

the Commissioners was wrong. He added this note:—

“*Note.*—The business premises are under the same roof as the dwelling-house, and are undoubtedly attached thereto, although there is no internal communication between them, and as both are occupied by the same person they must be valued *in cumulo* under the statute.”

The case of *Robert Salmond jun. v. The Inland Revenue*, the circumstances of which were analogous to the above, was similarly decided on the same day.

The interlocutors were acquiesced in.

Tuesday, January 15.

SECOND DIVISION.

[Lord Curriehill, Ordinary.]

PHILIP AND OTHERS (RHIND'S TRUSTEES)
V. RHIND AND OTHERS.

Presumption—Circumstances where the Court fixed a Date at which Death must be presumed.

A sailor, born in 1805, was last heard of in Jamaica in 1843. He had written immediately before that to his sister, communicating an intention to return to England “if I live.” In an action brought for the distribution of his estate, the Court held that, in these and the other circumstances of the case as proved, the presumption was that he had died, and fixed 1st January 1850 as the date prior to which the death must presumably be held to have taken place, and directed division of his estate upon caution.

The question involved here was—Whether a certain Thomas Rhind was to be presumed to be dead, and if so, at what date the presumption was to be held to have operated? It arose in a multiple-pointing at the instance of the executors of the late Alexander Rhind, merchant in Dundee. Mr Rhind died in 1841, leaving a last will and codicils thereto of different dates in 1840 and 1841. By the said will Mr Rhind left the whole residue of his estate to be divided among his nephews and nieces (of whom Thomas Rhind was one) in liferent and their children in fee, and in the event of any of them dying without issue, his or her share was to be divided among the others then alive. Most of the residue of the testator's estate had been distributed by the executors, and the only sum about which there was any dispute was the share effeiring to Thomas Rhind. The present action was raised by one of the surviving nieces of the testator for the purpose of having his share divided, and for various other purposes, which need not be referred to.

The following facts regarding Rhind, as brought out in evidence, are taken from the note of the Lord Ordinary (CURRIEHILL):—“Thomas Rhind was born in 1805. He was a sailor, and was for many years in the merchant service. He appears to have been of short stature, and natur-

ally robust; but although he was a good sailor, he was unquestionably addicted to drink. During his employment in the merchant service he made, between his voyages, frequent visits to his relatives in this country, amongst others to his uncle the trustee, and to his sisters Mrs Bell and Mrs Peddie, his last visit having been in 1839. He also corresponded with several of his relations, but particularly with his sister Mrs Bell, to whom he appears to have been much attached. After his visit to Scotland in 1839 he left the merchant service and entered the Royal Navy. He was second master of H.M.S. ‘Griffon,’ then commanded by Captain Jenkins, who says in his evidence that Thomas Rhind was addicted to drink all the time he was in the service, which led to his being tried by court-martial for three separate acts of drunkenness and insubordination, and being dismissed the service by the sentence of the Court on 3d March 1843, when the vessel was on the West India station, near Jamaica.

“While in the Royal Navy Thomas Rhind was in the Naval Hospital, Haslar, on the sick list, from November 1841 till June 1842, under treatment for *fistula lacrymalis*; and immediately on his discharge from the ‘Griffon,’ in 1843, he was admitted as a patient into the hospital at Kingston, Jamaica, and remained there under treatment for stricture till he was discharged on 31st March.

“During Thomas Rhind's residence at Haslar his uncle, the trustee, died, and the late Mr David Mitchell, writer, Dundee, the agent of the trustees, had a good deal of correspondence with him as to payment of a special legacy of £50 bequeathed to him by his uncle. The letters of Thomas Rhind to Mr Mitchell cannot be found; but from the letters to him in Mr Mitchell's letter-books, and from the legacy receipt and other documents in process, it is proved that the legacy of £50 was duly received by him in May 1842. It is also proved that a copy of the trustee's will was sent to him when in Haslar Hospital by his cousin James Bell, and that Rhind had been dissatisfied with the settlement, as conferring less benefit upon him than he had expected. He does not appear to have made any claim at the time for his liferent under his uncle's will, probably in consequence of the ‘Griffon’ having sailed for Jamaica soon after June 1842. On 20th March 1843, shortly after his dismissal from the ‘Griffon,’ he writes from the hospital in Jamaica to his sister Mrs Bell a letter in the following terms:—‘Dear Sister,—I am sorry to inform you of my ill-health, yet happy to say I am still alive, but God knows how long. I have been in the midst of all the dreadful earthquakes hear, and hurt nothing, but now obliged to come to hospital. I have left the service in consequence of a disturbance between me and the purser and gunner. I merely write you this to let you know I am alive, and not write to the ‘Griffon’ any more. If I live to come to England, I will try and get a ship when I am able to come out of this hole, for it's not like a hospital—rather a poorhouse. I was in Antigua when the earthquakes took place, which almost sunk the dock, and made our ship shake like the leave of a tree. There are great numbers of deaths hear from fever, but I am recovering. My love to mother, Wm., and all the family.—I remain, with respect, your loving brother, THOMAS RHIND.’

That letter, as the postmark shows, was received by Mrs Bell on 27th April 1843; and from that day to this Thomas Rhind has never been heard of. It is true that although he was in bad health, and considered himself very ill at the date of that letter on 20th March, he was discharged from the hospital ten days afterwards, but the certificate of discharge does not bear that he was discharged cured. His declared intention, however, was, if he recovered his health and lived, to get a ship, if possible, and return to this country. But no evidence has been adduced to show that he ever left Jamaica. Certain it is that he never again visited any of his relatives, or wrote to any of them, even his sister Mrs Bell, and he has never since been heard of. All his relatives have for years considered him dead. Even Mrs Bell, who seems occasionally to have said that she would not be surprised to see him some day appear among them again, did not, in my opinion, seriously entertain any such expectation."

The Lord Ordinary therefore held that it must be presumed that James Rhind predeceased his uncle, the trustor, in the year 1843, and appointed the cause to be enrolled for further procedure.

The following part of his note explained the grounds of judgment:—"I think that if Thomas Rhind had lived for any length of time after his leaving the hospital at Kingston, he would have been heard of. He had expressed his intention of coming to England—that is, to Great Britain—as soon as possible. He was evidently not in flourishing pecuniary circumstances, and I cannot doubt that had he lived he would have applied for further payments out of his uncle's trust-estate. But he did not do so; and I think all these circumstances, taken in connection with his drinking habits, his ill-health, and the insanitary state of Jamaica, raise a strong presumption that he must have died shortly after the date of his letter to his sister Mrs Bell. Every case of this kind must be decided upon its own circumstances, and it is always a delicate and difficult matter in the case of a person born only seventy-two years before the inquiry takes place to presume death even from his absence and silence for thirty-four years. But, on the whole, I am inclined to think that the circumstances of this case, when taken together, are sufficient to raise a presumption of death. Whether payment of those parts of the fund *in medio* to which Thomas Rhind would be entitled if he were still alive should be made to any of the claimants except on their finding caution to repeat in the event of his reappearance, or to his representatives in the event of his death being thereafter proved to have taken place at a later date than 1843, is a question as to which the parties will be heard before any final decree is pronounced."

William Bell and others, claimants, upon leave being granted, reclaimed.

Authorities—*Fairholme v. Fairholme's Trustees*, March 18, 1858, 20 D. 813; *Barstow (Maltman's Trustees) v. Cook*, March 14, 1862, 24 D. 790; *Bruce v. Smith*, Nov. 24, 1871, 10 Macph. 130; *Maclay, &c. v. Borland, &c.*, July 19, 1876, 3 R. 1124.

At advising—

LORD JUSTICE-CLERK—In this case I am unable to concur with the Lord Ordinary in so far

as he holds that Thomas Rhind must be held to have died in 1843. As to the question whether he is now alive or not, I am clearly of opinion that the presumption is that he is not. He has not been heard of since March 1843 (if now alive, he would be seventy-two years of age), and if he had lived, his interest clearly was to communicate with his friends in this country. Besides this, the last that was heard from him was in a letter to his sister, in which he evidently contemplates coming home, for he says—"If I live to come to England I will try and get a ship when I am able to come out of this hole." I think we should be carrying the presumption of life to an extravagant extent if we were to hold, in the circumstances of this case, that the presumption was that Thomas Rhind was still alive.

But it is quite another matter to hold that he must be held to have died within twelve months from the time at which he was last heard of. None of the facts stated raise the presumption of death within such a short time; there is not even the probability of his death within that time. It is clear that he was a robust strong man, and, apart from the occasions when he got drunk, an excellent seaman. The fact of his having risen to the position of second master when in the Navy shows this very clearly. And although no doubt he was twice in hospital, he was only there for temporary ailments, and the last that was heard of him was that he was dismissed from the hospital at Jamaica, and there is no reason to doubt that he was dismissed cured. The fact of his not having been heard of, for some time after this, at all events, is of no great weight, for we have it that formerly his relatives did not hear from him on one occasion for three years while he was engaged in the slave trade. In view of all these circumstances, I think the presumption is all the other way, viz., that he was alive at the end of 1843.

But if we are prepared to hold that he is now dead, I think we are entitled to fix upon a reasonable period at which to assume the time of his death, in order to a settlement of the funds involved in this case. If we find that he presumably died prior to 1850, and that the estate should be divided as if he had died on 1st January 1850, I think we shall do justice in this case.

We therefore shall alter the Lord Ordinary's judgment to this extent, and find that the funds in the case must be divided on the footing that Thomas Rhind died on 1st January 1850, leaving the question of the amount of caution to be found to the discretion of the Lord Ordinary.

It is not necessary to go into the general question of presumption of life, or to lay down any definite rule upon the matter. As has been said in the cases quoted, it is always a question of the facts of the particular case. In accordance with the presumption arising from the facts here, we must hold that the man is now dead, but that he cannot be held to have died in the same year in which he was last heard of.

LORD ORMDALE—I concur. The presumption is that Thomas Rhind must now be dead, and this helps us to the conclusion that he died before 1850, because every year that elapses without his being heard of induces the belief that he must have died soon after he was last heard of, especially when we have in addition the facts that he

was intemperate in his habits, and had strong pecuniary interests to communicate with his friends. But to hold that he must have died in 1843 would, I think, be a very strong measure, and what your Lordship has suggested, in my opinion, we can safely do in the circumstances.

The general principles of the law of presumption are remarkably well stated by Lord Deas in the case of *Bruce v. Smith*, November 24, 1871, 10 Macph. 130. Dealing with this case as a jury, I think we are entitled to fix a period as your Lordship suggests; and with this variation we should adhere to the Lord Ordinary's interlocutor.

LORD GIFFORD—I concur. I think your Lordships, sitting as a jury, have fixed a very fair time, not as the actual time of Thomas Rhind's death, but as the time which in the absence of facts we fix as the time of his death for the purposes of this case.

The Court pronounced this interlocutor:—

“The Lords having heard counsel on the reclaiming note for William Bell and Others, claimants, against Lord Curriehill's interlocutor of 4th July 1877, Find that it must be presumed that Thomas Rhind died prior to 1st January 1850, and that the funds in this case must be divided on the footing that he died on that date; and, with this variation, adhere to the Lord Ordinary's interlocutor: *Quoad ultra* remit to the Lord Ordinary, and reserve all further questions of expenses to be dealt with by him.”

Counsel for Bell and Others (Reclaimers)—Kinnear—Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, January 15.

FIRST DIVISION.

[Lord Rutherford Clark,
Ordinary.

BURGH OF KINGHORN *v.* COMMON AGENT OF THE KINGHORN LOCALITY.

Process—Teinds—Locality.

Where a scheme of locality had been made final after a process extending over about sixteen years, towards the close of which, after various other opportunities had been offered, it had been opened up of consent for the purpose of allowing an heritor who objected to the locality to prove the tenor of a sub-valuation, and where that opportunity had not been taken advantage of, the Court, on his applying to have the interlocutor pronouncing the scheme final recalled, *refused* the motion.

The minister of Kinghorn procured an augmentation of stipend in the year 1862, and a remit was made to prepare a locality. In 1867 the case was wakened of consent, and in 1868 a rectified scheme was ordered to be prepared. Interlocutors continuing the cause were pronounced in each of the three following years, and in 1872 the scheme was allowed to be seen and objected to. No objections were made to it, and it was made

final on March 5, 1872. The burgh of Kinghorn then intimated for the first time by a minute that they wished to found on a sub-valuation of teinds. The Common Agent then consented to the opening of the locality, which was done on July 5, 1872. On 4th July 1873 an interlocutor was pronounced continuing the case, and thereafter it went to sleep till 9th March 1877, when it was wakened of consent. On 18th May of that year the Lord Ordinary again allowed the rectified scheme to be seen and objected to. No objections were lodged by the burgh, and on 21st December 1877 the following interlocutor was pronounced, the burgh of Kinghorn having appeared and asked to be allowed to lodge objections, after the Lord Ordinary had intimated that he would pronounce decree in absence:—

“21st December 1877.—The Lord Ordinary having advised the scheme of locality, No. 71 of process, and heard counsel for the Common Agent and the burgh of Kinghorn—Approves of said scheme as a final locality, and decerns: Further, remits to the Auditor to tax the Common Agent's account of expenses, and to report.”

Against this interlocutor the burgh of Kinghorn reclaimed, with a view of having the scheme reconsidered. A motion to that effect, which was tantamount to a motion to be reponed, was made in the Single Bills.

At advising—

LORD PRESIDENT—This is rather an interesting process of locality. It so happens that there is no question to be discussed except this of the burgh of Kinghorn. There was no record closed between the Common Agent and the heritors, and there was no interlocutor pronounced in a contentious form. The process has been dragging its slow length along from the year 1862 till 1878, nothing being done in it but purely formal matters. The rectified state was ordered by Lord Ormisdale in 1868, and as soon as it was submitted to the Lord Ordinary it was approved of as a state, and then came an order allowing it to be seen. No objection was raised against it by anybody, and consequently the case was kept hanging on, and it was more than once continued so that it might not fall asleep altogether. At length the Lord Ordinary, on 5th March 1872, issued an interlocutor approving of the scheme. I think that to open up that interlocutor was a very strong step, for the matter had been depending for ten years, and nothing had been done in that time but to make a scheme, and in it there was no contentious matter. Nevertheless that interlocutor was opened up on the motion of the burgh of Kinghorn on 5th July of that year on representation being made that that burgh found that it was to their interest to have the scheme altered in respect of a sub-valuation of which they desired to have an approbation. To this the Common Agent agreed—whether he was entitled to do so or not I do not know—and the Lord Ordinary recalled his interlocutor. But what happened next? Within a day of one year the Lord Ordinary was again moved to continue the case, and from that date till the 9th March 1877 the process slept very soundly indeed. But then a minute was put in, and the Lord Ordinary held the case to be wakened by consent, a proceeding and expense caused entirely by the action of the burgh. Then on 18th May the Lord Ordinary allows all con-