Thereupon the Port-Glasgow Harbour Trustees presented two reclaiming notes, viz.—(1) a reclaiming note against the interlocutor refusing to allow them to lodge defences; and (2) a reponing note against the original interlocutor of conjunction.

CLARK and LEE for reclaimers.

GIFFORD and BLACK in reply,

The Court (1) remitted to the Lord Ordinary to receive the defences tendered, and to find the Port-Glasgow Harbour Trustees liable to the pursuer in payment of the whole expenses incurred or to be incurred by the pursuer in so far as incurred in consequence of the trustees not having appeared timeously; and (2) refused the reponing note against the interlocutor of conjunction.

Agent for Pursuer—W. H. Muir, S.S.C.

Agents for Defenders and Reclaimers—Hamilton & Kinnear, W.S.

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*Wednesday, December 4.*

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## MILLER *v.* BUILDING COMMITTEE OF U. P. CHURCH, LOCHGELLY.

*Interdict—Building Contract—Arbiter.* Circumstances in which the Court *refused* interdict against the proprietors of a house, in course of erection by a contractor, taking down and rebuilding the house.

In June 1861 John Miller, builder, Cowdenbeath, and David Lamond, mason at Lochgelly, contracted with the managers of the U. P. Church, Lochgelly, to execute the mason work of a manse for the U. P. Church there. The manse was to be built according to plans and specifications prepared by Mr John Melvin, architect in Alloa. The walls were to be ready for the roof by the 1st of October. Payments for the work as it advanced were to be made on certificate by Mr Melvin, to whose satisfaction the work was to be carried on. Any additions to, alterations on, or deductions from the work contracted for, which the managers might require, were to be made by the contractor, the amount and value of such additions, alterations, and deductions being referred to Mr Melvin, who was made sole arbiter in any dispute regarding the works. The work was commenced after some delay, and about 12th December the walls were ready for the roof. Cracks then began to appear in the walls, and disputes arose in consequence between the parties. The contractors contended that the cracks were not owing to insufficient workmanship, but were due to the ground on which the walls were built having fallen in, being situated immediately above old coal workings. The managers, on the other hand, asked Mr Melvin to inspect the building, and obtained from him an order on the contractors to take down and rebuild the portions of the building which were giving way. The contractors denied that the matter fell within the reference. Finally, on 29th August, Mr Melvin, in respect of the contractors having failed to commence the operations enjoined in the previous order, authorised the managers to employ some other party to execute the alterations and complete the work. The managers accordingly employed another builder to take down and rebuild the walls. One of the contractors, Lamond, had by this time left the country. Miller now presented this note of suspension and interdict, asking to have the respondents, and persons acting under their order, interdicted from acting under the arbiter's award, and from taking down or interfering in any way with the building; and also asking to have them interdicted from using or interfering with the building materials, scaffolding, and tools belonging to the complainer. The Lord Ordinary on the Bills refused the note, holding that the complainer had taken a wrong remedy. If he was unjustly treated he should raise his action for the price, or for damages.

The complainer reclaimed.

A. R. CLARK and RHIND for him.

GIFFORD and W. A. O. PATERSON in reply.

LORD PRESIDENT—The complainer contracted with the respondents to build a house for them, and after he had so far completed his contract that the walls were built and ready for the roof, it turned out that the wall would not stand for some reason or other. One party said that that was owing to bad building, the other blamed the bad foundation, and stated he had been desired to build on a piece of excavated ground not sufficient to sustain the building. It is impossible to decide that here, but in the meantime the respondents say they are not going to wait till that is decided, but will build up their walls, and leave the contractor to his action of damages; and accordingly they took down and built up the walls again. When this was going on, and before the old work was entirely pulled down, this application was made, and the question is, ought the Lord Ordinary to have passed the note or refused it? I must say I think the respondents would have been more correct in their conduct, and safer for their own interest, if they had not proceeded to do what they did, but waited for a judicial warrant. The proper course in such a case is to go to the Judge Ordinary of the bounds, and ask him to inspect the work himself, or by some person of skill, and apply the necessary remedy to protect the interests of all parties. But they did not do that, and the question is, whether this failure on their part makes this proceeding on the part of the contractor a competent proceeding? He asks that we should interdict the proprietor of the ground and building from taking down the walls, and from interfering in any way with the progress of the contract. Without pronouncing absolutely whether that is competent, I think with the Lord Ordinary, that it is not reasonable in the circumstances. On Miller's own showing he can't go on with his contract, for, he says himself, that even with good workmanship he can't build a wall that will stand. In these circumstances, he cannot execute his contract, and is not in a favourable position to hinder the owners from trying their hand. Therefore, I think the Lord Ordinary was right.

The other Judges concurred.

Reclaiming note refused, but without additional expenses.

Agents for Complainer—D. Crawford and J. Y. Guthrie, S.S.C.

Agents for Respondents—J. & A. Peddie, W.S.

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*Wednesday, December 4.*

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## SMITH'S TRUSTEES *v.* SCAIFE AND OTHERS.

*Trust—Vesting—Residue—Interest on Shares—Majority.* A testator died in 1853. His trustees were directed to pay and make over the free residue of his estate to five persons named, equally, as they respectively attained the age of

twenty-one years complete. The eldest beneficiary was of age at the death of the testator, The others attained majority in 1854, 1857. 1858, and 1865. *Held* (1) that vesting did not take place till majority; (2) that the eldest beneficiary became entitled to payment of his one-fifth share of the residue as soon after the testator's death as the residue could be ascertained; and that each of the other beneficiaries was entitled to his one-fifth share of the principal of the residue as at the date of majority, with the interest actually accruing on said share from the testator's death till the term of payment.

Mr Smith, who died in January 1853, directed his trustees, after paying certain legacies, and providing for other purposes of the trust, to pay and make over the whole residue of his means and estate to five relatives named in the deed, "equally among the said five persons, as they respectively attain the age of twenty-one years complete." One of these residuary legatees attained majority before the death of the testator; the others attained majority in 1854, 1857, 1858, and 1865, respectively. The question between the parties now related to the interest payable to the parties on their shares of residue, the three residuary legatees who were last of attaining majority contending that they were entitled to interest on their shares in such a way as to equalise the payments made to them with the payments made to the older beneficiaries, whose shares had become payable to them earlier, in consequence of their having sooner attained majority.

The Lord Ordinary (Ormidale) held that vesting took place at majority in the case of each; that the eldest beneficiary, who had attained the age of twenty-one at the death of the testator, was entitled to one-fifth of the residue as it stood at the testator's death, exclusive of subsequent increase from interest, dividends, and profits, with interest at 4 per cent. on said share of the residue from the time when it became payable; and that the other beneficiaries were to have, as on their respectively attaining the age of twenty-one years, the same sum of residue as that payable to the legatee who first attained twenty-one, with interest at 4 per cent. from the dates of their respectively attaining majority; and that what remained of residue after that payment, arising from the accumulation of interest, dividends, and profits since the date when the legatee who first attained the age of twenty-one became entitled to her share, was to be divided amongst all the five residuary legatees equally. His Lordship held, though the sums to be paid were the same, the dates when the payments were to be made were different; and though this might result practically in giving some legatees an advantage over the others, this must be held to be the intention of the testator.

The younger beneficiaries reclaimed.

Lord Advocate (Gordon) and Stewart for them.

Gifford and John Marshall in reply.

Lord Ardmillan—The questions raised under this reclaiming note in the multiplepoinding for distribution of the estate of the late Mr Robert Graham Smith, relate only to one portion of that estate, namely, the residue thereof, and more particularly the interest on the several shares of that residue.

Mr Graham Smith died on 1st January 1853, leaving a trust-disposition and settlement, dated 18th May 1841, conveying his whole heritable and moveable estate in favour of certain trustees for the purposes—(1) of payment of his debts, funeral charges, and expenses of the trust; (2) of legacies and provisions as directed by any writing under his hand; and (3) of disponing and paying the residue to the parties therein mentioned. To this he annexed a codicil, dated 3d February 1842, recalling the nomination of one of the trustees.

On 24th February 1852, in consideration of the death of his only child, and other reasons, he appointed certain additional trustees, and made various alterations on the deed of settlement; and by another codicil, dated 25th February 1852, he appointed certain other legacies to be paid. These documents may be read together; but the questions here raised depend on the deed of alteration and direction, dated 24th February 1852. By this deed Mr Graham Smith directed his trustees to secure certain provisions to his different relatives according to their respective interests of liferent and fee as therein set forth. There is no occasion to explain these in detail, as there is no question here raised with reference to these provisions. It is only necessary to observe, in regard to them, that in each case the provisions are payable as the legatees respectively attain the age of twenty-one years; that during the minority the trustees are directed to apply the interest of the principal sum for behoof of the legatees, in such manner as they (the trustees) deem best for their education and advancement in life; but declaring that the legacies shall not vest till the legatees respectively attain the age of twenty-one years. It is obvious that, were it not for the declaration that these legacies should not vest before majority, the effect of the provision for the employment of interest for behoof of the legatees would have afforded a strong, if indeed it would not have been a conclusive, reason for supporting the vesting prior to majority.

By this deed of alteration the residue is thus disposed of:—[*reads*].

All these five persons, to whom the residue is thus provided by name, are now alive and of full age. Mrs Ferguson attained majority before the testator's death; Mrs Janet Graham or Carruthers attained majority on 29th March 1854; Mrs Margaret Richardson or Smith on 2d February 1857; John Richardson on 21st December 1858; and Robert Graham on 27th June 1865. Mrs Ferguson was paid her share of the residue so far as then ascertained; and payments to account have been made to the other parties interested. The question now before the Court relates to the distribution of the interest accruing on the residue.

As the fund distributable by the trustees is the residue in their hands after payment of the truster's debts and legacies, and of the expenses of the trust, the making payments to account was not an unreasonable proceeding, as it might be some time before the exact amount of residue could be satisfactorily ascertained. It is obvious that any funds which remained in the hands of the trustees after payment of debts, &c., must be held as falling into residue, and consequently as distributable in the manner in which the residue fell to be distributed. If the right to these shares of residue vested at the testator's death, or at the majority of the beneficiary first attaining that age, then there could be no doubt that the annual interest on the residue must be divisible just as the principal sum is divisible, the interest of each share passing with the share.

But I do not think that the case can be disposed

of on this footing. I am unable to arrive at the conclusion that, if one of these five beneficiaries had survived the testator, but died in minority, his or her share would have vested, so that it could have been claimed by an executor or disponee. The provision of residue to these persons is not given separately from the direction to pay. It is only given by a direction to the trustees to pay and make over the residue to the persons named, "as they respectively attain the age of twenty-one years complete." This is not merely fixing the term of payment, but it is attaching to the right to the provision itself the condition that each legatee shall respectively attain majority. It is not only when they become of age that they are entitled to payment, but as they respectively become of age that they have any right under this provision. The question of vesting is truly a question of construction of the deed; but where there is a settled rule of construction, and no sufficient ground for exception, we cannot disregard it. The day of majority is an uncertain day; it may never arrive; and the rule, *dies incertus pro conditione habetur*, is a canon of construction clearly recognised in our law. It cannot be here held as introduced to qualify a previous gift by fixing a more distant term of payment, *morandæ solutionis tantum ;* for there are no previous words of bequest; there is no gift except as the legatees attain majority, or, in other words, no gift till the uncertain day arrives.

There are no such indications of intention in this deed, or even in this series of deeds, as can, in my opinion, take the case out of the general rule which I have mentioned. The only alleged indication of such intention pressed on us at the bar as important, is the declaration in regard to the previous particular provisions that they shall not vest, and the absence of such declaration in regard to the residue. But this appears to me to be explained by the consideration that, in the previous provisions the trustees were directed to employ the interest for behoof of the legatees during their minority, and that the declaration that the legacies should not vest was rendered necessary by that direction. As there is no such direction, and no such necessity, in regard to the residue, the declaration that it should not vest was not required, and its absence cannot aid the plea for vesting. I am therefore of opinion that the shares of the residue did notvest in the beneficiaries until they respectively attained majority.

These beneficiaries are now, however, of age, and their shares have vested accordingly. Each of these five persons became, as they respectively attained majority, entitled to a fifth share of the sum of the residue. Mrs Ferguson having been of age before the testator's death, became entitled to payment of her share as soon as the state of the testator's affairs enabled the trustees to ascertain and divide the residue. Of course, after she received her share, the interest as accessory to the principal was a fruit reaped by herself. The next that came of age was Mrs Janet Graham or Carruthers, and she would be entitled to her share, with interest thereon, from the date of the testator's death; that being the date when the first share became payable; and each in succession would take the share falling to him or her, with interest thereon, from the testator's death till payment. The rate of interest should be the rate actually accruing on the fund in the hands of the trustees. This mode of distribution would, I think, produce as nearly as possible equality in the shares.

Now, on a fair construction of the deed, I am of opinion that the equality of these shares of the residue was according to his intent of the testator. His only child had died; the residuary legatees were his near relatives, he directs payment equally among them, and over and above any legacy bequeathed to them, and, in the event of deficiency of funds, he directs a rateable abatement of all legacies and annuities. Again, in the event of Mrs Peter Smith, by her settlement, creating inequality among "the legatees, or residuary legatees, before named," the testator, Graham Smith, gives directions to the trustees to restore equality. I have therefore no doubt that equality in the shares of the residue was the intention of the testator.

In this view of the case, the question of vesting, which would have arisen in the event of one of the residuary legatees dying in minority, does not practically arise. There is no such question here. I assume—I take it for granted—that there would have been no vesting in such a case. But the question is, What did the testator mean in regard to the distribution of this residue? I repeat, that I think he meant to direct its equal distribution. The principal sum of each share was in the hands of the trustees during the whole period between the testator's death and the payment of the shares and was awaiting distribution as residue. The trustees were bound to pay to Mrs Ferguson her fifth share, because she was of age when the testator died. After that, the trustees held the remainder of the residue as four-fifths thereof till the respective periods of payment should arrive. The accruing interest on these sums—as a fruit or accessory of the principal —was also in the hands of the trustees, and not being otherwise disposed of by the testator, that interest fell into residue, with attachment, or adherence, or accretion, to the principal sums forming the respective shares of residue held in trust for distribution at the respective periods of majority. In short, while the interest on the first share passed to Mrs Ferguson, the first beneficiary, inclosed as it were within the principal, so that she drew the fruits thereafter herself, the interest on the other four shares which remained in trust management, were held, as it were suspended, to await distribution when the respective terms of payment should arrive. On the arrival of the term for payment, the share was due with the interest which had accresced to the principal.—(*Glasgow's Trustees* v. *Glasgow*, 30th Nov. 1830, 9 S. and D. 87). The death of one of these five beneficiaries after the testator, but in minority, might have raised a delicate question as to the division among the survivors which does not now arise, and on which I do not at present express any opinion. We have before us all the beneficiaries, and all of age, with all their shares vested, and no disposal of the residue otherwise than under this direction for distribution among them. The interest accruing on the fund is accessory to the fund, and the fund being in the hands of trustees as four-fifths of a residue, of which one-fifth had been paid away, I think that the interest must be viewed as impressed with the same character as the principal to which it was accessory, and as in the hands of the trustees for such distribution as will best fulfil the testator's intention to make an equal division.

Therefore, I am of opinion that the proper distribution in this case is, that the ultimate equaliy of the shares in the residue should be secured so far as possible, and that this can be done by giving to each beneficiary, as at the date of majo-

rity, the fifth share of the principal, with such interest as has actually been reaped by the trust from the testator's death till the term of payment.

There is one satisfactory feature in the disposal of this case, and that is, that none of the claimants suffer loss by the decision. This is a competition for a benefit under trust-distribution. It may be that every competitor does not get all he seeks, but each gets a share. No claimant is contending *de damno vitando;* none is called on to restore what has been already received; and none is made richer at the expense of another.

The other judges concurred.

Agent for Reclaimers—Wm. Mitchell, S.S.C.

Agents for Respondents—C. & A. S. Douglas, W.S., and Dalmahoy & Cowan, W.S.

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*Wednesday, December 4.*

## SECOND DIVISION.

### RITCHIE *v.* ANDERSON.

*March-Ditch— Title — Possession — Executor—Expenses.* Circumstances in which *held* that a party had proved possession of a ditch for seven years under a sufficient title, and held entitled to the benefit of a possessory judgment. 2. Executor of the party deceased allowed to insist in the action with the view of relieving the executry estate of expenses.

This was an advocation from the Sheriff-court of Nairnshire. The action arose by a petition in the inferior Court, at the instance of Mrs Ritchie, liferent proprietrix of a small pendicle of ground adjoining the lands of the respondent, concluding that the respondent, who had filled up a ditch which divided the two properties, should be ordained to restore it to its former condition, the said ditch being alleged to be the march fence between the properties. In the petition, the petitioner described the ditch as having been a march fence for forty years, but in her condescendence it was stated that it had originally been formed out of the properties of the parties respectively, and that it was accordingly common property. It was also stated that march stones had been originally placed at the formation of the ditch in the centre of the ditch with the view of indicating the line of march between the properties. These latter statements were introduced into the revised condescendence at adjustment, and were objected to by the respondent in the discussion in the Supreme Court as incompetent. In addition to her averment of a march fence for forty years, the petitioner alleged possession of the ditch for seven years immediately prior to the date when the respondent filled up the ditch, and claimed the benefit of a possessory judgment. The respondent denied either that the ditch was ever a march fence or common property, and maintained that it had been made by his ancestor out of his own lands, and therefore belonged in property to him. In support of this contention, he relied mainly on the fact that from 1845, as seen from the plans produced, and from an earlier period, as spoken to by the witnesses, there had been a line of march stones *in situ* of the petitioner's pendicle, and on her side of the ditch, showing that the march stones, and not the ditch, were the boundary between the lands. The respondent further said that one of these march stones, at the south-east corner of the petitioner's land, had been removed after the raising of the action, and, that to suit this removal, the statement in the condescendence as to march stones being placed in the centre of the ditch had been incompetently made. The titles of the parties mentioned their lands as their respective boundaries, and made no mention whatever of a ditch. One of the plans produced was that of the burgh of Nairn, the common superior of both proprietors, and the respondent undertook to show that the line of march stones upon which he relied were traced in that plan, and in others which had been prepared long previous to the present dispute, in precisely the same direction, which placed the ditch in question entirely upon the lands of the respondent. The Sheriff-substitute allowed a proof of the parties' averments. The petitioner's proof consisted mainly of the evidence of the members of her own family, several of whom spoke to the period when she acquired her feu (1824), and said that the ditch was made about that time from land taken from each side. The possession of the ditch during the period required to found a possessory judgment was spoken to exclusively by two of the petitioner's sons, who were charged by the respondent as being either instrumental in or the parties who removed one of the march stones for the purposes of the action. The respondent, in his proof, endeavoured to show that the ditch had always been regarded as part of his property, and had been declared to be so by his predecessors. He also strongly relied on the position of the march stones, and on the removal of one of them in the interests of the petitioner. The Sheriff-substitute (Falconar) found that the averments of the petitioner were such as to entitle her to a possessory judgment, if proved, and that the proof was sufficient to establish them. The Sheriff (Bell) altered, holding that, even if the case could be treated as a possessory one, the evidence upon which possession was based was not credible. The respondent obtained decree for his taxed account of expenses.

The petitioner advocated. After the advocation was brought the petitioner died, and her executor was sisted to the process.

The Lord Ordinary (Ormidale), before whom the process first depended, recalled the interlocutor of the Sheriff, and returned to that of the Sheriff-substitute.

The respondent reclaimed.

D.-F. Moncrieff and W. A. Brown, for him, argued—The case, as originally laid in the petition, was one of march fence, and it was incompetently altered on adjustment by the introduction of the statement that the ditch was made by a portion of land taken from each property. There is no relevant allegation of common property, because it is distinctly said that stones were laid in the centre of the ditch to mark the boundary, and, if the ditch was common property there was a *pluris petitio* in the petition, for it prayed for a restoration of the whole ditch to its former condition. The petitioner's contention was excluded by her titles, for they contained no mention of a ditch as the boundary of her lands, and a possessory judgment could not be founded upon a title which did not clearly include the subject in dispute. Assuming the petitioner's case could be dealt with as a possessory one, her contention failed—(1) because she had not relevantly set forth possession of the ditch, the only statement being that she had possessed her pendicle and its pertinents; (2) because the possession proved was not the possession alleged, assuming there was a sufficient allegation; (3) be-