

in and to, or to dispose of, test upon, or convey, the fee or capital of the sum of £2000 liferented by my said niece under the trust-disposition and deed of settlement of my deceased brother Dr Andrew Sym."

At the time of Dr Andrew Sym's death a considerable part of his estate consisted of ground-annuals, which were well secured, and his trustees, instead of setting apart any particular ground-annuals, or selling these and re-investing a sum of £2000 out of the proceeds to meet the provision for Miss Lewis Sym made in the fourth purpose of his trust-disposition and settlement (quoted above), retained the whole ground annuals, and paid to her, out of the annual proceeds received from them, interest at the rate of 4½ per cent. on a capital sum of £2000 in satisfaction of the liferent thereof. This arrangement continued, with the knowledge and implied consent of the said Miss Sarah Sym and the said Miss Lewis Sym, until the death of Miss Sarah Sym in September 1876, and was thereafter continued, with the consent of Miss Lewis Sym, till March 1881.

Miss Lewis Sym, as residuary legatee of her aunt Miss Sarah Sym, became entitled at the death of the latter to the residue of the estate of the deceased Dr Sym. Accordingly, in March 1881 Dr Sym's trustees resolved to make over said residue to Miss Lewis Sym, under deduction of sufficient estate to satisfy the liferent to which Miss Lewis Sym was entitled under the fourth purpose of Dr Sym's settlement. To meet this liferent the trustees resolved to retain the following two ground-annuals, viz. — (1) Ground-annual of £46, 15s., payable by John M'Ilroy's representatives, from property, Rutland Crescent, Glasgow; and (2) Ground-annual of £65, payable by James Shaw, from subjects Sauchiehall Street, Glasgow. These ground-annuals, capitalised at 22½ years, the then current selling value of such securities, would have given a capital sum of £2514, 17s. 6d., which was somewhat in excess of the amount of the legacy, but Miss Lewis Sym consented and approved of this, the surplus of their value beyond the legacy being declared, by minute of Dr Sym's trustees, to be at her own disposal.

On 14th June 1888 Miss Lewis Sym granted a discharge in favour of Dr Andrew Sym's trustees, whereby, on the narrative that under the testamentary writings of Dr Andrew Sym and Miss Sarah Sym she was entitled to the fee of the whole residue of the said trust-estates and effects, except, the discharge proceeded, "a sum of two thousand pounds left to me in liferent, and as to which there is some doubt regarding my present right of fee;" and on the further narrative that certain sums had been paid to her by the trustees of Dr Sym, she discharged them of the whole provisions in her favour except the two ground annuals as above set forth, "reserving always all questions regarding the said legacy of two thousand pounds."

Miss Lewis Sym died unmarried on 9th July 1896, leaving a trust-disposition and settlement, dated 16th June 1887, and rela-

tive codicil, dated 15th April 1893, by which she conveyed her whole estate, heritable and moveable, to the trustees therein mentioned, for the trust purposes therein set forth. By the fifth purpose of her trust-disposition and settlement she provided as follows:—"With respect to the disposal of £2000 in which I am liferented under the will of my late uncle the Reverend Andrew Sym, Doctor of Divinity, and of which I consider I am entitled to dispose, I direct that the said sum, or so much thereof as may remain at my death, shall be divided equally among" certain persons named.

The trust-disposition also provided as follows:—"(*Lastly*) I direct my trustees, as soon after my death as they may deem expedient, to realise the whole residue and remainder of my said means and estate, and to pay over the same to the Directors of Ayr Hospital for behoof thereof."

The two ground-annuals for £46, 14s. 10d., and £65 respectively, retained by the first parties to satisfy the fourth purpose of the trust-disposition and settlement of Dr Sym in terms of the arrangement above set forth, were sold by them on 18th November 1896, and realised the sum of £3547, 5s.

In these circumstances, a question having been raised as to the right of the legatees under the fifth purpose of Miss Lewis Sym's trust-disposition and settlement in the proceeds realised from the sale of the ground-annuals above mentioned, a Special Case was presented for the opinion and judgment of the Court in which the facts above narrated were set forth.

The parties to the case were (1) Dr Andrew Sym's trustees, (2) Miss Lewis Sym's trustees, (3) the legatees under the fifth purpose of Miss Lewis Sym's trust-disposition and settlement, (4) the Directors of Ayr Hospital.

The third parties maintained that they were entitled to the whole of the proceeds of the ground-annuals less the expenses connected with the sale of them, or at least to the whole of the proceeds less £726, 3s. 9d., i.e., £514, 17s. 6d. (the value above £2000 of the ground-annuals in 1881) and the proportion of the increase applicable thereto, and the expenses aforesaid.

The fourth parties, on the other hand, maintained that the third parties were only entitled to £2000, with interest thereon from the date of the death of Miss Lewis Sym till payment.

The questions of law for the opinion and judgment of the Court were as follows:—

"(1) Whether the third parties are entitled, under deduction of the expense of realisation, to the whole proceeds derived from the sale of two ground-annuals, or whether they are only entitled to said proceeds under deduction of said sum of £726, 3s. 9d. ? or (2) Whether the third parties are entitled to receive the capital sum of £2000 with the interest accrued thereon?"

Argued for the third parties—The second branch of the first question should be answered in the affirmative. It was necessary to look at Dr Sym's settlement and the course of events between his death

and the death of Miss Lewis Sym to see what she supposed herself to be dealing with when she made the legacy in question, although no doubt her intention must be determined by her own settlement only. Looking to the circumstances of this case, the expression "or so much thereof as may remain at my death" showed that she intended to give an investment and not a sum of money. The words "£2000" were designative not taxative. What the testatrix meant to bequeath to the third parties was her interest in the fee of what ultimately came to her from the legacy contained in the fourth purpose of Dr Sym's settlement. No doubt originally that was a sum of £2000, but it was a sum which was to be set aside and invested, and once set aside and invested, as at latest happened in 1881, it ceased to be a sum of money and became a fund or estate, to which the fiar under the legacy became entitled, with the advantage of any increase and the disadvantage of any decrease in its value.—*Robinson v. Fraser's Trustee*, August 3, 1881, 8 R. (H.L.) 127. What Miss Lewis Sym therefore meant to give under the fifth purpose of her settlement was not a sum of £2000 only but the value realised by a certain investment which in 1881 was valued at £2000. There could be little doubt that if the value of the ground-annuals had fallen below £2000 there would have been no recourse against the residuary estate after 1881, and those who would have had to bear the loss were entitled to benefit by the gain. It had been held that bonus additions were carried by a legacy of a certain sum insured on the testator's life.—*Roberts v. Edwards* (1863), 33 L.J., Ch., 369; and arrears of interest by a legacy of a specific sum in a loan—*Cunninghame v. Vassall*, November 3, 1871, 10 Macph. 49. These cases were analogous to the present. If it appeared that what the testatrix meant to bequeath was not merely a certain sum of money but the proceeds of a certain piece of property in which that sum had been invested, as the third parties submitted was the case here, that intention would not be defeated, because in the words of gift a specific sum was mentioned, that being merely a *falsa demonstratio*. See *Bruce's Trustees v. Bruce*, June 7, 1875, 2 R. 775; and *Forbes' Trustees v. Forbes*, January 13, 1893, 20 R. 248. When the testatrix referred to "£2000 in which I am liferented under the will of my late uncle," that was merely a *falsa demonstratio*, for in truth she was liferented in an investment valued at £2000 in 1881, and as this was evidently what she referred to, the third parties were entitled to the increased amount which that investment realised when sold, and not to the sum of £2000 only.

Argued for the fourth parties—The meaning of this bequest must be determined by a consideration of Miss Lewis Sym's settlement, not of the settlement of anyone else. What she gave was a sum of £2000 and nothing more. The expression "or as much thereof as may remain at my death" was inserted so as to make sure that these lega-

tees should have no claim upon the residue of her estate if the sum held by Dr Sym's trustees turned out to be insufficient to pay their legacy in full. But even if Dr Sym's settlement was taken into consideration the fourth parties were entitled to prevail. What he gave was a principal sum, not an investment. The investment contemplated was merely to secure a principal sum of £2000 which was the true subject of the gift. Throughout his trustees had distinguished between the principal sum of £2000 and the investment on which it stood. The liferentrix did not receive the interest or produce of any investment, but $4\frac{1}{2}$ per cent. on the sum of £2000. Under the arrangement of 1881, to which Miss Lewis Sym was a party, and which was embodied in the minute, a distinction was drawn between the sum of £2000, which was the subject of the legacy, and the investment. The state of matters which Miss Lewis Sym had in contemplation when she made the provision in question was that Dr Sym's trustees held a sum of £2000 in terms of the fourth purpose of his settlement, and a certain balance over and above that sum, which was hers absolutely, and that these sums were invested in two ground-annuals, the difference between the value of which and £2000 was at her own disposal. She was aware what the investment was, which had been retained to meet the sum of which she enjoyed the liferent, and if she had intended to give the third parties the proceeds of that investment, or that part of the proceeds which represented £2000 in 1881, she would have said so, and would not have used the words £2000 as was the case here. The second question should be answered in the affirmative.

LORD JUSTICE-CLERK—This Special Case relates to a bequest made by the late Miss Lewis Sym in the fifth purpose of her trust-disposition and settlement. The clause in question is in the following terms:—"With respect to the disposal of £2000 in which I am liferented under the will of my late uncle the Reverend Andrew Sym, Doctor of Divinity, and of which I consider I am entitled to dispose, I direct that the said sum, or so much thereof as may remain at my death, shall be divided equally among" certain persons, who are the third parties to the present case. The question is, whether the investment which was set apart for the purpose of meeting Miss Sym's liferent, and which has increased in value, is all carried by the fifth purpose of her settlement, and whether in consequence these legatees are entitled not only to the sum of £2000, but also to the difference between that sum and the amount which the investment will now yield. If this purpose had not contained the words "or so much thereof as may remain at my death," it would have been simply a bequest of £2000. The testatrix seems to have thought the investment might diminish in value, and she evidently intended that if it did the balance between the amount which it might realise and the sum of £2000 was not to be

drawn from her general estate. I do not think she had any other object in inserting these words in the clause than to guard against the residue of her estate being diminished to meet this legacy of £2000 if the investment in question realised less than that sum, and that we have here nothing more than a bequest of £2000. Now, this legacy being simply a bequest of £2000, to be divided equally among certain persons, and the direction being so to divide that "sum," all that these legatees are entitled to is the sum of £2000 with the interest which has accrued upon that sum since Miss Lewis Sym's death, and nothing more. I therefore think that we must answer the first question in the negative, and the second question in the affirmative.

LORD YOUNG concurred.

LORD TRAYNER—The sum of £2000 left by Miss Lewis Sym as a legacy to the third parties appears to me to have been dealt with by the several persons whose deeds are before us as a specific sum apart from all considerations as to how it was or was to be invested. Thus, Dr Sym directed his trustees to set aside "the principal sum of £2000 sterling," to be held by them on behalf of Miss Lewis Sym in *liferent* and her children in *fee*. Again, Miss Sarah Sym directed her trustees to pay the residue of her estate to Miss Lewis Sym, including all interest or right she had in and to "the *fee* or capital of the sum of £2000 *liferented* by my said niece" under Dr Sym's settlement. And lastly, Miss Lewis Sym by her settlement, "with respect to the disposal of £2000," in which she had been *liferented*, directed that the "said sum" should be divided equally among the parties named, being the third parties to the case. I think that the legacy was one of £2000.

That Miss Lewis Sym did not intend to bequeath more to the third parties than £2000 appears to me to be clear. Miss Sym knew when she executed her settlement that the ground-annuities which Dr Sym's trustees had retained in their hands to secure her *liferent* were of greater value (by at least £500) than £2000, and that she was at liberty to dispose of that excess of value as she pleased. But she did not leave the ground-annuities to the third parties nor their excess value beyond £2000. She left "the said sum" to them. But more than that, she left "the said sum, or so much thereof as may remain." Now, that qualification of the legacy may mean either of two things. Either so much of the £2000 as might not be otherwise disposed of by her, or so much of the £2000 as the ground-annuities, if they decreased in value, would ultimately produce. Whichever of these meanings is attached to the mode of qualification, the result in my view is the same. For I cannot read "the said sum or so much thereof as may remain," as increasing the legacy. They indicate that the legacy in certain circumstances may be less than £2000, but I cannot read them as indicating that under any circumstances the legacy should ever be more.

I think therefore that the question put to

us should be answered as your Lordship proposes.

LORD MONCREIFF—The question is one of some difficulty, but on the whole I think that on a proper construction of the fifth purpose of Miss Lewis Sym's settlement, the third parties to this case are only entitled to a legacy of £2000, that being the sum *liferented* by the testatrix. No doubt she might, if she had been so disposed, have bequeathed to them the securities which were retained by Dr Sym's trustees to secure her *liferent*; but for the reasons which your Lordships have indicated I do not think that the words which she has used will bear that construction. In addition to what your Lordships have said I have only one further remark to make. In the fifth purpose she uses these words—"the sum of two thousand pounds in which I am *liferented*, and of which I consider I am entitled to dispose." Now, there was no doubt about the right to dispose of the balance or surplus of these securities over the sum of £2000. She knew she had full right to it, but it seems that she had some doubt as to her right to the *fee* of the £2000, because I see on page 14 in the discharge granted in favour of the trustees she says that she is "entitled to the *fee* of the whole residue of the said trust-estates and effects, except a sum of two thousand pounds left to me in *liferent*, and as to which there is some doubt regarding my present right of *fee*." Now, when she says in the fifth purpose that she considers that she is entitled to dispose of the £2000, I think she is referring solely to the £2000 in question, and perhaps relying on the special power of testing upon that sum which she is expressly given in the settlement of Mrs Sarah Sym. On the whole matter, I think the third parties are not entitled to more than £2000.

Counsel for the fourth parties asked for expenses against the third parties, and objected to their expenses being paid out of the residue, but the Court was of opinion that the expenses of all the parties should be paid out of the residue of the trust-estate.

The Court pronounced the following interlocutor:—

"Answer the 1st and 2nd alternatives of the first question in the negative, and the second question therein stated in the affirmative: Find and declare accordingly, and decern: Find the whole parties to the special case entitled to their expenses out of the residue of the trust-estate of the deceased Miss Lewis Sym as the same may be taxed by the Auditor."

Counsel for the First, Second, and Third Parties—H Johnston, Q.C.—Craigie. Agent—J. C. Couper, W.S.

Counsel for the Fourth Parties—J. Gardner Millar—T. B. Morison. Agent—Marcus J. Brown, S.S.C.

Friday, November 12.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

ERENTZ'S TRUSTEES v. M'LAY
(ERENTZ'S JUDICIAL FACTOR).

Expenses — Trustee — Action by Judicial Factor against Trustees who have Resigned—Extrajudicial Expenses.

An action of count, reckoning, and payment was raised against trustees who had resigned office, by the judicial factor on the trust-estate. The action was directed against the trustees as individuals. Although the trustees had resigned office they had not received their discharge under a pending petition, and still retained in their hands a part of the estate. The defenders successfully resisted the action. They were prepared to hand over the balance of the trust estate in their hands to the judicial factor on receiving their discharge.

Held that the defenders were entitled to retain out of the trust-estate the extrajudicial expenses incurred in defending the action.

A petition was presented in May 1894 by trustees under the marriage-contract of Mr and Mrs Erentz, craving the Court to appoint a judicial factor on the marriage-contract estate, to authorise them to resign office, and to grant a discharge.

In October 1894 Mr James M'Lay (a Glasgow chartered accountant) was appointed factor, and the petitioners were allowed to resign office, which they subsequently did. Thereafter an action of count, reckoning, and payment was raised against the petitioners as individuals at the instance of the judicial factor, and the procedure in the petition was suspended pending the issue of the action. The petitioners lodged in process an account of their intromissions, and after sundry procedure the Lord Ordinary (KINCAIRNEY) on 19th February 1897 assoilzied them from the conclusions of the action, and found them entitled to expenses.

The petitioners thereafter lodged an account of their intromissions with the trust funds in their hands, subsequent to the date of the account lodged in the action. They stated that the balance left in their hands amounted to £351, 13s. 8d., which they offered to pay over to the judicial factor on obtaining an order for discharge, which they craved the Court to grant. The judicial factor objected, *inter alia*, to the deduction by the petitioners of certain sums from the balance in their hands for extrajudicial expenses incurred by them in defending the action of count, reckoning and payment. The Lord Ordinary (KINCAIRNEY) on 2nd September 1897 pronounced an interlocutor by which he found that the sum due by the petitioners to the judicial factor was £351, 13s. 8d., as set forth in their note, and in respect of

payment by them of that sum discharged them in terms of the prayer of the petition.

The judicial factor reclaimed, and argued — The petitioners had been called in the action as individuals, having been allowed by the Lord Ordinary to resign office. They were in no better position than an ordinary defender; the fact that they had still funds in their hands belonging to the estate did not alter their position. In any case, the finding of expenses in the interlocutor of 19th February 1897 only implied expenses between party and party, and it was too late now to ask for extrajudicial expenses; the motion should have been made before the Lord Ordinary at the time of the action — *Fletcher's Trustees v. Fletcher*, July 7, 1888, 15 R. 862.

LORD PRESIDENT—I have heard nothing to shake the soundness of the Lord Ordinary's judgment.

On the main question it is quite clear that these two gentlemen, albeit they had resigned, were still vested in a part of the estate, not as proprietors, but as trustees, in this sense, that they held it for the judicial factor, and were ready to hand it over to him if he would be so good as to receive it. But he brought an action which turned out to be unsuccessful, the effect of which would have been, if successful, to have converted the trust-estate into a personal liability of the trustees instead of the subjects which these two gentlemen held and were ready to hand over. In these circumstances they were fairly entitled to be treated just as if they had not parted with the estate, but were holding it until the judicial factor was ready to relieve them of their duty.

LORD M'LAREN, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Petitioners and Respondents—Ure—Cooper. Agents—Drummond & Reid, W.S.

Counsel for the Reclaimer — Guthrie — Craigie. Agent—James Russell, S.S.C.

Saturday, November 13.

SECOND DIVISION.

[Sheriff-Substitute of
Renfrew and Bute.]

THOMSON v. SCOTT & COMPANY.

Reparation—Master and Servant—Negligence—Contributory Negligence—Insufficient Precautions for Safety of Workmen Repairing—Employers Liability Act 1880 (43 and 44 Vict. c. 42), sec. 1, (1), (2) and (3).

In an action of damages brought by the representatives of a workman against his employers, the pursuers