COURT OF SESSION.

Friday, November 27.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MASSON *v.* SMELLIE.

Succession—Legacy—Bequest of Money in Bank — Money Placed on Deposit-Receipt Outwith the Knowledge of a Testatrix who had Right thereto.

A by her will made sundry specific bequests and provided as follows:—"Any money in banks after paying my lawful debts, funeral expenses, &c., I give over to my step-daughter M." The will contained no further directions as to the disposal of A's estate. A ultimately became entitled under the will of her brother to a share of the residue of his estate. At the time of his death she was too ill to be informed thereof. She was never able thereafter to attend to business, and she died in ignorance of her rights under his will. In the course of administration of his executry estate the agents therein before A's death placed a sum to which she was entitled therefrom on deposit-receipt in bank in their own names "for" her; to this sum competing claims were made by M and by A's heirs *in mobilibus*. *Held* that the sum referred to, having been placed on deposit-receipt without A's knowledge or instructions, was not "money in banks" in the sense of her will, and fell into intestacy.

Mrs Isabella Masson or Smellie, 62 Craiglea Drive, Edinburgh, died on 23rd August 1902 leaving a holograph will whereby she gave (1) her furniture and personal effects, and the liferent of a house and of a bond for £500, to her step-daughter Margaret Smellie; (2) the fee of the house and of the bond to the children of her step-son; and (3) £100 to each of three nieces; and, finally, provided as follows:—"Any money in banks, after paying my lawful debts, funeral expenses, &c., I give over to my step-daughter Margaret Smellie." The will contained no further directions as to the disposal of Mrs Smellie's estate.

At the date of Mrs Smellie's will she had £30 at her credit with the Edinburgh Savings Bank. At the date of her death she had nothing at her credit with the Savings Bank. Prior and subsequent to, but not at the date of the will, Mrs Smellie had an account-current with the Union Bank of Scotland, Limited. At the date of her death there was a sum of £6 belonging to Mrs Smellie at the credit of an account-current with the Union Bank in the name of Miss Smellie. In addition to the £30 mentioned above, Mrs Smellie's estate at the date of her will consisted of a house and furniture and £800 in money.

Mrs Smellie was predeceased by her brother John Paterson Masson, who died on 21st February 1902 leaving a holograph will, whereby he bequeathed three-fourths of the residue of his estate to Mrs Smellie and the other one-fourth to his brother the Rev. Alexander Masson.

At the date of her brother's death Mrs Smellie was so ill that she could not be informed thereof, and thereafter she was never able to transact business, and she died in ignorance of his death and of her rights under his will.

The amount of Mrs Smellie's share of the estate of John Paterson Masson due to her at the date of her death was £1313, 7s. 3d. Certain payments were made therefrom by Mr Masson's executors on Mrs Smellie's behalf during her last illness, and in the course of administration of the executry estate the executors set aside a sum of £1200 towards payment of her share. As Mrs Smellie was unable to grant a receipt for this sum it was placed in bank by the agents in the executry on deposit-receipt, the receipt being in the following terms:—"Received from Messrs Hope, Todd, and Kirk, for Mrs Isabella Smellie, one thousand two hundred pounds, which is placed to their credit in deposit-receipt."

An action of multiplepoinding was thereafter raised, in which the fund *in medio* consisted of the sum of £1200 referred to and certain other sums which need not be specified for the purposes of this report. Claims were lodged by (1) Miss Margaret Smellie, and (2) the Rev. Alexander Masson and others, the whole heirs *in mobilibus* of Mrs Smellie.

Miss Margaret Smellie claimed to be ranked and preferred as residuary legatee to the whole fund *in medio*, less sums due in payment of legacies, debts, &c., or alternatively "as a special legatee to the extent of £1200 and accruing interest thereon, under deduction of the deceased's debts, &c."

The Reverend Alexander Masson and others claimed the whole balance of the fund *in medio* as intestate moveable succession.

On 12th June 1903 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor in the following terms:—"*Secundo loco*, ranks and prefers the claimant Miss Margaret Smellie in terms of her alternative claim as a special legatee to the sum of £1200 contained in the deposit-receipt by the Bank of Scotland, dated 9th July 1902, in name of Messrs Hope, Todd, & Kirk, for Mrs Isabella Smellie, with accruing interest thereon, but under deduction of the lawful debts, funeral expenses, &c., and *tertio loco*, ranks and prefers the claimants the Rev. Alexander Masson and others to the balance, if any, of the fund *in medio*."

Opinion.—The testatrix here made her holograph will on 25th April 1901. She died on 23rd August 1902, and in the meantime her means had largely increased through the death of a brother on 21st February 1902. The two different situations were these—at the date of her will she was owner of the house she lived in, the furniture in it, and about £800 of

money; at the date of her death she was owner of the house and furniture and about £2100 in money. Now, the only fact which requires to be mentioned is one which is common ground between the parties, that during the interval between her brother's death and her own death she was too ill to know that she had fallen heir to this sum of money, and that in consequence of her illness the trustees of her brother were not in a position to get from her a discharge. Accordingly on 9th July 1902 the greater part of the succession was put on deposit-receipt in the Bank of Scotland in the name of the agents of her brother's executry, but the deposit-receipt bears *in gremio* that the money had been deposited by these gentlemen, Messrs Hope, Todd, & Kirk, for Mrs Isabella Smellie.

"Now, let us see what the will itself says. It is in the simplest terms. It gives the furniture and the testatrix's personal effects absolutely to her stepdaughter. It gives her also the liferent of the house and the interest of the largest investment which she had, namely, a bond for £500. After her death the house and bond were to go to the children of her late stepson, who, I presume, was a brother of Miss Smellie. So far she had given nothing to her own blood relations at all, but then she proceeded to give £100 to each of three nieces, and then she concluded by saying—'Any money in banks, after paying my lawful debts, funeral expenses, &c., I give over to my stepdaughter Margaret Smellie.' Miss Smellie was thus by much the largest beneficiary under the will. For some of her next-of-kin the testatrix made no provision at all.

"Now, the first question arising under this last bequest in favour of Miss Smellie is, whether it carries the whole residue, and I am free to confess that there is a good deal to be said for the view that probably the testatrix so intended—that is to say, at the date of her will it is extremely probable, from all we know of her affairs, that she had no residue except the money lying in bank out of which her lawful debts, funeral expenses, and so on could conveniently be paid; and accordingly it looks as if she meant that, after paying these necessary outlays, the residue of her estate was all to go to Miss Smellie. And if the substantive which she used had been a generic one and not specific, I think I should have been inclined to sustain this as equivalent to a gift of residue. But then the substantive is not generic—it is controlled by the words "in banks"—and that being so, it seems impossible, on any reasonable canon of construction, to hold that it includes any money or any property which is not in bank. The amount of money in this position is small, but so far as it goes I think the conclusion must be that it is intestate succession and must go to the next of kin.

"Next there arises the question whether the words are apt to include the deposit-receipt for £1200. There I think Miss Smellie is undoubtedly right. It is said against her that the testatrix had not this money in view either when she made her will or when she died, because she died as I have said without ever being in a condition to learn of the succession. That does not seem to me to be a consideration which can affect the construction of the will. We cannot speculate as to what this lady would have done had she known of her succession, and we can only gather from the words which she has actually used what is to be done with it. Now, so far as can be gathered from the general conception of the will, the presumption is that if the testatrix had known of this windfall she would have desired Miss Smellie to get the benefit of it. But really that is all in the region of speculation. The sole question is what the words are fit to cover, and there the only objection to Miss Smellie's claim is that this money—although the old lady was the sole beneficiary—was not hers in the sense that she had at the moment a title to it. My answer to that is, that a testatrix making her will does not concern herself with questions of title—she deals with the property to which she has right, or believes herself to have right, which is available for her debts, and the balance of which she believes herself free to dispose of as she pleases. Now this money satisfies all that. It stood in the bank, not indeed in her name but for her behoof. The trust was constituted by the very document which formed the title to the money, namely, the deposit-receipt; and Messrs Hope, Todd, & Kirk, although possessing the legal title, possessed it in the character of trustees for the testatrix. When a testatrix uses about property in that position a phrase like the present, one must not make too curious inquiries as to the process by which she or her executors could reduce the money to possession. The question is one of right, and it is enough that she, and she alone, had the right to this money.

"It seems to me clear that this £1200 and accruing interest is covered by the words 'any money in banks.' I shall therefore sustain the alternative claim for Miss Smellie."

The claimants, the Reverend Alexander Masson and others, reclaimed and argued—The bequest of "money in banks" covered only sums with regard to which the relationship of debtor and creditor existed between the testatrix and a bank. What was done with the £1200 in question by Mr Masson's executors in the course of administration of his estate could not affect the character of that sum for the purposes of the will of the testatrix.—*Macfarlane* v. *Greig*, February 26, 1895, 22 R. 405, Lord M'Laren at p. 409, 32 S.L.R. 299; *Campbell* v. *Grant*, December 1, 1869, 8 Macph. 227, 7 S.L.R. 133. The testatrix could not have uplifted the sum in question. She died in ignorance of its existence, and could not be said to have expressed any intention with regard to it. This sum therefore fell into intestacy.

Argued for the claimant and respondent Miss Margaret Smellie — At the date of the death of the testatrix, which was the date from which her will spoke, the

sum in question was "in bank"; it was deposited "for" her; though not in her name, she could have assigned it, or her creditors could have arrested it. The deposit-receipt was earmarked, and under it the testatrix could have recovered from the bank; the sum deposited was therefore carried by the bequest of "money in banks."

At advising—

LORD JUSTICE-CLERK—In this case I regret that I am unable to agree with the judgment of the Lord Ordinary, so far as it relates to the only question which the reclaimers raised in debate. The deceased lady, whose estate is in question, directed by her will that "money in banks" at the time of her death was to go to Miss Margaret Smellie.

It happened that shortly before her death the right emerged to her to certain funds from a brother who predeceased her, but her state of health was such that she never became aware of her having succeeded to it. As she was unable to do business, the agents in whose hands the sum of money lay placed it in bank on deposit-receipt, and it lay so deposited at her death.

The Lord Ordinary has held that this sum must go to Miss Smellie, as it falls within the words of the testament "money in banks." I cannot agree with that view. It is true that the money was in a bank at the time of her death, but I find it impossible to hold that it falls within her intention, which plainly related to her own funds in bank by her act at the time of her death. The fact that this money was in a bank at the time of her death was, so far as she was concerned, an accident. It was a fact with which she had no connection, either of act or knowledge. The act was entirely that of the solicitors, for the protection of money they held to which she had right, and which they were unable to hand over in consequence of her incapacity for business. If they had kept it in their own hands, debiting themselves with interest, or if they had deposited it in a proper security with a company not carrying on a bank, it could not have been maintained that it was "money in banks." They made the deposit at their own hand, not to carry out anything that the testatrix desired, but solely as a matter of prudent administration in connection with the brother's estate, they being unable to pay it over and get a discharge till some one should get a title as curator or otherwise to receive it for her behoof.

It seems to me that this sum cannot be held to have been disposed of by the deceased in respect of the words "money in banks" in her testament, and that the claim of the next-of-kin to it must be sustained.

LORD YOUNG concurred.

LORD TRAYNER—The testatrix at the date of her will had accounts with two banks, the Edinburgh Savings Bank and the Union Bank, in each of which she had a small sum at her credit. By her will she directed her trustees, after paying her debts, funeral expenses, &c., to give over to her step-daughter Miss Smellie "any money in banks." And the question now to be determined is whether the £1200 referred to on record falls to be treated as part of the money "in banks" included in the bequest to Miss Smellie. I am of opinion, differing from the Lord Ordinary, that it does not.

I notice in the first place that Miss Smellie is not a residuary legatee; there is no clause disposing of residue in the testatrix's will. The bequest to Miss Smellie is special—the money, if any, "in banks." That the testatrix did not intend the £1200 in question to be bequeathed by her to anyone is certain from the fact that she never knew that she had or was entitled thereto. A residuary clause may confer right on a residuary legatee to estate which falls to the testator either before or after the testator's death, and of which he was ignorant at the time of executing his will. But this cannot be said of a special bequest. Apparently what the testatrix meant to bequeath to Miss Smellie was any money that remained at credit in the two bank accounts I have mentioned, if any, after payment of debts and funeral expenses. To hold that gives full effect to the language of the will. It is contended for Miss Smellie that the mere fact of the £1200 being placed in bank brings it within the bequest. But that money was placed in bank, not by the testatrix, or by her instructions, or with her knowledge, but by the executor of the late Mr Masson, and then as a matter of convenience for himself. It was admitted by the counsel for Miss Smellie that if the executor had kept the money in his safe, or had deposited it with an investment company at interest, her claim could not have been maintained. But the deposition of the money in bank by the executor was quite accidental, and the place where he thought it best to place the money for security cannot, in my opinion, have any effect on the provision of the liferentrix's will either in the way of enlarging or restricting it. I am therefore of opinion that Miss Smellie has no claim to the £1200, which, undisposed of by the will, falls as intestate succession to the next-of-kin of Miss Smellie.

LORD MONCREIFF—It seems pretty clear that in her holograph will, dated 25th April 1901, Mrs Smellie intended to dispose and thought she was disposing of the whole of her estate.

I also think that it appears that she intended to give the residue of her estate to her step-daughter Margaret Smellie by these words, "Any money in banks after paying my lawful debts, funeral expenses, &c., I give over to my step-daughter Margaret Smellie." Probably at the time the will was written the money in bank was, so far as the testatrix knew or remembered, the only fund of which she had not previously disposed.

Now, John Masson, a brother of the testatrix, died on 21st February 1902, leaving a

will under which Mrs Smellie was entitled to a sum of £1300. But at that date Mrs Smellie was so ill that she was unfit to transact business or to be informed of her brother's death; and accordingly the agents in the executry, Messrs Hope, Todd, & Kirk, not being able to get a discharge from Mrs Smellie, lodged a sum of £1200 in the Bank of Scotland, their own bank, on deposit-receipt in these terms—"Received from Messrs Hope, Todd, & Kirk, for Mrs Isabella Smellie, £1200, which is placed to their credit in deposit-receipt."

At the close of the debate I thought that perhaps the judgment might be supported on these grounds, that in order to avoid intestacy and also to give effect to the evident intention of the testatrix that Margaret Smellie should take the residue of her estate, the Court should be astute to hold that the expression "money in banks" in the holograph will was sufficient to cover the sum lodged in the Bank of Scotland by Messrs Hope, Todd, & Kirk. But on reconsideration I have come to be of opinion that to do so would be to strain the meaning of the words by which the testatrix inadvertently limited what she intended to be the residuary clause of the will. The £1200 was not paid to the testatrix nor to her agents, nor paid into her bank to her credit. It was paid into the bank of Messrs Hope, Todd, & Kirk, and lay subject to their control, being merely ear-marked in order to indicate the person to whom it should ultimately be paid. On these grounds I agree with the view which your Lordships take.

The Court recalled the interlocutor reclaimed against, and sustained the claim of the Rev. Alexander Masson and others with regard to the £1200 in question.

Counsel for the Pursuers and Real Raisers, and Claimants and Reclaimers, the Reverend Alexander Masson and Others—Mackenzie, K.C.—Chree. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Claimant and Respondent, Miss Margaret Smellie—Graham Stewart—Wilton. Agent—Robert H. Wood, S.S.C.

Tuesday, December 1.

SECOND DIVISION.

[Sheriff Court at Greenock.

M'INTYRE *v.* A. RODGER & COMPANY.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (1)—*Accident Arising Out of and in the Course of the Employment.*

A, a workman in the employment of a firm of shipbuilders, was engaged in oiling the machine at which he was working with a brush, which he knew was not the one belonging to his machine. B, another workman, to whose machine the brush belonged, and who required it for his work, came up and demanded it. On A asking him to wait a moment, B pulled the brush out of A's hand, and in doing so unintentionally injured A by drawing his hand across the sharp end of a piece of iron which he was carrying, and cutting it.

Held that the accident was one arising "out of and in the course of" the employment in the sense of the Workmen's Compensation Act 1897, sec. 1 (1), and that A was entitled to compensation under the Act.

Falconer v. *London and Glasgow Engineering and Iron Shipbuilding Company, Limited*, February 23, 1901, 3 F. 564, 38 S.L.R. 381, *distinguished.*

In an arbitration under the Workmen's Compensation Act 1897, on a claim by John M'Intyre, plater, Port-Glasgow, against A. Rodger & Company, shipbuilders and repairers there, the Sheriff-Substitute (GLEGG) assoilzied the defenders.

The pursuer appealed, and the following case was stated by the Sheriff-Substitute:—"This is an arbitration in which the appellant prays for decree against the respondents for a weekly payment of £1, in respect of injuries received to his right hand while in their employment. Proof was led and parties heard on 13th October, and on 14th October 1903 I pronounced the following interlocutor:—'The Sheriff-Substitute having considered the cause, finds in fact (1) that John M'Intyre, the pursuer, entered the employment of Anderson Rodger & Company, the defenders, as a plater, on 23rd April 1903, and continued in that employment till the aftermentioned occurrence on 30th May 1903; . . . (3) on 30th May the pursuer was working at a punching-machine in the company's works, and at the time in question was engaged in oiling the punch; (4) for the oiling he used a brush about 15 inches in length; (5) such brushes were not supplied by the workmen, but were made by them from materials supplied by the company, and the custom was that each machine had a brush which was considered to belong to it; (6) the brush used by the pursuer did not belong to the machine at which he was working, and had been obtained by him from another workman named Williams; (7) the pursuer was aware that the brush did not belong to his machine, and that he had no right to retain it from the workman to whose machine it belonged, but he was not aware to whose machine it did belong; (8) it belonged to the machine of John Clark; (9) on the occasion in question John Clark, who had been getting a "slip" of iron cut at the smithy, came for the brush in order to proceed with the work on which he was engaged; (10) Clark was angry at the brush having been removed, and impatient at the delay which its absence caused to him and other workmen in their work; (11) he came up to M'Intyre angrily, said the brush was his, and took hold of it; (12) the pursuer said, "Wait a moment"—meaning that he would have finished with it in a moment