Wednesday, July 17.

SECOND DIVISION.

GRAHAM AND OTHERS (CAMPBELL'S TRUSTEES) *v.* CAMPBELL AND OTHERS.

Succession — Repudiation of Provisions under Settlement — Forfeiture — Intestacy — Fee — Liferent.

A testator directed the trustees under his settlement to pay over a sum of £2000 to his son, or in the event of their seeing fit to do so, to retain the said sum in their hands for his behoof, and pay him the interest, to hold the residue of his estate for behoof of his two married daughters in liferent, and their "heirs and successors equally amongst them" in fee; declaring that these provisions should be in full to them of any claims they might have against his estate after his death, "and that in the event of any of my children creating any dispute in regard to these presents the child so acting shall forfeit all claims competent to him or her under the same, and my trustees are hereby directed to deal with such child's share in the event of it being that falling to my son in the same manner as I have appointed in regard to the residue of my means and estate, and in the event of its being in regard to the share conceived in favour of either of my daughters, then to hold the half of such share for behoof of my other daughter in liferent, and pay the fee of the same to her heirs as aforesaid, and to pay and make over the other half to my said son and his heirs, or to retain same for his behoof as aforesaid." By a codicil he appointed his trustees, instead of paying over to his son the sum of £2000, "or any other or further sum which may happen to fall to him," to retain said sum in their own hand for his behoof, and pay him the interest annually, such interest to be purely alimentary, and he appointed his trustees at his son's death to pay and make over the said sum of £2000 to his heirs and successors equally among them.

One of the daughters repudiated the provisions in her favour, and claimed legitim. *Held* (1) that the repudiation implied a forfeiture both of her own rights under the settlement and also those of her heirs and successors, and (2) (Lord Rutherfurd Clark *diss.*) that with regard to the share of residue so forfeited by the daughter, the son was entitled to the fee of one-half of it, subject to the directions contained in the codicil, and that the trustees were bound to hold the other half for behoof of the other daughter in liferent, and her heirs in fee.

Mr Duncan Campbell, sometime of Stirling, died on 18th March 1887. He was survived by one son James Campbell, settled in Australia, and by two married daughters, Mrs Mackenzie and Mrs Irons. His estate consisted wholly of personalty, amounting to £11,029, 2s. 8d.

He left a trust-disposition dated 10th March 1881, and a codicil of date 5th July 1884.

The deed provided—"*Third*, on my means and estates having accumulated as aforesaid, or as soon thereafter as my trustees may find convenient, I direct and appoint my trustees to pay, convey, and make over to my son James Campbell, presently residing in New South Wales, and his heirs, executors, and representatives whomsoever, the sum of £2000 sterling, declaring, as it is hereby specially provided and declared, that my trustees, should they see fit, and deem it necessary to do so, shall retain said sum in their own hand for behoof of the said James Campbell, and pay him the interest annually derived therefrom in such portions and at such time or times in the year as they see proper, and of which they shall be the sole and only judges; declaring further, as it is hereby specially declared, that in the event of my trustees retaining said sum for behoof of my said son as aforesaid, the interest to be derived therefrom shall be purely alimentary, and shall neither be liable for the debts of my said son, nor subject to the diligence of his creditors. *Fourth*, I direct and appoint my trustees to hold the whole rest and residue of my means and estate, heritable and moveable, real and personal, for behoof of my daughters Elizabeth Campbell or Mackenzie, spouse of Daniel Mackenzie, lessee of the Drummond Arms Hotel in Crieff, and Mary Campbell or Irons, spouse of James Hay Irons, station-agent of the Caledonian Railway Company at Edinburgh, equally between them in liferent for their respective liferent uses allenarly, and on the death of either of my daughters shall pay and make over the fee applicable to such daughter's liferent to her heirs and successors, equally among them, share and share alike. . . . Declaring, as it is hereby specially provided and declared, that the provisions herein conceived in favour of my children are in full to them of all claim competent against my estate, and that in the event of any of my children creating any dispute in regard to these presents, the child so acting shall forfeit all claims competent to him or her under the same, and my trustees are hereby directed to deal with such child's share, in the event of it being that falling to my son, in the same manner as I have appointed in regard to the residue of my means and estate; and in the event of its being in regard to the share conceived in favour of either of my daughters, then to hold the half of such share for behoof of my other daughter in liferent, and pay the fee of the same to her heirs as aforesaid, and to pay and make over the other half to my said son and his heirs, or retain same for his behoof as aforesaid."

In the codicil the testator directed his trustees "in place of paying, conveying, and making over to my son James Campbell, before designed, the sum of £2000 sterling, or any other or further sum which may happen to fall to him in virtue of my said trust-disposition and deed of settlement, to retain said sum in their own hand for his behoof, and pay him the interest annually derived therefrom in such portions, at such time or times in the year as they see proper, and of which they shall be the sole and only judges; declaring that the interest to be derived from said sum shall be purely alimentary, and shall neither be liable for the debts of my said son, nor subject to the diligence of his creditors; and at his death I appoint my trustees to pay and make over the said sum of £2000 sterling to his heirs and representatives whomsoever, equally amongst them, share and share alike."

After her father's death Mrs Mackenzie claimed her legitim, and received in payment thereof the sum of £1750, 4s. 2d., with interest from his death.

Doubts having arisen as to the true construction of these deeds in view of the repudiation by Mrs Mackenzie of her rights under the settlement, the present case was presented for the judgment of the Court by (1) the testamentary trustees of Duncan Campbell; (2) James Campbell; (3) Mrs Mackenzie and her husband; (4) Mrs Irons and her husband; (5 and 6) the minor children of Mrs Mackenzie and Mrs Irons respectively, with advice and consent of their curators, and also the tutors of such of their respective children as were still in pupillarity.

The second party contended that on a sound construction of the trust-deed and codicil Mrs Mackenzie's children had no separate or independent interest in the share of residue directed to be liferented by her, but only a contingent and derivative interest in so far as they might happen to be her heirs and successors at her death, and that such interest had fallen or been forfeited by their mother's election to claim her legal rights, and that in consequence he was entitled to one-fourth of the residue over and above the special provision of £2000. Alternatively, he contended that he was entitled to be paid the income of one-fourth of the residue during Mrs Mackenzie's life over and above the said special provision.

The fourth and sixth parties contended that on a sound construction of the said fourth purpose of the trust-deed Mrs Mackenzie's children had no separate or independent interest in the share of residue directed to be liferented by her, but only a contingent and derivative interest in so far as they might happen to be her heirs and successors at her death, and that such interest had fallen or been forfeited by their mother's election to claim her legal rights, and that consequently the first parties were bound to hold one-half of the share of residue so forfeited for behoof of the fourth party in liferent, and to pay the fee of the same to her heirs. At all events, they maintained that if the said rights had not been so forfeited the income of the share of the residue destined to Mrs Mackenzie and her heirs and successors vested in the first parties during her lifetime, and fell to be applied by them in compensation of the legitim received by her; or otherwise, that one-half of the said income fell to be paid by the first parties to the fourth party during her life; and further, that the said share of the free residue must contribute to satisfy Mrs Mackenzie's claim of legitim.

The fifth parties contended that on a just construction of the fourth purpose of the trust-deed the prospective rights of Mrs Mackenzie's children were not forfeited by the action of their mother in electing to claim her legal rights, and that the income of the share of residue destined to her and her heirs and successors fell to be accumulated by the first parties during her lifetime for the benefit of the other beneficiaries who had suffered by Mrs Mackenzie's election of her legal rights, in so far as their respective rights had been diminished in consequence of her election, and, *inter alia*, for the fifth parties.

The third parties maintained that if such forfeiture had taken place the fee of the one-half of the share of residue, destined by the trust-deed to Mrs Mackenzie, of which James Campbell, in consequence of her election, would have the liferent, must be held to have fallen into intestacy of the said Duncan Campbell, and fell to be divided amongst his next-of-kin as at the date of his death, including Mrs Mackenzie.

The following questions were, *inter alia*, submitted to the Court:—"(1) Are the children of Mrs Mackenzie entitled to have the share of residue directed to be liferented by her set aside for behoof of her heirs and successors at her death, notwithstanding that she has elected to claim her legal rights? (3) If the first question is answered in the negative, is the second party entitled to the fee or the liferent of the half of the residue forfeited by Mrs Mackenzie, and are the first parties bound to hold the other half of the residue so forfeited for behoof of the fourth party in liferent and her heirs in fee?"

James Campbell (the second party) argued—(1) The forfeiture incurred in consequence of the repudiation by Mrs Mackenzie of the provisions under the will did not extend only to her own share in the provisions of the will, but undoubtedly included also the fee provided to her heirs and successors. In *Fisher* v. *Dixon*, and the other cases following upon that decision, it had been held that the repudiation affected only the person so repudiating, but the words of the settlement in this case were different from the words under consideration in those cases. In this case also it was to be noticed that the fee was not to be paid to her children, but to her "heirs and successors," who had not a separate and independent, but only a derivative succession through Mrs Mackenzie. If, then, by her repudiation she lost all right in the provisions under the will so did her heirs and successors—*Fisher* v. *Dixon*, November 24, 1831, 10 S. 55; *Jack, &c.* v. *Marshall*, January 21, 1879, 6 R. 543; *Snody's Trustees*, February 9, 1883, 10 R. 599. (2) As regarded the share of half the residue which fell to be accounted for by the repudiation of Mrs Mackenzie, it could not be allowed to fall into intestacy, so that the daughter who had taken her legitim and repudiated the provisions of the will could still obtain a benefit from her father's estate by making the will invalid. One-half of that share went in fee to James Campbell as provided in the will—*Gillies* v. *Gillies' Trustees*, February 23, 1881, 8 R. 505. If intestacy resulted Mrs Mackenzie could claim no benefit therefrom, as it was the result of her repudiating the provisions in the settlement.

Argued for the fourth parties—(1) These parties accepted the argument of the second parties on the first point. (2) The result, however, of the forfeiture of Mrs Mackenzie's share was not only that Mrs Mackenzie could not claim her share, but also that James Campbell could not claim any share either. The wording of the codicil showed that that was the true meaning. The change made by the codicil was to prevent the trustees paying to James more than the interest of the £2000 formerly set apart for him—*Nisbet's Trustees* v. *Nisbet*, December 6, 1851, 14 D. 146.

Argued for the third parties—(1) No doubt Mrs Mackenzie's repudiation of the conventional provisions prevented her from claiming under the will, but the share which she had forfeited went to her children in fee, and the income had to be

kept up until they were entitled to claim the capital. Alternatively, her share went into intestacy, and she was entitled to her share of the residue. The case of *Gillies* was distinct from this in point of fact.

At advising—

Lord Lee—The first question in this case is, whether the children of Mrs Mackenzie, who claimed her legitim in preference to taking the benefit of her father's settlement, are entitled to have the fee of the share appointed to be life-rented set aside for her heirs and successors?

It was not disputed that unless the deed provides otherwise the fee which is directed to be paid to her heirs and successors is not forfeited by the daughter's repudiation of her liferent. The cases of *Fisher* v. *Dixon* and *Snody's Trustees* leave no room for doubt on that point.

But it was contended that the directions of the deed in this case provide for the case which has happened in such a manner as to defeat the interest of the heirs and successors of the daughter who has repudiated.

The declaration is that the child creating any dispute shall forfeit all claims under the deed, "and my trustees are hereby directed to deal with such child's share" . . . in the event of its being "in regard to the share conceived in favour of either of my daughters, then to hold the half of such share for behoof of my other daughter in liferent, and to pay the fee of the same to her heirs as aforesaid, and to pay and make over the other half to my said son and his heirs, or retain the same for his behoof as aforesaid."

I think it impossible to doubt that a daughter's share is here dealt with as including the interest of her heirs and successors. For the fee previously appointed to be paid to them is here directed to be otherwise disposed of in the event contemplated. If therefore Mrs Mackenzie has so acted as to create a dispute under the deed (which appears to me to be the case), there is in the event which has happened no direction to pay the fee to her heirs and successors on her death. The original direction to that effect has been superseded. I think therefore that the first question in the case must be answered in the negative.

2. But a further question is raised as to that portion of the forfeited share which was by the original deed directed to be paid or made over to the son and his heirs, "or retained for his behoof as aforesaid." The difficulty arises in consequence of a codicil executed by the testator on 5th July 1884. It is clear that under the original deed the son took a fee in his portion of the forfeited share, just as he took a fee in the £2000 which was to be paid to him in his own right, subject to certain power of retention. The effect of the testator's original directions as to his interest in the forfeited share are that it was either to be paid to him or retained for his behoof in like manner as the £2000 was to be paid or retained. But the effect of the codicil is to take away from the trustees, both as to the £2000 and also as to the son's half of the forfeited share, the power of paying the money to the son, and to direct them to retain the amount in their own hands for his behoof. The words of the codicil are, that in exercise of his powers of alteration, "I," the testator, "do hereby direct and appoint my trustees, in place of paying, conveying, and making over to my son James Campbell, before designed, the sum of £2000 sterling, or any other or further sum which may happen to fall to him in virtue of my said trust-disposition and deed of settlement, to retain the said sum in their own hands for his behoof, and pay him the interest annually derived therefrom, in such portions, at such time or times in the year, as they see proper, and of which they shall be the sole and only judges; declaring that the interest to be derived from said sum shall be purely alimentary, and shall neither be liable for the debts of my said son nor subject to the diligence of his creditors, and at his death I appoint my trustees to pay and make over the said sum of £2000 sterling to his heirs and representatives whomsoever, equally amongst them, share and share alike."

It is noticeable that there is no express revocation of the fee conferred on the son by the original deed, and no declaration that the capital sum is not to be subject to his deeds. Nor is there any direction that the capital shall be dealt with at his death in a manner inconsistent with the fee being vested in him.

The direction is only that the sums shall be retained for his behoof to the effect of making the interest available for his aliment.

Now, I think that there is no repugnancy between such a direction and the vesting of a fee. And the result is that there being no revocation express or implied of the fee conferred by the deed it remains vested in the son.

I am the more easily induced to reach this conclusion by the consideration that it avoids partial intestacy. For such would be the result of holding that the codicil had the effect of revoking the fee conferred by the deed so far as the sum falling to the son as a part of the forfeited share is concerned.

The fact that the codicil contains an express direction to pay over the £2000 at his death to the son's heirs and representatives whomsoever, is not sufficient in my opinion to imply a revocation of the fee of any further sum happening to fall to him under the trust-deed.

It was not then known that any sum would so fall to him; and the testator appears therefore to have left such sum unencumbered by any direction except that it was to be retained so that the interest might be paid to him annually. This therefore, I think, is a question which falls within the principle which we found applicable in the case of *General Christie's Trustees*, decided the other day [July 3, 1889, 26 S.L.R. 611].

3. In my view therefore no question arises concerning the disposal of the son's half of said residue. It is disposed of by being vested in the son. But if it had not been so vested, I should have had difficulty in avoiding the conclusion that it formed an intestate portion of the succession in which Mrs Mackenzie would have been entitled to share. The case of *Gillies*, 8 R. 505, to which we were referred does not appear to me to be applicable.

I am for answering question 1 in the negative; question 3, that the second party is entitled to the fee subject to the directions contained in the codicil, and that the second part of the question should be answered in the affirmative; and by declaring the questions *quoad ultra* to be superseded.

LORD RUTHERFURD CLARK — Mrs Mackenzie claimed her legal rights and repudiated the provisions made for her by her father's trust-disposition and settlement. It is clear that in consequence she forfeited not only her personal provisions, but also the provisions made for her heirs and successors. In coming to that result I proceed entirely upon the deed itself, and I can read the clause in the deed as meaning nothing else than that repudiation of the provisions made for any of the daughters should lead to the forfeiture of the provisions to that extent. I do not proceed upon the cases of *Fisher* v. *Dixon*, and the other cases cited to us, because I think even if they were applicable they would not necessarily be conclusive the other way, while I think the words of the deed are conclusive as to the view I have expressed.

As respects the share of the estate which becomes free by the forfeiture of Mrs Mackenzie in view of her repudiation of her legal rights, I have great doubts whether Lord Lee's construction of the codicil is the right one according to a sound construction of the deed. On the contrary, I think the effect of the codicil is to restrict the interest of James Campbell to an alimentary liferent only. I do not think the deed can bear any other interpretation.

As regards the next question, what would become of the fee of the sum which in my opinion is liferented by Campbell, whether it falls into residue or into intestate succession? I desire to exercise my privilege and not express an opinion at all, as I do not think it necessary to do so in view of the opinion your Lordships hold of the primary right.

LORD JUSTICE-CLERK—I think it is quite plain that if Mrs Mackenzie chose to repudiate the provisions made for her in the will and claim her legal rights, she has thereby forfeited all claims under her father's settlement, both as regards herself and also as regards her children. It is clearly laid down in the settlement—"In the event of any of my children creating any dispute in regard to these presents, the child so acting shall forfeit all claims competent to him or her under the same." That is a plain declaration that by her repudiation the fee of her share is absolutely taken away from her and from her heirs.

On the other question I have come to be of the same opinion as Lord Lee. I think if we read the will and the codicil together they do not import a deprivation of the son James of the share coming to him through Mrs Mackenzie's repudiation of the provisions made for her. By the will the trustees were directed to pay over to James Campbell the sum of £2000, and the alteration in the codicil is to the effect that instead of paying over that sum they are to retain the capital and pay him the interest. There is a confusing direction at the end of the codicil, no doubt—"And at his death I appoint my trustees to pay and make over the said sum of £2000 stg. to his heirs and representatives whomsoever." But I do not think that that interferes with our opinion as to where the fee of Mrs Mackenzie's share is to go after her repudiation. There is no direction in the codicil except this, that if any sum should come to him from the repudiation of the provisions by any one of the children, the trustees are to retain the sum in their hands, and pay him the interest annually. Consistently with the case of *Christie's Trustees*, which we decided a short time ago, there may be a fee in a person, although the sum may remain in the hands of trustees, who can only pay him over the interest annually. I take it that this case is ruled by that of *Christie's Trustees*. The questions will be answered as provided in Lord Lee's opinion.

The Court pronounced this interlocutor:—

"Answer the first of the questions therein stated in the negative; and with reference to the third question, are of opinion that the second party is entitled to the fee of the half of the residue forfeited by Mrs Mackenzie, subject to the directions contained in the codicil of 5th July 1884; and that the first parties are bound to hold the other half of the residue so forfeited for behoof of the fourth party in liferent, and her heirs in fee," &c.

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Wednesday, July 17.

SECOND DIVISION.

[Lord Trayner, Ordinary.

SHIELLS *v.* THE SCOTTISH ASSURANCE CORPORATION (LIMITED).

Insurance—Condition in Policy—Act 44 *and* 45 *Vict. cap.* 62.

The owner of a Clydesdale stallion insured it "against death from natural disease or accident." By the conditions annexed in the policy it was stipulated that in case of the death of any animal notice in writing should be sent to the office of the insurance company within twelve hours of the death, either accompanied by or followed within a reasonable time by a full report in writing from a qualified veterinary surgeon, and that as soon as might be thereafter a claim should be given in with particulars of the loss, and the report of a qualified veterinary surgeon. Notice to an agent of the company was not to be a sufficient compliance with this condition. The horse was found at 7 o'clock on a Saturday morning suffering from a compound comminuted fracture of a foreleg, and was destroyed on the advice of a veterinary surgeon, who was not, however, registered as such under the Act 44 and 45 Vict. cap. 62. The same afternoon the owner telegraphed to the local agent of the company that the horse had broken its leg and had been condemned by a veterinary surgeon. This telegram was handed to the manager of the company the same night.