

COURT OF SESSION.

Saturday, October 19.

FIRST DIVISION.

ANNE LOWE AND HUSBAND, PETITIONERS.

Factor—A. S., 13th February 1730.

Held, under the Act of Sederunt, that a factor failing to lodge accounts is liable in a half year's salary for each year in which he so fails.

This was an application which was originally made to Lord Mackenzie, setting forth that the factor on a trust-estate had, *inter alia*, failed to lodge any accounts in terms of the A. S., 13th February 1730, from the date of his appointment, 2d June 1855, till on or about 14th February 1868, and thereafter that he had failed to lodge annual accounts of his intromissions for the two years ending 14th January 1870. An interim audit of his accounts had been made, embracing the period ending 14th January 1868, and he had then been allowed to remain in office; but, in regard to the subsequent period, the Lord Ordinary was moved, under the 4th section of the said A. S., to impose a penalty on the factor of not less than half a year's salary for each of the two last years in which he had failed to lodge accounts. That section is in these terms, viz. :—“Such factor shall once every year give in a scheme of his accounts, charge and discharge, to the clerk aforesaid (the clerk to the process), that all concerned may have access to see and examine and provide themselves with proper means of checking the same, wherein, if the said factor fail, he shall be liable to such a mulct as the Lords of Session shall modify, not being under an half year's salary.”

The Lord Ordinary reported the matter to the Court.

The petitioners moved the Court to impose a penalty, in terms of the Act of Sederunt, on the factor, and contended that, according to the proper construction thereof, he was liable in at least half a year's salary for each of the two years wherein the failure had occurred. In support of his contention, he referred to the cases of *Lambe v. Ritchie*, Dec. 14, 1837, 16 S. 219, and *Nairn*, March 4, 1863, 1 M. 515.

There was no appearance for the factor, and he had previously been removed from office.

At advising—

LORD PRESIDENT—This argument having been *ex parte*, we were naturally anxious to be quite sure whether the point were settled.

It is now clear that it has been decided in several cases that the *minimum* fine is one-half of each year's salary during which the accounts are not lodged. It is unnecessary to go into the previous cases. In that of *Nairn*, Dec. 4, 1863, 1 Macph. 515, I delivered the judgment of the Court. Though from the report in Macpherson there appears to be a doubt as to whether the factor was mulcted for one year only or for each year, I was strongly of opinion that it was for each year, because the Lord Ordinary says so very distinctly in his note, and if I had differed from him I should have remarked upon it. My recollection is justified by the report in the Scottish Jurist, vol. xxxv, p. 312, from which it appears distinctly stated that the fine was to be for each year; and upon refer-

ence to the Session Papers, I find that the Jurist report must be correct. I am satisfied therefore that the case of *Nairn* is a direct authority on this point, and following as it does a series of previous decisions, there can be no doubt as to the construction of the section of the Act of Sederunt.

It is plain that Simpson must suffer loss of one-half of his commission for each of three years from 1865.

The other Judges concurred.

The Court pronounced the following interlocutor:—

“Finds that the said James Yates Simpson failed to lodge his account for each of the two years ending 14th January 1870, in terms of the Act of Sederunt of 13th February 1730; therefore mulct the said James Yates Simpson in the sum of £11, 9s. 10d., being one-half of his commission for the said two years, in terms of the said Act of Sederunt: Find that the balance due by the said James Yates Simpson on his intromissions, in terms of the Accountant's report, No. 114 of process, is £3, 1s., which, with the said mulct of £11, 9s. 10d. makes the sum due by him to the trust-estate mentioned in the proceedings amount to £14, 10s. 10d., and decern against the said James Yates Simpson for payment to Robert Cameron Cowan, the present judicial factor on the said trust-estate, of the said sum of £14, 10s. 10d. sterling: Find the said James Yates Simpson and his cautioner liable in the expenses of the petition, in so far as not already found due; allow an account thereof to be given in, and, when lodged, remit the same to the auditor to tax and report.”

Counsel for Petitioners—Brand. Agents—M'Caul & Armstrong, W.S.

Friday, November 1.

FIRST DIVISION.

SPECIAL CASE—ROBERT TAYLOR
TRAQUAIR AND HIS CURATORS, AND
MISS AGNES MARTIN.

Testament—Mutual Settlement—Revocation, Power of—Legatum rei alienæ—Surrogatum.

Two sisters, by a mutual settlement bearing to have been granted from their affection to one another, conveyed each their estate, heritable and moveable, to the other in *liferent*, if she should survive her, and to a nephew of the granters in fee. The granters reserved the *liferent* of the estates respectively conveyed by them, and also power “at any time during our joint lives, to alter, innovate, or revoke these presents, in whole or in part.” After the death of one of the sisters, the survivor executed a disposition, by which she conveyed the household furniture, which was her own, and a house of which the titles stood in the joint names of her sister and herself, to M. in *liferent*, and the nephew in fee. *Held*, in a question between M. and the nephew, that the destination of the fee of the respective estates in the mutual settlement was purely testamentary, and that the survivor could alter the same in so far as regards her own