have been inventoried, and he can therein fully vindicate his right to these effects. As stated by Lord President M'Neill in the case of *M'Kechnie*, v. *The Duke of Montrose*, 15 D. 626—'the process of sequestration, though a process for securing the landlord's rights, is also to some extent a process of repetition, for in it a person may claim to have articles withdrawn from the sequestration.' The proper course for the complainer is to enter appearance in the depending sequestration process, and not unnecessarily to multiply proceedings. In so far as regards the grounds or objections above stated, the whole matter has been competently brought before the Sheriff. It is for that Judge to pronounce, in the first instance, a decision upon these objections when stated to him, and he cannot, it is thought, be prevented from proceeding in the exercise of his jurisdiction by means of the interdict now craved by the complainer. The complainer can suffer no prejudice from following this course, because, if the Sheriff's judgment is adverse, he has his right of appeal.

"2. But although the respondent cannot be prevented from proceeding with his sequestration process, and obtaining the judgment of the Sheriff therein, he is not entitled, the Lord Ordinary is of opinion, to use any part of the articles averred to have been duly sequestrated by him, in carrying on the coal-workings and other works at Wallyford. His right of hypothec confers upon him no such power. The factor, who was on his application appointed by the Sheriff in terms of the powers conferred by the Act of Sederunt of 10th July 1839, § 152, to take charge of the sequestrated subjects, is not entitled to use them. The Lord Ordinary has accordingly granted interim interdict, prohibiting the respondent from using the sequestrated effects for carrying on the collieries and other works which were leased by the Messrs Christie. The respondent, in his answers, avers that the engines and other constructions erected upon the leasehold subjects by the Messrs Christie (commonly called trade fixtures) are his property, and were improperly inventoried in the process of sequestration. The Lord Ordinary considers that the respondent will require to show very special grounds to support his claim to the property of these subjects. None such have been averred by him, and the lease appears in some respects adverse to such a claim, inasmuch as it is thereby provided, with respect to engines, apparatus, or utensils fitted up by the tenant, that he shall, at the termination of the lease, have right thereto, if he thinks proper, and shall be entitled to take the same at a valuation, but not a part merely."

The complainer reclaimed.

The SOLICITOR-GENERAL and BALFOUR for him, argued that he was not bound to appear in the Sheriff Court, and was entitled to vindicate in any competent Court goods belonging to him which had been improperly included in the sequestration. The questions raised by the complainer were, in my view, sufficiently doubtful to entitle him to seek a decision of the Supreme Court, and to have the note passed.

At advising—

LORD-PRESIDENT—If the complainer were well founded in the first plea stated by Mr Balfour, viz., that the goods were not validly sequestrated, we should be bound to entertain the application and pass the note, because, if the goods are not legally sequestrated, they are not within the jurisdiction of the Sheriff in the process of sequestration. But I am not of that opinion. I think the construction of the prayer for sequestration, on which the argument proceeds, to be judaical. I am of opinion that it prays for sequestration of the goods as well as of the minerals. And, being of that opinion, I have no further doubt. Every other point that the complainer seeks to raise is competent in the Sheriff Court and that is the proper tribunal. I do not doubt the power of this Court to interfere, if they considered a case for interference to be made out. But they will be very slow to exercise this power where a competent and convenient remedy exists in the Sheriff Court.

The other Judges concurred.

The Court adhered.

Agents for the Complainer—Boyd, Macdonald, & Lowson, S.S.C.

Agents for the Respondent—Tods, Murray & Jamieson, W.S.

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*Saturday, May* 18.

## SECOND DIVISION.

### SPECIAL CASE—FERRIER *v.* FERRIER.

*Legacy—Vesting—Term of Payment.*

In a *mortis causa* trust-disposition and settlement a testator directed his trustees to retain from his estate the sum of £500, and pay over the free income thereof to his sister during her lifetime; and as soon as convenient after her death, or after his own death in case of his sister predeceasing him, to pay the £500 to his nephew; but if his nephew should die before the "period of payment," the said sum was to be disposed of otherwise. The testator died, having been predeceased by his sister. *Held* that the vesting of the legacy took place on the death of the testator, and was not to be suspended until the trustees should find it "convenient" to pay it.

This was a Special Case between Mrs Louisa Spence or Ferrier, widow, executrix, and universal legatee of William Ferrier, of the first part, and John Ferrier and James Ferrier, of the second part.

Alexander Black, bookseller in Brechin, died on 12th December, 1870, leaving a trust disposition and settlement, the 3rd purpose of which was to the following effect:—"My trustees shall retain from my estate the sum of £500 sterling, and pay over the free income or annual proceeds thereof half-yearly to or for behoof of my sister, Mrs Ann Black or Ferrier, during her lifetime, and after the death of my said sister, or after my own death in the event of the said Ann Black or Ferrier predeceasing me, that my said trustees shall, as soon thereafter as my trustees shall find it convenient, pay the capital of said sum of £500 to my nephew, the said William Ferrier, whom failing, to the lawful issue of his body equally; and in the event of the said William Ferrier dying before the period of payment of said sum of £500 without leaving lawful issue, my trustees shall pay over £200 thereof to the widow of the said William Ferrier, and the balance of said sum of £500 shall be divided equally between John and James Ferrier, brothers of the said William Ferrier." The moveable estate of the testator at his death was sufficient for the payment of his debts, and to meet all the

provisions in his trust-deed. Mrs Black or Ferrier, the testator's sister, predeceased him; her son, William Ferrier, survived him, but died on 18th May 1871, leaving a will constituting his wife sole executrix and universal legatee. The other nephews of the testator, John and James Ferrier, claimed the £300 left to them by the clause above quoted, on the ground that William had not survived the "period of payment." William Ferrier's widow, on the other hand, claimed the whole of the £500.

The questions submitted for the opinion of the Court were:—

"1. Whether the legacy of £500 vested in the said William Ferrier, and so was conveyed by his will to his widow, the first party?" or

"2. Whether the said William Ferrier died before the period of payment of the said legacy of £500, and the direction took effect to pay £200 thereof to his widow, and the remaining £300 to the said John Ferrier and James Ferrier?"

LEE, for Mrs Ferrier, contended that the legacy vested in William Ferrier *a morte testatoris*, and that there was nothing to show that the testator contemplated a different "period of payment," except in the event of his being survived by his sister, Mrs Black, in which case the legacy would have vested on her death.

M'LAREN, for John and James Ferrier, answered that the "period of payment" meant the time when it was convenient for the trustees to pay the money, and they were actually ready to pay it; and that William Ferrier must be held to have died before that period had arrived. He relied chiefly on the cases of *Howat's Trustees*, 1869, 8 Macph. 337, 7 Scot. Law Rep. 157; *Thorburn* v. *Thorburn*, 1836, 14 S. 485; and *Wilkie* v. *Wilkie*, 1837, 15 S. 430, where vesting was held to have been suspended until the period of "receiving payment," or that of actual division had arrived.

At advising—

LORD JUSTICE-CLERK—I do not suppose your Lordships are disposed to question what has been laid down in the authorities quoted to us, but the present case stands quite distinct from these. In these cases there was a period of receipt of payment, or of actual distribution of the testator's funds, entirely distinct from the period of the testator's death. In this case there were two alternative periods of payment, viz., the death of the testator, or the death of his sister, Mrs Black, in case she should survive him; but there is nothing to indicate the testator's intention that the legacy should not vest until some period subsequent to one of these events. The third purpose of the deed begins by directing the trustees to retain the £500, on the assumption that they actually had it in their hands. The remainder of the estate sufficed for payment of debts and the other legacies, and there was no reason why the trustees should delay to pay the £500. It was to be paid as soon as convenient after the death of the testator. I can, therefore, see no reason for holding that the period of payment was intended in any way to be postponed, or for departing from the ordinary rule that a legacy vests *a morte testatoris*.

LORD COWAN.—I concur in the view taken by your Lordship. I think the period of payment means the death either of the testator or of his sister. By the words "as soon thereafter as my trustees shall find it convenient," the testator merely expressed his desire that they should not be put to any inconvenience; and there is nothing to show that he intended to make the period of vesting dependent on their discretion.

LORD BENHOLME—It appears to me not to be the tendency of courts of law to hold that the vesting of rights should depend on mere accident or caprice. Unless there be some special and distinct reason that vesting should be suspended, the ordinary rule must be followed, and the legacy held to vest on the death of the testator. I am, therefore, of the same opinion as your Lordships.

LORD NEAVES concurred.

The Court accordingly answered the first question in the affirmative.

Agents—M'Kenzie & Kermack, W.S., and Henry Buchan, S.S.C.

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*Tuesday, May 21.*

## FIRST DIVISION.

### GILRAY (ROBERTSON'S CURATOR).

Curator Bonis—*Lunatic.*

Circumstances in which the Court refused to sanction a *curator bonis* to carry on the business of a lunatic, but directed the Accountant of Court to fix the rate of commission for past services.

Mr John Gilray, coal merchant, Edinburgh, was in 1867 appointed a *curator bonis* to a lunatic, William Robertson, ironfounder, Oakfield Foundry. The assets of the estate consisted chiefly of the stock and effects of the foundry, and of such profits as could be made out of the business. The curator continued to carry on this business, and in auditing his first account, closed on 30th June 1868, the Accountant of Court allowed the curator £100 as commission for the work which he had done, but stated in a note that as the foundry business was of a hazardous nature, the Court would not sanction the curator to carry it on, and that it would therefore be necessary for him to discontinue doing so. The curator, however, continued at his own risk to carry on the business, to the great benefit of the estate, and of the lunatic and his family. But when the Accountant of Court audited his accounts up to 30th June 1871, he reserved the question of commission, on the ground that it would imply approval of the curator carrying on the business, which involved such risk that it might terminate in the loss of the whole estate. The factor, however, having urged his claim for commission for the period up to 30th June 1871, the Accountant reported the matter to the Lord Ordinary on the Bills for instructions, and the Lord Ordinary having refused *in hoc statu* the curator's motion to have the amount of his commission fixed by the Accountant, the curator reclaimed.

BLACK for the *Curator Bonis.*

LEE for the Wards.

At advising—

LORD PRESIDENT—The Court cannot judicially sanction the curator to carry on this business, as to do so would establish a dangerous precedent. But the Accountant of Court in his report says, that under the management of the curator the business has for the last four years yielded a profit, by which the lunatic and his family have been