

The fifth purpose provided for a case like the present—*Paxton's Trustees v. Cowie*, July 16, 1886, 13 R. 1191.

At advising—

LORD PRESIDENT—There are just two questions which fall to be determined by this special case; the first is, Whether Mrs Ronaldson, as the survivor of the two liferentices, is entitled to the liferent of the whole residue of the trust-estate in consequence of the death of Mrs Clark and her daughter? That of course must depend upon whether any right of accretion existed between the two liferentices. The second question is, Supposing one-half of the liferent to be undisposed of, does it fall into residue or intestacy?

Upon the first question there is, I think, no room for doubt. By the fourth purpose the trustees are directed as follows—[reads the fourth purpose]. Now, the meaning of this undoubtedly is, that the sisters are to have equally between them during their joint lives the free annual income of the residue, but it is clear that the share of each is to be separable, because there is the provision that if either of the sisters predecease the testatrix leaving children, the trustees are to pay to the children of such predeceasing sister the mother's share. That being so, there can be no accretion. I think that the doctrine of *Paxton's Trustees v. Cowie* directly applies, and that the present case is *a fortiori* of it.

The next question which arises is, what is to become of the one-half of the liferent of residue undisposed of and set free by the death of Miss Clark? The general rule is that when in a deed like the present you find a residuary clause, the existence of such a clause prevents intestacy. It is not, however, necessary to appeal to the general rule in the present case, for the construction of this deed makes it abundantly clear that there is no room for intestacy here. There are two residues mentioned in this settlement; the first is referred to in the fourth purpose as follows—[reads the fourth purpose]—that is to say, the trustees were to create a residue by means of sale and realisation, and this residue is to support the burden of the liferents. But at the end of this clause reference is made to another residue, the nature of which is set out in the fifth purpose. It is to be observed that there is no reference back in this section to the residue mentioned in the fourth purpose; it is quite separate, and it is provided that whatever belongs to the estate at the death of the surviving liferentrix is to fall into this residue.

As regards this second question, also, I do not think there is any difficulty. In consequence of the existence of this residuary clause there is no room here for intestacy.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent from illness.

The Court answered the first and second questions in the negative, and the fourth question in the affirmative.

Counsel for the First and Second Parties—Lorimer. Agent—N. Briggs Constable, W.S.

Counsel for the Third Parties—Low. Agents—Fyfe, Ireland, & M'Kay, W.S.

Friday, January 27.

## FIRST DIVISION.

[Lord Lee, Ordinary.]

ROSE v. STEVENSON AND OTHERS.

*Title to Sue—Decree for Expenses—Assignment.*

An assignation was granted by the defender in an action of a decree for expenses which he had obtained against the pursuers. The assignee then raised an action against persons other than the pursuers, to recover the amount of the expenses, on the ground that they were truly the *domini litis*. Held that the assignee had no title to sue.

In August 1883 Andrew Brodie and Malcolm Neil, weavers, Kilbarchan, Renfrewshire, raised an action of declarator of right of way against Thomas Mann of Glentyan. Judgment was pronounced in the Court of Session, and in the House of Lords in favour of the defender, with expenses, which amounted in all to £860, 19s. 4d.—*Brodie, &c. v. Mann*, June 13, 1884, 11 R. 925, 21 S.L.R. 657, *revd.* May 4, 1885, 14 R. (H. of L.) 52, and 22 S.L.R. 730.

By assignation dated 11th February 1887 Mann assigned to Andrew Rose, commercial traveller, 605 Great Eastern Road, Glasgow, his decree for these expenses. The assignation was in these terms—“Considering that an action of declarator and interdict was raised against me in the Court of Session at the instance of Andrew Brodie, weaver, Ewing Street, and Malcolm Neil, weaver, Ewing Street, both in the village of Kilbarchan and county of Renfrew, and that after sundry procedure, including an appeal to the House of Lords at my instance, and a petition to the Court of Session at my instance to have the judgment of the House of Lords applied, I was assailed from the conclusions of that action, and the said Andrew Brodie and Malcolm Neil were decreed and ordained to make payment to me of the sum of £438, 6s. 5d. sterling, being the taxed amount of expenses of process incurred by me in the Court of Session, including the expenses of the said petition and procedure thereon, and the sum of £1, 3s. 8d. as the dues of extracting said decree, conform to extract decree of the Court of Session dated 3rd December 1883, and 10th June and 11th July, both in the year 1885, and extracted 13th August 1885, as the same in itself more fully bears, and considering also that in the said appeal to the House of Lords the said Andrew Brodie and Malcolm Neil, respondents, were ordered to pay or cause to be paid to me the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk of the Parliaments, conform to order and judgment of the House of Lords dated 4th May 1885, and that the said costs were certified to amount to £421, 9s. 3d., conform to certificate given under the hand of the Depute-Clerk of the Parliaments dated 7th August 1885; and now seeing that for certain good and onerous causes and considerations, but without any money being paid to me, I have agreed to grant these presents; therefore I have assigned and conveyed, as I do hereby assign,

convey, and make over, to and in favour of Andrew Rose, commercial traveller, 605 Great Eastern Road, Glasgow, his executors or assignees, the said sums of £438, 6s. 5d. and £1, 3s. 8d. contained in the said decree of the Court of Session, and the said sum of £421, 9s. 3d. contained in the said certificate by the Depute-Clerk of the Parliaments amounting said several sums to £860, 19s. 4d., and whole interest due and to become due thereon during the not-payment, together with the said decree of the Court of Session, the said order and judgment of the House of Lords, and the said certificate by the Depute-Clerk of the Parliaments, and the whole tenor and contents thereof, with all that has followed or that may be competent to follow thereupon in so far as relative to the said several sums, with all my right, title, and interest in and to the premises, surrogating and substituting the said Andrew Rose and his foresaids in my full right and place in the premises, with power to him and his foresaids to ask, crave, sue for, and uplift the sums of money hereby assigned, and upon payment to grant discharges or conveyances thereof, either in whole or in part, and generally to do everything in the premises that I might have done myself before granting hereof; which assignation above written I bind myself and my heirs and executors to warrant to the said Andrew Rose and his foresaids from all facts and deeds done or to be done by me in prejudice thereof, and I have herewith delivered up to the said Andrew Rose the foresaid extract-decree of the Court of Session and certificate by the Depute-Clerk of the Parliaments to be used by him and his foresaids as their own proper writs and evidents in all time coming.”

Rose then raised an action for payment of the sum of £860, 19s. 4d. against James Stevenson and various other parties residing in Kilbarchan. The pursuer averred in Cond. 9 that although the action of declarator against Mann had been raised in the names of Andrew Brodie and Malcolm Neil, it was truly instituted and carried on by and for behoof of the defenders, who were the true *domini litis*, and directed and controlled the same; that Brodie and Neil were selected for their poverty, with the object of preventing Mann, if successful, from recovering his expenses from the defenders, who were members of a committee appointed at a public meeting to carry on the action.

The defenders in their answer to Cond. 10 averred that the assignation conferred no right on the pursuer to sue them; that it was merely an assignation of a decree against Neil and Brodie, the pursuers in the action of declarator, who were not defenders in the present action. They averred that Mann was the true *dominus litis*, and that he should be ordained to sist himself, and that the pursuer had no means to carry on a litigation in the Court of Session.

The pursuer pleaded—“(1) Defenders being the real *domini* of the action of declarator and interdict mentioned in the condescendence, are liable conjunctly and severally in payment of the expenses incurred by the said Thomas Mann in the said action, and decreed for in his favour, and the pursuer, as assignee

of the said Thomas Mann, is entitled to decree as concluded for with expenses.”

The defenders pleaded no title to sue.

The Lord Ordinary (LEX) on 11th January 1888 pronounced this interlocutor:—“The Lord Ordinary having heard counsel in the procedure roll upon the defenders’ preliminary plea, before answer allows the defenders a proof of their allegations in answer to condescendence 10, and to the pursuer a conjunct probation; and appoints said proof to take place before the Lord Ordinary on a day to be afterwards fixed.

“*Opinion.*—In this action the pursuer founds upon an assignation in his favour by Mr Thomas Mann, of two sums amounting together to £862, 19s. 4d., being the expenses connected with a litigation in the Court of Session and House of Lords, for which Mr Mann obtained against Andrew Brodie and Malcolm Neil, other parties to the litigation, a decree of the Court of Session to the extent of £438, 6s. 5d., and an order and judgment by the House of Lords to the extent of £421, 9s. 3d.

“The pursuer alleges as his ground of action that the debtors named in the assignation, and against whom alone the debt is constituted (*viz.*, Andrew Brodie and Malcolm Neil), were merely nominal pursuers in that litigation, and were truly put forward by the defenders in this action in order to secure them against liability for expenses.

“The first question raised by the defenders is, whether the pursuer by virtue of the alleged assignation had a title to sue such an action? The assignation makes mention only of the sums themselves, together with the decree of the Court of Session, the order and judgment of the House of Lords, ‘and the whole tenor and contents thereof, with all that has followed or may be competent to follow thereupon, in so far as relative to the said several sums, with all his the said Thomas Mann’s right, title, and interest in and to the premises.’ But although there is no mention made of any right to sue other debtors as being truly liable in the sums contained in the decree against Brodie and Neil, the assignation contains the usual clause surrogating and substituting the pursuer in Mr Mann’s full right and place in the premises, with power to ask, crave, sue for, and uplift the sums of money thereby assigned, and upon payment to grant discharges, and generally to do everything in the premises that the said Thomas Mann might have done himself before granting the said assignation. The assignation contains the usual warrandice from fact and deed.

“I have had some difficulty in sustaining the title, more especially as no authority or precedent was cited for allowing the assignee to a debt constituted against one person to raise action against another as being the true debtor. I have come, however, to be of opinion that the title is sufficient. Assignations carry to the assignee all rights that corroborate or strengthen the right conveyed, though these corroborative rights should not be specially mentioned in the conveyance. (Ersk. iii. 5, 8; Stair iii. 1, 17; *Cultie v. Earl of Airlie*, reported by Stair, 2 Br. Sup. 197; *Lyell v. Christie*, March 11, 1823, 2 S. 288). It appears therefore to be sufficient to entitle the assignee to proceed against all

persons who are liable that the debt itself be conveyed with all the cedent's rights therein.

"II. Another point raised by the defenders, however, is that Mr Mann, and not the pursuer, is the real *dominus litis* in the case. It is alleged that Mr Mann is the person really interested in the action, that he gave instructions for raising it, and is now directing it, and supplying funds for carrying it on. It is also alleged that the pursuer is a person without means, who has entered into a collusive agreement with Mr Mann for the purposes of this action. As no consideration appears to have been given for the assignation, I think that the same course must be followed here as was adopted in the case of *Jenkins v. Robertson*, 7 Macph. 739; and that before deciding anything as to the pursuer's right to sue this action, without either bringing forward Mr Mann or finding caution for expenses, the defenders must be allowed a proof of the allegations contained in answer to Cond. 10, so far as bearing on this point."

The defenders reclaimed, and argued—The assignation did not confer a right of action against anyone except the two persons named in the decree—*Cultie*, 2 Br. Supp. 197. What was assigned was the decree against Brodie and Neil—*Mathieson v. Thomson*, November 8, 1853, 16 D. 19.

Argued for the pursuer—The only question at present was the value of the assignation. Mann had a title to sue, and he assigned all he had to Rose. This was not a corroborative right; it was the right itself which the pursuer sought to make good—*Hepburn v. Tait*, May 12, 1874, 1 R. 875; *Thomson v. Magistrates of Kirkcudbright*, January 23, 1878, 5 R. 561; *Kyle v. Kerr*, November 16, 1822, 1 S. 20; *Barbour v. Bell*, January 25, 1831, 9 S. 334; *Potter v. Hamilton*, July 19, 1870, 8 Macph. 1064.

At advising—

LORD PRESIDENT—I am of opinion that the pursuer here has no title to sue.

The Lord Ordinary seems to have entertained some doubts upon this matter, though in the end he saw his way to sustain the title. Looking at the Lord Ordinary's note, however, I do not think that his Lordship quite realised the real question between the parties, for he says—"I have had some difficulty in sustaining the title, more especially as no authority or precedent was cited for allowing the assignee to a debt constituted against one person to raise action against another as being the true debtor."

I do not think the present pursuer has an assignation to a debt, but only an assignation to a decree. The sum in the decree is the amount of expenses awarded to a successful party in a litigation. What Mann assigned to the pursuer, therefore, was and could be nothing but the decree for expenses incurred in the litigation. It was a decree against certain parties therein named, and clearly it could not be used against any others.

But the ground of the present action is that the defenders were the true *domini litis* in this litigation. The ground of action, however, is not the decree, but the special facts set forth in article 9 of the condescendence. Looking, then, at this assignation, it is impossible to hold that the cedent was assigning a right of action against

a different set of defenders from those mentioned in the decree.

I am therefore for recalling the interlocutor of the Lord Ordinary and dismissing the action.

LORD MURE concurred.

LORD ADAM—The only debt assigned here is a claim against Brodie and Neil constituted against them by this decree. But this decree is only a *modus probationis* in an action by Mann against those defenders. I therefore agree with your Lordship that the pursuer here has no title to sue.

LORD SHAND was absent from illness.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for the Pursuer—Gloag—Watt. Agents—Winchester & Nicolson, S.S.C.

Counsel for the Defenders—James Reid. Agents—Macpherson & Mackay, W.S.

Friday, January 27.

## FIRST DIVISION.

[Lord Fraser, Ordinary.]

THE LORD ADVOCATE *v.* STIRLING.

*Teinds—Valuation in cumulo—Surplus Teind.*

The teinds of a barony situated wholly in one parish were valued in 1773. In 1853 part of the barony was included in a new parish, which was in that year disjoined and erected *quoad omnia*, with the provision that the stipend payable from the disjoined lands to the minister of the former parish was to continue, the remaining part of the valued teinds being allocated to the new parish. In the locality of the new parish the free teind of that portion of the barony assumed to be included in it was converted, in a year when the fiars' prices were abnormally low, into victual, and allocated to the minister. On reconversion into money according to the fiars' prices of the succeeding years, the amount in money exceeded the free teind, and an overpayment was therefore made to the minister. The titular of the original parish raised an action against the proprietor of the barony for payment of the surplus teinds of his lands in that parish. *Held*, upon a construction of the decree of 1773, that the valuation was *cumulo*, and that therefore in ascertaining the amount of surplus teind the heritor was entitled to deduct the payments made for both parishes from the valued teind of the whole barony.

This was an action at the instance of the Lord Advocate, on behalf of Her Majesty's Commissioners of Woods, Forests, and Land Revenues, against Patrick Stirling, Esquire, of Kippen-davie, in the county of Perth, whose lands included the barony of Kinbuck, for payment of £91, 17s. 5½d. of surplus teinds for the lands of Easter and Wester Kinbuck, Mill of Kinbuck, Craigton, and Whitestone, for crops