*, February 9, 1888, 15 R. 399; *Ferrier* v. *Ferriers*, May 18, 1872, 10 Macph. 711.; *Sutherland's Trustees* v. *Clarkson*, October 29, 1874, 2 R. 46; *Scott. &c.* v. *Scott's Executrix*, January 27, 1877, 4 R. 384.

At advising—

Lord President—The pursuer of this action is Miss Mary M'Elmail, who was the wife of the defender John Lundie junior, but that marriage was dissolved on the 22nd February 1887 by the pursuer obtaining decree of divorce on the ground of adultery against her husband. Now the effect of that decree was to entitle the pursuer to her legal rights—that is to say, of terce and *jus relictæ*—in the same way as if her husband were naturally dead. There is no question here as to terce, but the pursuer contends that one great portion, if not the whole, of her husband's estate at the dissolution of the marriage was his right and interest in the trust-estate of his father held and administered by the other defenders the trustees, and she seeks to have it found and declared that she became entitled to her *jus relictæ* by the decree of divorce and that her husband's estate included "the share or shares of the trust-estate of the said deceased John Lundie, carried to the other defenders, as trustees foresaid, by the said deceased John Lundie's trust-disposition and settlement, which share or shares are thereby, and particularly by the second and fifth purposes thereof, provided to and appointed to be held for the use and behoof of the said John Lundie, defender, therein designed John Lundie junior, and the profits, interests, or annual produce thereof, and all right, title, and interest in the estate of the deceased John Lundie subsisting as at the said dissolution of the said marriage in the said John Lundie, defender."

Now, the Lord Ordinary has decerned in terms of these declaratory conclusions, and the trustees have reclaimed against his judgment, on the ground that at the dissolution of the marriage by decree of divorce no part of John Lundie junior's right in the estate of his father had vested in him, and that therefore his share in that estate did not form part of his moveable estate. That of course necessarily depends on the construction of the deed of settlement by John Lundie the elder, and in that deed there are several clauses to which it is necessary to refer in order to solve that question.

The testator there among other things provides a certain annuity to his widow, and a capital sum is set aside to secure that annuity, but this capital sum he directs on the death of his spouse is to "be divided into six equal shares or portions, and my said trustees shall pay over one share thereof to my son the said Robert Stark Lundie, and one share thereof to my son James Buchanan Lundie; and my said trustees shall hold one share thereof in trust for the use and behoof of my son John Lundie junior, and shall retain the same, or such part thereof as they may think proper, in their own hands, for such period after the death of my said spouse as they may deem expedient, and they shall pay the said share to him by such instalments, or in such portions, and at such times as they may think fit; but so long as the said share, or any part thereof, shall not be paid over to my said son, my trustees shall pay to him the interest or annual produce of such share, or part thereof, so remaining unpaid up, and that half-yearly by equal portions, at the terms of Martinmas and Whitsunday in each year, aye and until the said share be wholly paid over to him and discharged." And then he directs one of these shares to be held for one married daughter, another for another married daughter, and a third for an unmarried daughter, but in the case of all the provision is to them in liferent and to their children in fee.

Now, this portion of the estate fell to be divided into shares on the death of the widow, and at that time the proceeds of that security, or whatever it was, were to be paid over so far as regards two of his sons, but were to be held by the trustees for his son John Lundie; and as regards the residue of his estate he repeats in terms the same provision and orders the trustees "to apportion and divide the whole of the free residue and remainder, of my said heritable and moveable means, property, and estate, under deduction of expenses of management, incidental expenses, and all expenses in connection with this trust, into six equal shares, and so soon as my estate shall be realised they shall pay over one share of said residue to my son the said Robert Stark Lundie; and my trustees shall pay over one share of said residue to my son, the said James Buchanan

Lundie; and my said trustees shall hold one share thereof in trust for the use and behoof of my son John Lundie junior;" and then the clause proceeds in the same terms as in the above-mentioned clause as to John Lundie. Two of the testator's sons accordingly are to have immediate payment of their shares, and John Lundie is to have his share held in trust for him as is provided in the previous section as to the capital sum held in security for the widow's annuity.

All this, however, does not throw very much light on the question of vesting raised by the trustees, but it is necessary to keep the precise provisions of these two clauses in view in dealing with the important clause regarding the vesting of the different interests. That clause is in these terms —"Declaring that the foresaid provisions to my said three sons, and to the issue of my said three daughters, shall not become vested interests in them until the respective terms of payment thereof. And accordingly upon the death of any of my said sons or daughters without leaving lawful issue the said provisions of such of them so dying without leaving lawful issue shall accresce and be paid to and divided equally amongst my surviving sons in fee, and my surviving daughters in liferent, and their issue respectively in fee." Now, there are two things to be attended to here—(1) to ascertain precisely what the testator here assigns as the term or terms of vesting, and (2) what is the effect of the death of a son or daughter dying without issue before vesting takes place? As regards the latter question there can be no doubt that if any fail—die without issue—there is accretion to the survivors. The words requiring particular construction are, "the foresaid provisions to my said three sons, and to the issue of my said three daughters, shall not become vested interests in them until the respective terms of payment thereof." In the first place, it is quite clear that the testator had in mind more than one term of payment, and that these terms were appointed either to different persons or to different portions of the estate. That is the idea suggested by the word "respective" and therefore we must endeavour to ascertain what are the respective terms of payment as regards the subjects and the objects of the gift in the prior clauses of the deed.

Now, the trustees seem to bring their contention to this—That, in so far as John Lundie junior is concerned, there is no term of payment except the precise time at which money is actually passed from the hands of the trustees to the hands of John Lundie, and therefore that every instalment made under direction of the previous clause is a separate term of payment. *Prima facie* it appears that the phrase "term or terms of payment" refers to something the testator has already fixed by the provisions of the deed, and therefore in ordinary circumstances we must always look at the deed to see what are the terms of payment in the mind of the testator. There can be no mistake at all that there are several terms of payment here. First, as regards the payment of the capital sum set aside for the widow's annuity, the term of payment is the death of the widow. That is a separate matter from the term of payment of other parts of the estate. Then, in the next place, as regards the children of the daughters who are to take the fee, the term of payment there is in each case the death of the mother. That is another and separate term of payment. Then, as regards the two sons Robert Stark Lundie and James Buchanan Lundie, the term of payment of the residue is undoubtedly "so soon as my estate shall be realised." These two are then to obtain immediate payment of their shares. The question is, whether that is not also the term of payment of the share of John Lundie. The trustees say "No," because they are not entitled then to pay over his share. The direction to them is to pay "by such instalments, or in such portions, and at such times, as they may think fit." There is certainly a distinction between the case of John Lundie and of his two brothers, but that does not quite solve the question whether the testator did not mean the term of payment of which he speaks in the vesting clause to be the same in the case of all the sons. It is quite true that the trustees are not authorised to pay over the share of John Lundie all at once, but by instalments—instalments of what number or of what amounts is left to their discretion; still, from the time at which the estate is realised they are to pay to him as well as to the others. It may be that they may not pay till some time after, that they may not have paid till a considerable time after the arrival of the period at which they are directed to pay over to the other sons, but still this is the term of payment, and so far as regards residue the only term of payment. There is no other term of payment as to residue. Then as regards the other capital sum to be divided on the widow's death, there is only one term of payment. Therefore we come back to the vesting clause with this light from the other provisions of the deed, that there are several terms of payment appointed to different sums and persons, and we must see whether there is anything in the word "respective" to create in the case of John Lundie a different term of payment from that at which his brothers are to receive their shares.

I have come to the conclusion with the Lord Ordinary that the only terms of payment are those which I have mentioned—1st, The term of payment for the capital sum set aside in security of the widow's annuity; 2nd, the term of payment for the issue of the daughters of the testator; and 3rd, the term of payment for the residue of the estate. There is no other term of payment mentioned in this deed. To say that the "term of payment" here necessarily means in the case of John Lundie the time at which each particular instalment is handed over to him is, I think, a very false reading of the phrase. That is the time at which payment may be made. The term contemplated by the truster is a different thing altogether. The one is a term in the mind of the testator; the other is the result of accident. No doubt we have seen cases in which an express provision has been made that there should be no vesting until the sums should be paid over, and where the testator so expresses himself there can be no doubt of his intention. He then means that until the money is placed in the hands of the beneficiary he has no vested interest in it. But it is not so said here. Here the testator uses only the ordinary terms of vesting, which mean in every case the terms provided by the testator himself when the funds are to be distributed.

Lord Mure—I am of the same opinion. The judgment of the Lord Ordinary proceeds upon the footing that the share of John Lundie in the

residue was vested in him at the date of the decree of divorce by the realisation of the estate. I think the Lord Ordinary is right. The clause providing for the disposal of the residue is pretty distinct; the testator directs his trustees "to apportion and divide the whole of the free residue and remainder of my said heritable and moveable means, property, and estate, under deduction of expenses of management, incidental expenses, and all expenses in connection with this trust, into six equal shares, and so soon as my estate shall be realised, they shall pay over one share of said residue to my son the said Robert Stark Lundie." He then directs another share to be paid over to James Buchanan Lundie, and the clause continues—"And my said trustees shall hold one share thereof in trust for the use and behoof of my son John Lundie junior, and shall retain the same, or such part thereof as they may think proper, in their own hands, for such period after the realisation of my estate as they may deem expedient, and they shall pay the said share to him by such instalments, or in such portions, and at such times, as they may think fit." Here there is a distinct order to pay in certain proportions. Then comes a provision—"So long as the said share, or any part thereof, shall not be paid over to my said son, my trustees shall pay to him the interest or annual produce of such share, or part thereof, so remaining unpaid up, and that half-yearly by equal portions at the terms of Martinmas and Whitsunday in each year, aye and until the said share be wholly paid over to him and discharged." Therefore this share from the realised estate the trustees are distinctly appointed to hold for behoof of John Lundie, though they have a discretion to give it to him by instalments, upon which they have acted.

If that clause stood alone there would be no doubt as to the vested right of John Lundie in the sums held for him. There is, however, a subsequent clause, which declares "that the foresaid provisions to my said three sons, and to the issue of my said three daughters, shall not become vested interests in them until the respective terms of payment thereof." On that it is maintained that because there is a discretion to pay at certain periods there is no vesting in John Lundie till the times at which payment is made to him. I agree with the conclusion to which your Lordship has come, that the clause cannot be so interpreted, and that the leading provision of the deed vests in John Lundie this money held by the trustees for his behoof.

Lord Adam—By the second purpose of the trust-disposition and settlement the truster provides an annuity to his widow, and a capital sum is set apart to meet this, and on her death he directs the capital sum to be divided as is there set forth. It is needless to consider that clause further. It contains the same provisions as the clause dealing with residue. The capital sum is to be divided in the same way as the residue, except that the division is to be on the death of the widow.

Perhaps I may make the remark, as I agree with the reasoning of the Lord Ordinary, that he seems to have thought that the whole estate was to be divided on the death of the widow. That, however, makes no difference in the reasoning in which he proceeds, but I merely point out that he does not distinguish between the two periods of division.

In the fifth purpose of the deed the testator directs the trustees to divide the residue into six equal shares, and to pay so soon as the estate is realised one-sixth share to each of his two elder sons, but they "shall hold one share thereof in trust for the use and behoof of my son John Lundie junior, and shall retain the same, or such part thereof as they may think proper, in their own hands, for such period after the realisation of my estate as they may deem expedient." Now, I agree with Sir Charles Pearson that that one share belongs to John Lundie, when, as Lord Mure points out, the clause goes on, "and they shall pay the said share to him by such instalments, or in such portions, and at such times, as they may think fit." No option is given them as to whether they shall pay the whole share to John Lundie or not. He is to have the whole share. That is still clearer from the next clause—"so long as the said share or any part thereof shall not be paid over to my said son, my trustees shall pay to him the interest or annual produce of such share or part thereof so remaining unpaid up, and that half-yearly by equal portions at the terms of Martinmas and Whitsunday in each year, aye and until the said share be wholly paid over to him and discharged." So long as the whole or part of the estate is not paid over, the clear intention and direction of the testator is to give John Lundie the absolute right to a one-sixth share.

If the question had been on the construction of this clause alone, I should have thought that the mere direction to pay in instalments was not sufficient to suspend vesting, but there is a clause which declares when vesting shall take place. It is there declared "that the foresaid provisions to my said three sons, and to the issue of my said three daughters, shall not become vested interests in them until the respective terms of payment thereof." If we could construe "terms of payment" as equivalent to the times when the funds may be paid to John Lundie, if that were the meaning of the phrase, then there would be no vesting till they were paid over to John Lundie, no matter as to the amount of the instalments in which they were paid. I agree with your Lordship that that is not the meaning of "terms of payment." What the testator means is, 1st, the death of the widow; 2nd, the realisation of the estate; and 3rd, the terms of payment on the death of their mothers to the grandchildren. These are the "terms of payment," and not the actual times when the trustees happen to pay over his share to John Lundie. I do not think, so far as the clause is concerned, it at all modifies the meaning of the previous clause by which an immediate right is given to John Lundie in his share of the residue upon the realisation of the estate.

Lord Shand was absent.

The Court adhered.

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