COURT OF SESSION,

Thursday, Oct. 21.

SECOND DIVISION.

[Lord Shand.

ROBERT YOUNG (STEWART'S TRUSTEE) *v.* STEWART & OTHERS.

Succession—Vesting—Clause of Survivorship.

Trustees were directed to make payment to the truster's wife, in the event of her surviving him, of a free annuity, and to hold the whole residue of his estate for the use and behoof of a son and three daughters, equally amongst them. The share of the son was declared to be payable on majority, and that of the daughters on majority or marriage, except in so far as regarded the capital necessary for the security of the annuity to the truster's widow, as to which the shares were only to become payable upon her death, "if she shall survive the respective terms of payment." The trustees were also empowered to advance money to the children for maintenance and education "until the said respective terms of payment." Then followed a clause of survivorship, providing that if any of the children should die "before the terms of payment of their respective provisions," his or her share should go to the survivors or to lawful issue if any.—*Held* that the rights of the children in the whole estate vested on the majority of the son and the majority or marriage of the daughters.

This was an action of multiplepoinding brought by Robert Young, solicitor in Elgin, as surviving trustee of the late Major-General William Stewart. The parties called were the son and the representatives of the deceased daughters of General Stewart. The question arose upon the construction of the trust-disposition and settlement of General Stewart, whereby, after directing payment of his debts and the expense of executing the trust, and the delivery to his wife of his household furniture as her own property, he appointed his trustees to make payment to his wife, in case of her surviving him, of a free yearly annuity of £220, payable half-yearly. His deed then proceeded, "and after answering the above purposes, I hereby direct and appoint my said trustees to hold and retain the whole residue and remainder of my estate and effects, heritable and moveable, for the use and behoof of Thomas, Margaret, Georgina, and Barbara Stewart, the children procreated of my marriage with the said Mrs Mary Brown or Stewart, my spouse, and that equally amongst them, share and share alike, declaring that the share of my said son shall be payable to him on his attaining the years of majority, and the shares of my daughters on their respectively attaining majority or being married, except in so far as regards the capital which it may be necessary to set apart and reserve for securing the foresaid annuity to my said spouse, as to which the shares of the said children shall be payable only upon their mother's death, if she shall survive the respective terms of payment above mentioned." The deed then gave a power of advancement to the children out of the capital or interest of their respective provisions for their maintenance and education, or otherwise, "until the said respective terms of payment."

Then followed a clause of survivorship in the following terms:—"Declaring that in case any of said children should die before the terms of payment of their respective provisions without leaving lawful issue, his or her share shall devolve on and belong to the survivors equally, and the lawful issue of any of them so predeceasing should be entitled to the share or shares of their parents."

The question between the parties was whether this clause of survivorship had the effect of suspending the vesting of right to part of the residue of the estate until the death of the late Mrs Stewart which took place in March 1874, or whether it related only to the majority of the truster's son and the majority or marriage of his daughters respectively, as the time at which the vesting of a complete share of the residue of the estate in each child took place.

General Stewart died in June 1836, and in November 1842 his trustees authorised a division of the trust funds to be made, by which they retained a sum of £6300 to meet the annuity of £220 a-year bequeathed by General Stewart to his wife, and divided the balance of the estate, amounting to £4502, among his children in equal shares. The present action related to this sum of £6300, with accumulations, which brought the fund up to upwards of £7100, as the interest received by the trustees from time to time was more than sufficient to meet Mrs Stewart's annuity.

The claimants averred that Thomas Hyslop Stewart (General Stewart's son) was lost on board a vessel which sailed from Bombay in the year 1843, and that he died without issue, and they were allowed a proof of this averment. He attained majority in 1841. General Stewart's daughters, who were all married, predeceased their mother. Two of them, viz., Mrs Margaret Stewart or Mackenzie, the eldest, and Mrs Barbara King Stewart or Leslie, the youngest, left children of their marriage. The other daughter, Georgina, afterwards Mrs Lyon Fraser, died without issue.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 12*th April* 1875.—Having considered the cause, Finds that according to a sound construction of the provisions of the trust-disposition and settlement of the late Major-General William Stewart, mentioned on record, the rights of his children in the residue of his trust-estate, regulated by that deed, vested in them in equal shares—in the case of the truster's son, Thomas Hyslop Stewart, on his attaining majority in or about the year 1841, and in the case of his daughters Margaret, Georgina, and Barbara Stewart, on their respectively attaining majority or being married, whichever of these events first occurred, and that there was no postponement of the vesting of any part of the residue of the estate in these children, or in the survivors, until the death of their mother, Mrs Mary Brown or Stewart: Appoints one-fourth of the fund *in medio* to be retained until the averments in regard to the alleged death of Thomas Hyslop Stewart shall have been disposed of on the proof now in the course of being taken; and in regard to the remaining three shares, sustains the claim of Miss Mary Stewart Mackenzie to one of said shares; the claim of James Lumsden and others,

trustees under the antenuptial contract of marriage between George Abercromby Young Leslie and Mrs Barbara King Stewart or Leslie, to another of said shares; and the claim of Simon Keir and Alexander Mackenzie, trustees under the antenuptial contract of marriage between Thomas Lyon Fraser and the deceased Mrs Georgina Brown or Fraser, to another of said shares, and ranks these claimants accordingly, and decerns; reserving all questions of expenses."

"*Note.*—(After narrating the facts of the case the note proceeded).—The effect of the clause of survivorship is to suspend the vesting in the children until 'the terms of payment of their respective provisions;' for in the event of any of the children dying before 'the term of payment of their respective provisions' without issue, his or her share is given to the survivors or survivor. The claimants, who represent the interests of children who died leaving issue, maintain that two separate periods of vesting were created by the deed in the event, which occurred, of Mrs Stewart surviving her husband,—the first with reference to the general residue, excepting from it the sum set apart to meet Mrs Stewart's annuity, and the second at the death of Mrs Stewart, with reference to the sum so set apart, and they maintain consequently that any children who predeceased Mrs Stewart acquired no right to a share of the fund liferented by her. Mrs Lyon Fraser's trustees, on the other hand, maintain that the rights of the children in the whole estate vested on the majority of the son and the majority or marriage of the daughters. I am of opinion that the latter contention is sound.

"Having regard to the particular phraseology of the deed, there is, I think, room for saying that the language admits of either construction—that is to say, the clause of survivorship in reference to the terms of payment of the provisions in favour of the children may be held to refer either exclusively to the majority of the son and the majority or marriage of the daughters, or to refer to these events and also as regards the sum retained to meet Mrs Stewart's annuity to the date of her death. The words used, 'terms of payment of their respective provisions,' are preceded by two clauses, in each of which the words 'the respective terms of payment' plainly refer only to the majority or marriage of the children, but in the provision for reserving a capital sum for the annuity which is made the subject of an express exception from the fund payable on majority or marriage, the sum reserved is declared to be payable to the children 'only on their mother's death.' There are thus two terms of payment of money to the children, if Mrs Smith should survive her husband, and the expression referring to terms of payment in the clause of survivorship may either, like the previous expressions, refer only to majority or marriage, or also to Mrs Stewart's death. I am, however, of opinion that, although the language be ambiguous to the extent of admitting of being read in either of the two ways stated, there are considerations in favour of holding the clause of survivorship to apply to one term of payment only in the case of each child; in which case the full right to a share of the whole residue vested in the truster's son Thomas at the date of his attaining majority, and in his daughters on their attaining majority or being married.

"The considerations to which I refer are—

"(1) The fact that similar words occurring in the deed plainly refer to the majority or marriage, or marriage of the children only.

"(2) That the general presumption, where language of somewhat doubtful construction is used, is to hold children's provisions as vesting on majority or marriage, because the estate provided then becomes useful, not only in so far as immediately payable, but as a fund of credit to each child, with reference either to entering on business or to marriage-contract provisions.

"(3) The provisions granted in this and similar cases are intended as an equal benefit to each child, the estate being granted share and share alike, and it is reasonable to infer an intention to give that equal benefit to the full extent at the majority or marriage of a child, where that contingency is made the time of vesting. That period unquestionably is the term of vesting as to the general estate in the present case, as all the parties are agreed; and it is an element also in favour of the vesting of the whole estate at that time that the provisions granted to the children are given in lieu of all claims, legal or conventional, on their father's estate.

"(4) The presumed intention of a testator must, I think, be held to be against an unsound and somewhat anomalous direction for the vesting of particular portions of the estate in his children, either as a class or *nominatim*,—not at one definite time, but from time to time, as funds became divisible. In the present case there was but one annuity, but the case would be the same in principle if there had been several annuities and liferents of separate funds. It appears to me to be reasonable to hold, where the language admits of it, that one period of vesting was intended to which the clause of survivorship would apply, rather than a period of vesting for the general estate, and other separate periods for particular sums falling in from time to time. The importance of this view is illustrated in the present case by the circumstance that having a separate term of vesting might readily enough have led to intestacy as regards the large fund retained to meet Mrs Stewart's annuity. For if Mrs Stewart had been predeceased by all her children without their leaving issue, they would all have been deprived of any benefit of what turned out to be the greater part of their father's estate, even as a fund of credit, on their attaining majority or marriage, and there would have been intestacy in regard to the fund *in medio*.

"(5) The Court has repeatedly asserted the principle that the intention to postpone vesting is not to be presumed by the mere provision for a liferent, and is even less to be presumed in the case of funds set aside to provide an annuity or annuities. The primary purpose of a testator in these cases is to benefit the annuitant, and not to take away from his residuary legatees any benefit which is consistent with that object, and the vesting may quite possibly take place notwithstanding the annuity, and without waiting for the death of the annuitant.

"The case of *Pursell* v. *Newbigging*, House of Lords, 2 Macqueen, 273, may be referred to in support of this doctrine, and also the cases of *Dickson* v. *Halbert*, 13th February 1851, 13 D. 675, and *Watson* v. *Macdougall*, June 4, 1856, 18 D. 971. The concluding passage of the opinion of

the Lord President in this last case supports the general view to which I have given effect. That view is also supported by the recent case of *Muir's Trustees*, October 23, 1869, 8 Macph. 53. The case of *Pearson* v. *Casamajor*, House of Lords, M'Lean and Robinson, page 685, is an instance in which the vesting of the estate in separate parts was contemplated as a contingency, as appeared from the clause of survivorship, but the terms of payment were there expressly mentioned. 'being one or more, as the case might be,' making it quite clear that the testator intended that in certain events there might be more than one term of vesting. The sound general rule to be applied is, I think, that where the language used is doubtful, as in the present case, the intention of the testator must be presumed to be against separate terms of vesting, and that this presumption can only be held to be overcome by the use of language which unequivocally shows the purpose of the testator to introduce separate terms.

"The rules of construction adopted in the law of England, as stated by Sir Edward Williams, are to the same general effect, 6th edition, pages 1159 and 1182. In the former of these passages he states, as the result of the authorities to which he refers—'In construing a settlement or will which makes a provision for children subject to a prior life interest, the Court leans strongly in favour of that construction by which the children will take a vested interest at twenty-one or marriage, whether they survive the tenant for life or not, and if the instrument is incorrectly or ambiguously expressed, or if it contains conflicting and contradictory clauses, so as to leave in a degree uncertain the period at which, or the contingency upon which the shares are to vest, the rational presumption is that the child acquires a vested and transmissible interest at the period when it is most needed, viz., at twenty-one if a son, or on marriage or at that age if a daughter.' And in the latter—'And here, it may be mentioned, that if a legacy is given to "A" for life, and after his death to his children at majority or marriage, with a gift over in the event of any one of them dying before his or her share becomes "payable," the Court will lean strongly (particularly in the case of a will making a provision for children) in favour of construing the word "payable" to refer to the majority or marriage of the legatees and not to the period of distribution, so that if any one of the children should happen to die after having attained majority or been married in the lifetime of the tenant for life, the legacy shall not go over, but shall be considered as having vested absolutely at the majority or marriage.'

"In the view which I have taken of the deed it is unnecessary to decide whether the accumulations from time to time from the surplus interest of the sum of £6300, beyond what was required for payment of the annuity, and now amounting in all to about £800, was payable to the children from time to time; but I am disposed to think that even if the capital sum retained had not vested they would have had right to these accumulations, because the sum of £6300 appears to have been set aside as being quite sufficient to meet the annuity."

The claimants, with the exception of Mr and Mrs Lyon Fraser's Trustees, reclaimed.

Authorities for reclaimers—*Young and others* v. *Robertson and others*, Feb. 11, 1862, 4 Macqueen, 314; *Viner* v. *Hillon*, July 13, 1860, 22 D. 1436; *Pearson* v. *Casamajor*, July 18, 1839, Maclean and Robinson, 685.

Authorities for respondents—*Pursell* v. *Newbigging*, May 8, 1855, 2 Macqueen 273; *Dickson* v. *Halbert*, Feb. 13, 1851, 13 D. 675; *Watson* v. *Macdougall*, June 4, 1856, 18 D. 971.

At advising—

LORD JUSTICE-CLERK—This question does not involve any disputed law, but is one merely of construction. There is no doubt that the mere postponement of the term of payment does not postpone vesting. A presumption, however, arises in favour of such a postponement where there is a clause of survivorship. There can be no doubt that in the present case vesting did not take place before majority in the case of the son and majority or marriage in the case of the daughters. But the question is whether the clause of survivorship applies also to the second term of payment, viz., the death of General Stewart's widow. The Lord Ordinary has found that it does not. I concur, and for much the same reasons.

General Stewart directs his trustees, in the first place, to make payment to Mrs Stewart, in the event of her surviving him, of a free yearly annuity of £220. He then directs his trustees "to hold and retain the whole residue and remainder of my estate and effects" for the use and behoof of his children, to be payable to them in equal shares. That is the bequest of the whole residue to certain legatees, who, as such, could only have taken under burden of the annuity already provided. The term of payment is, in the case of the son, directed to be majority, and in the case of the daughters majority or marriage. The next clause would appear to be parenthetical, "except in so far as regards the capital sum which it may be necessary to set apart and reserve for securing the foresaid annuity to my said spouse, as to which the shares of the said children shall be payable only upon their mother's death, if she shall survive the respective terms of payment above mentioned." This result would have followed had there been no such clause. But the expression here used, "terms of payment," must of course refer to the majority or marriage of the children, as the widow could hardly survive the period of her own death. The same remark applies to the similar expression in the next clause, which the trustees are authorised to make outlay out of the capital to the children "for their maintainance and education, or otherwise until the said respective terms of payment." It is absurd to suppose that such advances were to be made to married daughters, nor could they be made out of the capital sum which the trustees were to retain in security of the widow's annuity until her death. The question then is, whether, when the deed goes on to provide for the case of children dying "before the terms of payment of their respective provisions," that expression includes the period of the widow's death? I think not. Similar words occurring previously in the deed refer to the majority or marriage of the children only. That which is to devolve in case of survivorship is a share—not two shares, or a part of

a share. Nor is there the slightest indication in the deed that the truster contemplated two periods of vesting.

There is a difficulty which I do not attempt to disguise with regard to the provision by which the lawful issue of a child predeceasing the terms of payments is to succeed to the parent's share. This would seem to point, in the case of the daughters at least, to the period of the widow's death. But upon considerrtion of the whole deed, I am of opinion that this is not the meaning of this clause.

LORDS NEAVES, ORMIDALE, and GIFFORD concurred.

The Court adhered.

Counsel for Reclaimer — Asher — Darling. Agents—Mackenzie,—Innes & Logan, W.S.

Counsel for Respondents—Gloag. Agents—Gillespie & Paterson, W.S.

Friday, October 22.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WILSON *v.* MACKIE.

Damages—Wrongous Arrestments—Malice—Want of Probable Cause

In an action of damages for injury alleged to have been caused by the arrestment of the pursuer's personal funds upon the dependence of an action against him as executor—*held* (*dub.* Lord Deas) that proof of malice and want of probable cause was not necessary.

This was an appeal from the Sheriff-court of Lanarkshire in an action of damages at the instance of William Wilson, baker, Glasgow, as an individual and as executor of the deceased John Wilson, against Archibald Mackie, provision merchant, Glasgow, as an individual, and against him and his son Archibald Mackie junior, as partners of the firm of Archibald Mackie. Previously to the raising of this action there had been various legal proceedings between the parties in the Sheriff-court of Glasgow; in particular on 4th December 1872, the defenders, or one or other of them, had raised a summons against the pursuer, in his capacity of executor, for a balance of £142, 6s. 6d., which they alleged to be due to them by the deceased John Wilson. The pursuer averred that the defenders maliciously, without probable cause, and for the purpose of injuring his personal credit, had, on the dependence of that action, used arrestments in the hands of various persons of funds belonging to the pursuer personally, and not in any way connected with the executry estate, these arrestments proceeding upon the warrant contained in the foresaid summons against the pursuer as executor. None of the executry funds were ever held by any of the parties in whose hands the pursuer's funds were thus arrested. The schedules of arrestment used were in the following terms:—"I, Alexander Macintyre, sheriff-officer, by virtue of a libelled summons from the Sheriff-court books of Lanarkshire, containing warrant to arrest, dated at Glasgow, the fourth day of December 1872 years, raised at the instance of Archibald Mackie, provision merchant, 82 Main Street, Anderston, Glasgow, *pursuer*, against William Wilson, baker, Thistle Street, Glasgow, executor decerned and confirmed to the late John Wilson, baker in Glasgow—in Her Majesty's name and authority, and in that of said Sheriff, lawfully fence and arrest in the hands of you, the sum of Three hundred pounds sterling, more or less, due and addebted by you to the said William Wilson, together also with all goods and gear, debts, sums of money, or any effects whatever, lying in your hands, custody, and keeping, pertaining, or in any manner of way belonging to the said William Wilson, or to any person or persons for his use and behoof, all to remain under sure fence and arrestment, at the instance of the said pursuer, aye and until payment be made or security be found, acted in the Sheriff-court books for Lanarkshire, as accords of law, with certification.—This I do upon the seventh day of December 1872 years, before Alexander Macintyre junior, residing in Glasgow, *witness.*"

A petition for the loosing of these arrestments was presented to the Sheriff, which was granted without caution, and his judgment was sustained on appeal. The judgment proceeded on the footing that it was the personal and not the executry funds of the pursuer that had been arrested. In the present action the sum of £150 in name of damages was claimed for the loss, injury, and damage which the pursuer had sustained through the actings of the defenders, or of one or other of them. The defenders pleaded that the arrestments had been legally and regularly laid in virtue of a warrant of Court.

The defender Archibald Mackie senior having been sequestrated, his trustee did not enter an appearance, and on 15th July 1873 the Sheriff-Substitute pronounced an interlocutor holding him confessed, and decerning against him as libelled.

Archibald Mackie junior being thus the only defender, the Sheriff-Substitute (GUTHRIE) after a proof pronounced the following interlocutor:—

"*Glasgow*, 10*th December* 1874.—Finds that the individual defender Archibald Mackie junior maliciously and wrongously caused the arrestments libelled to be used against the funds of the pursuer: Finds him liable in damages therefor jointly and severally with the other individual defender Archibald Mackie, against whom decree by default has already passed for the whole sum sued for: Assesses the said damages at £25: Finds the defender Archibald Mackie junior liable in expenses.

"*Note.*—In the conjoined actions between the same parties the Sheriff-Substitute has found that a partnership exists between the Mackies to the effect at least of making them responsible to the present pursuer in respect of his claim in that action. But he is not sure that the principles of agency on which he proceeded there are applicable to a claim of damages for a malicious and illegal act which is not properly within the agency of a partner acting for his firm. Possibly the Sheriff-Substitute may take too narrow a view of a firm's liability for the way in which its members use arrestments in the course of their business. But he thinks that in the present action, which is directed against both the Mackies, as individuals as well as partners, and concludes