

credit, and stones which in that view were Cameron's property. Now, how were these stones used by the defenders? They were used as their own. They do not say that the leave of Cameron was asked. On the contrary, it is all but admitted that Cameron was left out of consideration. Now, unless they had a title as owners, what was the title upon which they were authorised to interfere and take possession of the stones? They were as good as owners of those stones when they laid hands upon them and built them into their works; because the moment Cameron goes away they enter without any notice to the masons, and take possession. So far as the masons were concerned, they continued their employment; and the materials, in so far as the stones were concerned—which upon their view, as represented here, were supplied on the credit of Cameron, or at least not on the credit of the defenders, and which therefore were not the defenders' property—are materials which they deal with as their own. Then there is the payment of the arrears of masons' wages due by Cameron when he went away. Those masons were in Cameron's employment and paid by him, and when Cameron went away they were employed by the defenders as if all through they had been in their own employment. No doubt defenders tell us they did this simply out of consideration for the loss which those poor workmen would have sustained if the arrears had not been paid by the defenders. There is, however, no evidence to this effect afforded by the masons themselves. They have not been called as witnesses; and in the circumstances it appears to me that the only fact which we can take into account is the fact that wages which would not have been due by the defenders if Cameron had been a sub-contractor upon the terms alleged by the defenders were paid by the defenders as if the defenders themselves were still the persons for whom the work performed.

Looking to the whole facts in the case, and for these reasons, I agree with your Lordship that the Lord Ordinary's interlocutor should be adhered to.

The Court adhered.

Counsel for Pursuer—Macdonald, Q. C.—Dundas. Agents—Mackenzie & Black, W.S.

Counsel for Defenders—Asher—Darling. Agent—T. J. Gordon, W.S.

Friday, February 18.

## SECOND DIVISION.

SPECIAL CASE—M'LAREN & OTHERS AND PULLAR & OTHERS (TRUSTEES AND PATRONS OF LUCAS' TRUST).

*Trust—Legacy—Repudiation of Conventional Provisions by Widow—Period of Conveyance of Residue.*

A testator directed his trustees to pay a certain annuity to his widow, and directed certain legacies to be paid to such of the children of a person named as should sur-

vive his widow. She repudiated the provisions made for her in the settlement and took her legal rights. Two annuities were instantly payable out of the estate. The residue of the estate was directed to be paid on the death of the widow to the patrons of a charity. *Held* that on the repudiation by the widow of the provisions for her under the settlement the patrons of the charity were entitled to a conveyance of the residue "subject to existing and contingent interests."

*Annuity Payable in Option of Trustees on the Occurrence of Certain Event.*

Where an annuity was to become payable out of an estate on the death of the testator's widow, should the testator's trustees consider that the annuitant required the same, and the residue of the estate was to be conveyed to a charity—*held* that when the widow repudiated her provisions under the settlement and took her legal rights, the charitable fund was entitled to a conveyance of the estate under obligation to pay the annuity unless the testator's trustees should inform them that payment ought in their opinion to be withheld.

John Lucas, farmer, Corntoun, Bridge of Allan, died on 4th April 1878, survived by a widow but, without issue, leaving a trust-disposition and settlement whereby he conveyed to trustees his whole estate, heritable and moveable. By the fourth purpose of this deed he directed his trustees to pay certain legacies to his servants, and to pay annuities to two half-sisters. By the ninth purpose he directed his trustees "on the death of his widow to pay to the children of James M'Laren surviving at said period the sum of £100 each. The eleventh purpose was for payment to his widow, if there should be no children of the marriage surviving the testator, an annuity of £200, and the liferent of certain heritable property, any further income which the trust-estate might yield after satisfying these provisions and the expense of the trust to be accumulated during the lifetime of the widow and to form part of the estate. The deed then provided, failing children of the marriage and on the death of testator's widow, that the trustees should pay to her brother Robert Donaldson, presently residing in New Zealand, "provided he return to this country and reside here, and also provided my said trustees consider that he requires the same, and of which they shall be the sole judges, a free yearly annuity during all the days of his life so long as he remains in this country." The thirteenth purpose provided that failing children as aforesaid, and on the death of the testator's widow, the trustees should, "after paying and providing for the other purposes of this trust, pay, assign, and dispose the rest, residue, and remainder of my said means and estate to and in favour of" certain trustees "as perpetual trustees and patrons of the fund after mentioned, and for the following purpose, viz., for founding and maintaining with the said residue a fund or trust to be called 'The Lucas Trust.'" Then followed a number of provisions for the benefit of the poor of Bridge of Allan and the adjoining parishes of Logie and Leacroft, for whose benefit the "Lucas Trust" was to be founded.

On Mr Lucas' death the trustee entered on the management of the estate and began payment half-yearly of the two annuities to the testator's half-sisters which were to come into immediate operation. The children of James M'Laren, who were to receive legacies of £100 on the death of Mrs Lucas, were ten in number, the youngest of them being three years of age. Their father was forty-nine years of age, their mother fifty years. Robert Donaldson's annuity, provided he resided in this country and in the trustees' opinion required it, was also not to become payable till the death of Mrs Lucas. He returned to this country and took up his residence in Bridge of Allan. Mrs Lucas repudiated the provisions in her favour above narrated and elected to take her legal rights. The trustees therefore made payment to her of her *jus relicta*, and were also prepared to satisfy her right of terce. In these circumstances the only purposes of the trust remaining to receive effect were the annuities payable and to be payable, the legacies to become payable, and the conveyance of the residue to the patrons of the Lucas' Trust, who maintained that the trustees under the settlement were now bound, after providing for the widow's right of terce and for the legacies, and annuities still payable and to be payable, to convey the residue to them for the purposes of the Lucas' Trust; or otherwise, that it was the duty of the trustees under the settlement to convey the whole estate to them under burden of paying and providing *ante omnia* for the widow's right of terce and the annuities and legacies payable and to be payable.

In these circumstances this Special Case was presented to the Court for the testamentary trustees as first parties, and the patrons of Lucas Trust as second parties.

The questions for opinion and judgment were—“(1) Are the parties bound to retain the said residue and accumulate the balance of income accruing thereon until the death of the said Mrs Lucas? or (2) Are the second parties, subject to the said existing and contingent interests, entitled to an immediate conveyance of the said residue? or (3) Are the second parties entitled during the lifetime of the said Mrs Lucas to payment of the balance of income derivable from the said residue, and on her death to payment of the residue, subject to the then existing interests?”

Argued for the first parties—The legacies to the children of Mr M'Laren were special legacies to each of the children who might be alive at the death of Mrs Lucas. More children might yet be born to Mr M'Laren. If the widow's repudiation of the provisions on her behalf were held as in the circumstances equivalent to her death, as the second parties contended, such future born children would lose their legacies. The first parties were bound to retain the estate for payment of the annuity to Robert Donaldson in the event of their holding him entitled to receive it—*White's Trs. v. Whyte*, June 1, 1877, 4 R. 786.

Argued for second parties—The difficulty as to Robert Donaldson's annuity would have been exactly the same if the wife had died instead of repudiating her provisions. The testator's object was just to secure the annuity, and that object would be served by the Lucas Trust undertaking to pay it if so directed by the first

parties—*Alexander's Trs. v. Waters*, Jan. 15, 1870, 8 Macph. 414; *Cameron v. Young*, Feb. 8, 1873, 45 Jurist 272. As to the existence of future children of Mr and Mrs M'Laren, in the parallel case of *M'Niven's Trs. v. M'Niven*, June 9, 1847, 9 D. 1201, the Court took the class of persons to be benefited as they existed at the date of the repudiation.

Their Lordships, without delivering any opinions, pronounced this interlocutor:—

“Find, in answer to the first question, that the first parties are not bound to retain the residue of the trust-estate and accumulate the balance of income accruing thereon until the death of Mrs Lucas; and, in answer to the second question, that the second parties are entitled to an immediate conveyance of the said residue, subject to existing and contingent interests, and subject to the provision with reference to the annuity bequeathed to Robert Donaldson, that the first parties shall give intimation to the second parties if in their opinion the conditions under which the annuity is by the trust-deed bestowed on him have not been fulfilled: Find that it is not necessary to answer the third query; and decern.”

Counsel for First Parties—Dickson. Agents—Duncan & Black, W.S.

Counsel for Second Parties—J. A. Reid. Agent—Henry Buchan, S.S.C.

Wednesday, March 2.

## SECOND DIVISION.

[Lord Lee, Ordinary.]

ROBERTSON *v.* DRIVER.

*Breach of Contract—Liquidate Damages—Penalty.*

When parties have entered into a time bargain, a stipulation reasonable in itself, that the party failing to perform his part by the time appointed shall pay a certain sum during such failure, will receive effect.

*Observed* that the Court will not enforce a claim for penalties beyond the amount truly due as compensation for breach of contract.

Terms of contract on which *held* (*altering* judgment of Lord Lee) that a stipulation under which the party failing should pay a certain sum to the party performing was not sufficiently specific to receive effect.

In April 1876 John Henry Driver, residing at Springfield House, Dollar, invited John Robertson, joiner in Dollar, to furnish specifications for certain alterations on Springfield House. Robertson furnished specifications, and offered to do the work for a certain sum. This offer was accepted. In August 1876 Robertson furnished specifications for oriel windows which it was proposed to add to the house. A written contract was entered into whereby he undertook to do this work also for a sum of £314. This latter contract contained this provision—“The roof of oriel windows to be made ready for the slates within