

Wednesday, May 30.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

THOMSON v. WILLIAM THOMSON & COMPANY.

Contract—Breach of Contract—Failure to Pay Annuity Pending Litigation as to Deduction Claimed—Acceptance of Subsequent Payments without Reservation—Acquiescence—Waiver—Personal Bar.

In January 1894 a father transferred his business as an engineer to his two sons by a written agreement, which provided that they, in respect of the assignation, were to pay him an annuity of £250 during his life, payable in equal portions at Whitsunday and Martinmas. The agreement further provided that in the event of the annuity remaining unpaid at any time for six months, it should be in the option of the father, on giving one month's notice in writing to his sons, to re-enter into possession of the business. In an action between the parties before the Court of Session, it was decided in 1896 that this agreement imported a lease by the father to his sons of the premises during his life.

At Whitsunday 1898 the sons claimed a deduction from the sum then payable in respect of the annuity for a period during which they had been deprived of the use of the works owing to a fire, and they did not pay the sum which they claimed right to deduct until August 1899, when they paid it in consequence of being ordained to do so as the result of litigation with their father on the subject. After the conclusion of the litigation, and before the sum retained had been paid by the sons, the father gave written notice to them that he intended to re-enter into possession of the business, in respect that the annuity payable at Whitsunday 1898 had remained unpaid for six months. While the litigation was pending the father had accepted payment of the sums due in respect of the annuity at Martinmas 1898 and at Whitsunday 1899, and granted receipts therefor without reservation or qualification.

Held (1) that there had been no failure within the meaning of the agreement on the part of the sons to make payment of the annuity due at Whitsunday 1898, and (2) that the father, by accepting payment of the sums due in respect of the annuity at Martinmas 1898 and at Whitsunday 1899 without reservation, must be held to have waived any right competent to him in respect of his sons' failure to pay the full amount due at Whitsunday 1898.

By minute of agreement dated 2nd January 1894 between William Thomson senior, engineer in Glasgow, of the first part, and his two sons William Thomson junior and John

Thomson, both engineers in Glasgow, and his son-in-law Charles Davidson as representing his wife, of the second part, the first party transferred to the second party the engineering business then carried on by him at 57 Smith Street, Glasgow, and the whole stock, funds, assets, rents, and goodwill thereof, together with the whole machinery and appliances in the premises, whether fixed or unfixed, belonging to him. Clause fourth of the said agreement provided that in respect of said assignation the second party bound and obliged themselves to pay to the first party an alimentary annuity of Two hundred and fifty pounds sterling per annum, payable in two equal portions at Whitsunday and Martinmas. Clause fifth of the agreement provided as follows:—
“In the event of said annuity remaining unpaid at any time for the period of six months, it shall be in the power and option of the first party, on giving one month's previous notice in writing by registered letter posted to the last known addresses of the second party, to enter into the possession and management of said business, and stock, funds, assets, rents, and goodwill, machinery, and appliances, as if these presents had never been granted, and to call upon the second party at their expense to retransfer the same to him as received by them under these presents, conform to the balance-sheet at present being made up, ordinary tear and wear and working requirements excepted, free of all debts and liabilities in connection therewith, but notwithstanding the first party exercising such option he shall be entitled to call upon the second party to pay the arrears of annuity and all expenses incurred by him in connection with the recovery of the same, and entering upon the possession and management of said business and others.”

The terms of this agreement were considered and construed by the Court of Session in the case of *Thomson v. Thomson and Others*, reported in 24 R. 269, and 34 S.L.R. 234, in which it was decided that, as in a question between William Thomson senior and his sons, the agreement imported a lease of the premises during William Thomson's life, the rent, though not specifically stated, being covered by the annuity.

On 19th March 1898 a fire occurred in the works of William Thomson & Company, and stopped the works for a time. William Thomson junior and John Thomson, who were the sole partners of that firm, were advised that in accordance with the above decision of the Court they were not liable in the annuity for the period during which the works were stopped. Accordingly at Whitsunday 1898 they offered to pay their father the proportion of the half-year's annuity from Martinmas 1897 to 19th March 1898, amounting to £69, 10s. 5d. On 10th August 1898 William Thomson senior raised an action against his sons in Glasgow Sheriff Court for the full half-year's annuity. Of consent interim decree was obtained for £69, 10s. 5d., and this sum was immediately paid. After sundry procedure the Sheriff

Substitute (Balfour), on 31st October 1898, held that the sons were entitled to a deduction of £19, 13s. 4d. in respect of the fire. This left a balance of £18, 3s. 3d. due to William Thomson senior. His sons were prepared to pay this balance to him, but on 8th November 1898 he appealed to the Court of Session against the judgment of the Sheriff-Substitute. This appeal was not disposed of until 11th July 1899, when the Court recalled the interlocutor of the Sheriff-Substitute, and found William Thomson senior entitled to £37, 6s. 7d. as the balance of the half-yearly payment due at Whitsunday 1898.

At Martinmas 1898, and again at Whitsunday 1899, William Thomson senior had received from his sons the amount of the half-year's annuity falling due at these terms in accordance with the agreement, and granted receipts therefor without reservation or qualification.

On 26th July 1899 William Thomson senior gave notice in writing to his sons in terms of clause 5th of the agreement, that as the annuity payable on 15th May 1898 had remained unpaid for the period of six months, he would, one month after date, enter into possession and management of the business, &c., and otherwise exercise the privileges conferred on him by the fifth article of the agreement.

On 10th August 1899 Mr Thomson senior received payment from his sons of the balance of the half-year's annuity due at Whitsunday 1898 decreed for by the Court, and granted a receipt therefor containing no reservation or qualification.

On 17th October 1899 William Thomson senior raised an action against William Thomson & Company, engineers, Glasgow, and against his two sons as partners of that firm and as individuals, and against his son-in-law for any interest he might have, in which he concluded for declarator (1) that the defenders had failed for more than six months, from 15th May 1898, to pay him the portion of the annuity due to him at that date under the agreement, and (2) that the pursuer was entitled to resume possession and management of the business as if the agreement had never been granted; and for a decree ordaining the defenders to re-transfer the business free of debts to the pursuer, and to remove from the premises in which it was carried on. Defences were lodged for William Thomson & Company and the pursuer's two sons.

The pursuer pleaded—"(1) The defenders having failed to pay the annuity due to the pursuer for the year 1898 under and in virtue of the minute of agreement libelled for a period of more than six months from the date when it fell due, and the pursuer having given the defenders notice of his intention to resume possession of his engineering business, decree ought to be pronounced in terms of the conclusions of the summons."

The defenders pleaded—"(2) These defenders not having failed to make payment of the annuity within the meaning of said minute of agreement, the action is unfounded, and defenders should be assolizied,

with expenses. (3) The said pursuer having accepted payment of the balance of said half-year's annuity on 10th August 1899, and granted the receipt produced, is barred from insisting in the conclusions of this action. (4) *Separatim*—The pursuer William Thomson having accepted payments for the half-year's annuity due respectively at Martinmas 1898 and Whitsunday 1899, and having granted the said receipts therefor in the circumstances set forth, is barred by his own actings from suing the present action, and defenders are entitled to absolvitor, with expenses."

On 2nd February 1900 the Lord Ordinary (KYLACHY) sustained the fourth plea-in-law for the defenders, and assolizied them from the conclusions of the action.

Opinion.—"This case is not free from difficulty, but on the whole I have come to the conclusion that the pursuer is not entitled, in respect of anything which has yet occurred, to enforce what has been called the clause of forfeiture contained in the fifth article of the agreement between the parties.

"In the first place, I am not satisfied that on the fair construction of that clause the defenders were not entitled, within the currency of the month's notice which the clause prescribes, to pay (as they offered to pay) the amount claimed, and so to purge the default on which the pursuer founds. It is not, it is true, expressed that the pursuer shall only resume possession if at the end of the month the term's annuity shall be still unpaid. But looking to the tenor of the clause and to its object (which plainly was to secure by a stringent remedy the due payment of the annuity) I must say that I think there is considerable force in the defenders' argument on this point.

"But it is not necessary to decide that question. The pursuer's case, in my opinion, fails for another reason. The default on which he founds was with respect to the half-year's annuity due at Whitsunday 1898, and the six months therefore expired on 15th November 1898. The notice, however, by which the pursuer declared his option to resume possession, and in pursuance of which he brings this action, was not given until 26th July 1899; and in the interval there is no doubt that he demanded and accepted, or at all events received and accepted, at least two half-years' payments of the annuity, viz., those falling due at Martinmas 1898 and Whitsunday 1899. He, moreover, it appears, did so without reservation or protest, or any intimation or indication that he contemplated then or ultimately the proceedings which he has now taken.

"Now, in these circumstances it is hardly disputable—and indeed was conceded at the debate—that, apart from some speciality in the situation, the pursuer must be held to have waived and passed from the option—if he possessed it—of resuming possession under clause 5 of the agreement. The question therefore really at issue is, whether the legal effect of the pursuer's action can be held as displaced by the circumstance that during the period in question a litiga-

tion depended between him and his sons having reference to the right of the latter to make a certain deduction from the annuity due at Whitsunday 1898. The pursuer's contention is that inasmuch as that litigation involved the question whether a default had in fact occurred, it would have been useless, and was therefore unnecessary, to give any notice or take any proceeding under clause 5. In short, he demurs to any inference one way or the other being drawn from his conduct during the dependence of the litigation.

"Now, I cannot assent to that argument. It may be, as the pursuer says, that if he had brought the present action in November 1898, when, as he now contends, his right to do so emerged, the action would have been at once sisted. But that, as it seems to me, was no reason why he should not at least have declared his option by giving the prescribed notice. Nor was it any reason why he should demand and accept without protest or reservation the half-year's annuities due at Martinmas 1898 and Whitsunday 1899. It appears to me that if, pending the litigation, the pursuer had desired and meant to keep his rights under clause 5 open, he would not have acted as he did, and would not have been allowed by his advisers to do so. It is part of his present case that the pending litigation did not justify the defenders in retaining against him the small balance which they retained of the annuity due at Whitsunday 1898. At least his case is that the defenders took their risk in taking that course. But if that be so, it seems to follow, by parity of reasoning, that the pursuer also took the risk of acting as he did. In other words, if the defenders' default is to receive its legal effect notwithstanding the litigation, so also I apprehend must the pursuer's conduct receive its legal effect. In truth, however, it is not necessary to have recourse in this matter to logical subtleties. The broad view of the matter as it seems to me is, that rightly or wrongly both parties—the pursuer and the defenders alike—concurred in treating the litigation as suspending while it continued the operation of clause 5. The pursuer gave no notice under the clause, and the defenders continued to possess the business and to make their half-yearly payments in the same manner as if it had been agreed—as I think it tacitly was—that the question of the validity of the deduction claimed in respect of the fire should be tried and decided without prejudice to the continuance of the agreement.

"Altogether I propose to sustain the defenders' fourth plea-in-law, and assolvize them from the conclusions of the summons, with expenses."

The pursuer reclaimed, and argued—Both parties must be assumed to have known that if the annuity was not paid within a period of six months, under clause 5 of the agreement the pursuer was entitled to have the business retransferred to him. The agreement was a conventional bargain, and must be read strictly according to its terms. The annuity had admittedly re-

mained unpaid in part for six months, and clause 5 therefore applied. Proceedings had been taken timeously, because until it was decided whether there had been failure to pay it would have been absurd to bring an action as to the consequences following upon failure to pay. By granting receipts without reservation the pursuer had not waived his rights. Whether there was bar or waiver depended on the circumstances of each case. The payments had been made and the receipts granted *pendente lite*, and the pursuer could not be held to have waived rights which depended on the decision of a case which was under discussion when he granted the receipts.

Argued for defenders—The pursuer had delayed for more than a year to give notice that he intended to act on his alleged rights. This was not timeous notice, and his actions showed that he had voluntarily waived his rights. The receipts which he had granted without qualification or reservation were also conclusive evidence that he considered that he was still entitled to his annuity, and that the agreement had not been broken. In any event, under clause 5 of the agreement the defenders had one month's grace after the pursuer had declared his intention of entering into possession within which to make payment.

LORD JUSTICE-CLERK—There is no doubt that the terms of this agreement are very stringent, and if I were satisfied that the defenders had committed any breach of its terms entitling the pursuer to put in force the fifth clause I would give it effect.

But I think that on two grounds the judgment of the Lord Ordinary can be supported—(1) on the ground set forth in the defenders' fourth plea-in-law, and (2) on that set forth in their second plea-in-law.

The Lord Ordinary has decided that the acceptance by the pursuer of more than one payment at terms subsequent to the alleged failure to pay prevents the pursuer from now insisting in his plea that he is entitled to enforce clause 5. I entirely agree in that. I do not think that the pursuer is entitled to take full payment without any reservation and thereafter to set aside the agreement in terms of which the payment was made. Such a course might lead in many cases to grossly inequitable results. I think that in accepting these payments the pursuer has put himself in such a position that he is unable to maintain his case.

But I further think that there is ground for holding that at Whitsunday 1898 the defenders did not fail to pay the annuity in the sense of the contract. A question arose between the parties as to whether on account of the fire causing a stoppage of the works for a time the annuity was due for that period. The pursuer raised an action for the whole amount. The defenders at once consented to decree passing for the sum which they admitted was due—by far the larger proportion—and left the rest to follow the judgment. I cannot agree that there was here failure to pay. It was suggested that they might have paid the

balance into Court. But this was never asked, and they were quite good for the whole sum, and paid over the balance whenever it was decided that it was due.

On the whole matter I have come to the conclusion that the second and fourth pleas-in-law for the defender should be sustained.

LORD YOUNG—I agree that the judgment of the Lord Ordinary is right. I am of opinion that on the facts it is impossible for us to decide that the defenders were guilty of such a violation of the contract as to expose them under clause 5 to a notice to terminate the contract. I think no violation of the contract by withholding payment of the pursuer's annuity for six months has been established. I do not think that it is according to fact that the annuity was withheld by the defenders, and the fact that a portion of the annuity was not paid in the circumstances admitted here till it was decided by the Court that it was legally due is not in my opinion a ground of action under clause 5.

The pursuer has also accepted without reservation payment of annuities falling due after the occurrence founded on. Suppose ten years ago a dispute had arisen as to whether a portion of the annuity was due at a specified time, but that all subsequent annuities had been punctually paid and accepted without reservation, it would be ridiculous to contend that the pursuer, founding on the non-payment of the whole amount of the annuity on account of the dispute, could give notice ten years thereafter to terminate the contract. In the present case a part, amounting to £37, 10s., of the annuity payable at the term of Whitsunday 1898 was kept back until the Court had decided that it was due. With that exception the annuity has been punctually paid down to the present date, and has been accepted without reservation. That excludes any idea of the case falling under clause 5 of the contract.

I do not need to say more. My opinion is sufficiently expressed by rejecting as unsound the plea-in-law for the pursuer and sustaining as sound the second and fourth pleas-in-law of the defenders.

LORD TRAYNER—I am of the same opinion. Without repeating what your Lordships have said, I shall only say that in my opinion the pursuer has failed to show such failure on the part of the defenders in the fulfilment of their part of the contract as entitled him to resume possession of the business under the provision of the fifth article of the agreement. I am therefore for sustaining the defenders' second plea-in-law.

I further agree with the Lord Ordinary that the defenders' fourth plea should be sustained. The pursuer received his annuity at the terms of November 1898 and May 1899 without protest or reservation. Now he was only entitled to claim or receive these sums on the footing that the defenders were still the owners of the business—that is, on the footing that the agreement

founded on was still in force. By accepting these payments of the annuity after what he now alleges was the breach of contract on the part of the defenders entitling him to resume possession of the business, I think he must be regarded as having waived all objections competent to him in respect of the failure to pay the annuity due in May 1898.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor:—

“Refuse the reclaiming-note: Sustain the second plea-in-law for the defender; and with this addition adhere to the said interlocutor reclaimed against, and decern.”

Counsel for the Pursuer—Salvesen, Q.C.
—M. P. Fraser. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Defenders—Jameson, Q.C.
—Orr. Agents—George Inglis & Orr, S.S.C.

Thursday, May 31.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

FOXWELL v. ROBERTSON.

Parent and Child—Aliment—Liability of Father for Aliment of Children after Divorce—Husband and Wife—Divorce.

Held (rev. judgment of Lord Kincairney) that a husband who has been divorced by his wife continues thereafter to be primarily liable for the whole aliment of the children of the marriage.

On 31st May 1899 Mrs Maggie Davidson Angus, formerly Robertson, now Foxwell, wife of John Burford Foxwell, engineer, Southport, with his consent and concurrence as her curator and administrator-in-law, and Mr Foxwell for his own interest, raised an action against John Robertson, shepherd and horsebreaker, Salloch, Ardour, Argyleshire, for payment to the female pursuer of the sum of £15 yearly as aliment for John Hector M'Lean Robertson, the only child of the now dissolved marriage between the said pursuer and the defender, payable quarterly and in advance, beginning the first term's payment of the aliment as at 1st November 1890, for the three months following, and so forth quarterly thereafter so long as said child should be unable to earn his livelihood and should remain in the custody of the female pursuer, with interest at 5 per cent. on each quarterly payment of aliment from the time the same became due till payment.

The facts as averred by the pursuers, and in substance admitted by the defender, were as follows:—Mr and Mrs Foxwell were married on 29th April 1896. Prior to her marriage with Mr Foxwell, Mrs Foxwell was on 27th November 1888 married to the defender, and one child, namely,