FEBRUARY 16, 1860.

HUMPHREY EWING CRUM EWING, *Appellant*, v. Mrs. JANE TUCKER CRAWFORD or EWING and Others (Ewing's Trustees), *Respondents*.

Trust Settlement—Legacy—Condition—What is "succeeding to estate"—Construction—*A testator directed his trustees to convey an heritable estate to his widow in liferent, and to the heirs of his body, whom failing to A B, in fee. He also left to A B a legacy of £20,000, to be payable "only in event of his not succeeding" to the said estate. In another clause he directed his trustees to pay the "haill legacies" before enumerated, with certain exceptions and additions, all in the event of his (the truster) leaving no children. The legacy to A B was not among the exceptions, and was not specially alluded to; but, in the same clause he directed the interest of £40,000 to be paid to A B "till such time as he should succeed" to the estate in question by the death of the liferentrix; and it was provided that legacies were to be payable within one year of the testator's death. The testator died leaving a widow, but no children. A B, a year after the death, claimed the legacy of £20,000, on the ground that the time of its payment had arrived, and that he had not succeeded to the estate in the sense of the trust deed.*

HELD (affirming judgment), *That he had succeeded to the estate in the sense required by the deed, and was not entitled to the legacy.*[1]

The late James Ewing of Levenside left his whole estate, with some trifling exceptions, to the defenders, as trustees, for the following purposes. After payment of debts, &c., he directed his trustees to execute and deliver a regular and valid deed, conveying his estate of Levenside, with the mansion house, offices, and pertinents, as well as any lands which he might afterwards acquire, as an addition to the estate, together with the furniture plenishing, plate, paintings, books, and other effects belonging to him in the mansion house and offices, at the time of his death, and not before conveyed to his wife, in favour of his wife in liferent, but so long as she should continue his widow allenarly, and of the heirs male of his body, and his heirs and assignees whomsoever; whom failing, the heir female of his body, and her heirs and assignees whomsoever; whom failing, to the pursuer, and the heirs male of his body; whom failing, the heirs female of his body; and to his and their respective heirs and assignees whomsoever in fee. The conveyance to the pursuer and his foresaids was to be granted under the express condition, that he and they should assume the surname of Ewing.

It was provided, that in the event of there being an heir male of the testator's body, and of his attaining majority, the liferent in favour of Mrs. Ewing should cease, and such heir should then "be entitled to assume possession of said estate of Levenside, mansion house, furniture, and others liferented to her as aforesaid"—Mrs. Ewing being secured in an annuity of £3000 a year in lieu of the liferent. In the event of Mrs Ewing marrying again, the liferent provision in the settlement was to fall, and she was then only to be entitled to the restricted provisions in the contract of marriage.

By the 4th head of the settlement, the testator, on the narrative that the estate of Levenside had then cost him about £111,000, directed his trustees to burden the pursuer and his foresaids, and the said estate, with payment to themselves, (the trustees,) for the purposes of the trust, of £40,000—as a condition of their granting the conveyance of said estate and others to him and his foresaids; and in the event of the truster purchasing Dumbarton Muir, which in that case would be added to, and form part of, the estate, it was provided that the pursuer and his foresaids should further pay the trustees the price paid for the muir in addition to the £40,000. The deed proceeded to direct "such sum or sums to be payable by the said Humphrey Ewing Crum and his foresaids to my said trustees and their foresaids, within two years after he or they shall succeed to the said estate, with interest from his term of entry, and thereafter till paid." In case the pursuer or his foresaids should sell the estate, it was directed that he and they should pay the trustees the further sum of £20,000; the pursuer, further, was to pay to the trustees the value of the household furniture and other moveable subjects within Levenside house and offices, "which are eventually to be conveyed to him as aforesaid," according to valuation, "and that within six months after he and his foresaids shall succeed to the same." The truster's library, with several articles of value, which had been gifted to him, were, together with the

[1] See previous reports 19 D. 835; 29 Sc. Jur. 402. S. C. 32 Sc. Jur. 344.

heirship moveables, directed to be considered as heir looms of the estate, and, as such, were to be preserved by the pursuer, and the heir succeeding to him in the estate.

The 5th article provided, that in the event of the truster leaving a lawful child or children, his heir (son) should not only be entitled to the estate of Cathkin, (the property of the truster's elder brother Humphrey Ewing M'Lae,) but the trustees were to pay to such heir, on attaining majority, the free residue of his personal and other estate, "after deduction of the legacies, annuities, and other provisions herein mentioned;" and in the event of younger children, such heir should be burdened with whatever provisions the truster might appoint for them.

By the 6th article, the truster directed that the trustees should, in "the event of my leaving a lawful child or children, pay the following legacies and annuities, and any other legacies, gifts, or provisions that I may appoint to be paid by any codicil hereto, or by any holograph writing or memorandum, clearly expressed, of my will, although not formally expressed, viz., to the said John Crum Humphrey Ewing Crum, (the pursuer,) Walter Crum, and James Crum, all children of Jean Ewing or Crum, my sister, and to their respective heirs and assignees, the sum of £20,000 each; but said sum is only to be payable to the said Humphrey Ewing Crum in the event of his not succeeding to the estate of Levenside."

There were then conveyed numerous legacies and annuities, to a very large amount, to the relations and friends of the testator, and for charitable and religious purposes.

The 7th article was in the following terms:—"In the event of there being no lawful child or children born to me, it is hereby expressly provided and declared, that my trustees shall pay the haill legacies, annuities, and provisions particularly before enumerated, with the exception of the foresaid legacies to John Crum, Walter Crum, James Crum, David Buchan, and Walter Buchan, and their foresaids, which are hereby recalled, and declared to be null and void; and my trustees shall, in lieu and stead of such legacies, pay to them and their respective heirs and assignees the increased legacies after specified, viz., to the said John Crum, who, in the said event of no children, will succeed to the entailed estate of Cathkin, the sum of £30,000; to Walter Crum, £40,000; to James Crum, £35,000; and to David Buchan, £15,000; and to Walter Buchan, £15,000."

In the same event of his having no children, the truster directed payment of certain additional sums to parties not mentioned in the 6th article; and then followed a direction to the effect, that "my said trustees shall also pay to the said" pursuer "and his foresaids the interest of £40,000, at such rate as my trustees can get for the said sum—such interest to run from the date at which the foresaid legacies to his brothers are paid, and to continue payable till such time as he or his foresaids shall succeed to the estate of Levenside on the death of my spouse, or in the event of her entering into a second marriage, when the payment of said interest shall cease and determine."

The 8th article specified the term of payment of the annuities and interest of liferented principal sums.

The 9th article provided, that the legacies (except those, the principal sums of which are liferented) should be paid within one year of the testator's death; but with power to pay them at any earlier period the trustees may think proper.

The 10th article regulated the payment of legacy duty, and declared the annuities and interest of principal sums to be alimentary, and excluded the *jus mariti* of the husbands of female annuitants; "that the provisions to those children who are to succeed to the several sums before specified on the death of their parents shall be payable" at certain specified periods.

This article concludes with the following provision:—"Declaring always, as it is hereby expressly provided and declared, that in the event of any deficiency of funds after paying and liquidating the foresaid provisions in favour of my wife, children, if there any be, and relations, and carrying into effect the other purposes of the trust, and paying the expenses thereof, then, and in such event, each of the different legacies and annuities before specified shall suffer a proportional abatement according to the amount thereof respectively—the legacies and annuities to my relations before named, being always preferable to the payment of legacies or annuities to strangers or charities."

There was a general provision, that all legacies, &c., should be payable within a year of the testator's death.

The truster died in November 1854, leaving a widow but no children. In virtue of the 3rd purpose of the trust deed, the pursuer then became entitled to the fee of the estate of Levenside, and assumed the name of Ewing. It was, however, and still is, subject to the liferent of the truster's widow, who is younger than the pursuer.

The pursuer raised the present action against the trustees, concluding for payment of the legacy of £20,000, provided in the 6th purpose of the deed, pleading, that he had not yet "succeeded" to the estate of Levenside, in the sense in which that word was used by the truster; and that there being no children born to the truster, it fell to be paid under the 7th purpose, not being one of the legacies thereby recalled.

The defenders pleaded, that the pursuer was actually vested in the fee of Levenside, and

could not therefore claim the legacy; and that that legacy, being in its nature essentially conditional, could not be rendered unconditional by the allusion to it under the general category of legacies in the 7th purpose.

The Court of Session sustained the defences, and assoilzied the defenders.

The pursuer appealed, maintaining in his *printed case*, that the decision of the Court of Session should be reversed—1. Because, according to the clear terms of the provision in the 7th purpose of the trust settlement, the legacy claimed was made payable in the event, which had happened, of no lawful child or children being born to the testator, and was dependent on no other event or condition whatever. 2. Because, assuming that the condition attached to the legacy in the 6th purpose of the settlement was imported into the 7th purpose with the legacy itself, the legacy was notwithstanding due, in respect the appellant had not succeeded to Levenside, in the sense in which that expression was used in the trust deed. 3. Because there were no specialties in the case inconsistent with the appellant's claim. On the contrary, all the circumstances supported it.

In their *printed case* the respondents supported the decision on the following grounds:—1. The legacy of £20,000 to the appellant, which was conditional, was to be payable only in the event of not succeeding to the estate of Levenside. 2. The appellant having succeeded to, and being vested in, the fee of the estate of Levenside, was not, according to the sound construction of the settlement, entitled to the legacy, as it was to be payable to him, according to the 6th purpose, only "in the event of his not succeeding to the estate of Levenside." 3. The legacy was not payable under the 7th purpose, as the direction to pay it in the 6th was not imported into the 7th purpose. Even if such direction could be held to be imported into the 7th purpose, it could only be so under the condition attached to it in the 6th, which excluded the appellant's claim. 4. The whole structure and tenor of the settlement demonstrated that the testator never intended the appellant to get both the legacy and the estate of Levenside.

The *Attorney-General* (Bethell), and *Anderson*, Q.C., for the appellant, contended that, according to the true construction of the will, the appellant was entitled to the legacy. The payment was dependent on the sole condition that he should die without leaving issue, which happened. But even if the condition attached to the legacy, and the 6th purpose of the will, can be read as part of the 7th purpose, then the meaning of the word "succeed" meant beneficial succession, and not a dry succession.

Rolt, Q.C., and *Sir H. Cairns*, Q.C., for the respondents, were not called upon.

LORD CHANCELLOR CAMPBELL.—My Lords, I am bound to say, that, on reading this case attentively, and the judgments of the Lord Ordinary and of the Judges in the Inner House, I formed a strong impression in favour of the decision to which the Court below have come. I was, of course, open to conviction when I came to hear the arguments at the bar, and I suspended my opinion till I had heard those arguments. The case has been very ably argued by the learned counsel for the appellants; and having listened very attentively to those arguments, I must say that I have come to a clear conclusion.

I do not think it necessary to add more than a few sentences to what has been thrown out during the argument. It seems to me quite clear, that the intention of the settler was, that, if he had issue, Humphrey and his other nephews should have legacies; but, if he should die without issue, then that Humphrey succeeding him should not have any legacy, but that he should be provided for by the interest of £40,000, made chargeable upon the estate. This is clearly evinced by the sixth article of the trust disposition, and I find nothing in any other part of the instrument which at all discharges that condition.

Then the only other point is, whether Humphrey can be considered as having succeeded, according to the meaning of the testator. I think the sense in which the word "succeeded" was used, in imposing that condition, was in the event of his becoming heir to the estate under the settlement, there being no issue of the body of the settler. If he succeeded as heir to the estate of Levenside, though the widow of the settler was still alive, he was not to have the legacy of £20,000. He was in a very different position from the other nephews. He was now the heir, and he was to be otherwise provided for than by a legacy, and he was, I think, well provided for by having the interest of £40,000. And being now the feuar, or laird of the estate, he had the power of charging the estate, though he could not sell it, for any purposes that he might desire.

I must say that, under these circumstances, it seems to me, that the unanimous opinion of the Lord Ordinary, and all the Judges of the Court below, ought to prevail, and that this appeal ought to be dismissed.

LORD BROUGHAM.—My Lords, I have only a word to say in agreeing to the conclusion of my noble and learned friend, and upon the same grounds. I cannot read the seventh condition of the trust disposition, directing payment of "the haill legacies and provisions particularly before enumerated" otherwise than as connected with the sixth condition, and as rendering those legacies and provisions subject to that condition.

I certainly at one time entertained very considerable doubts upon the provision, as to whether the exception applied to "the heirs and assigns" as well as to Humphrey. The gift is to

"Humphrey and his heirs and assigns;" and then the exclusion is, "provided he shall not succeed to the estate." I have some doubt whether those words did not apply to the whole gift to the heirs and assigns, as well as to Humphrey; and that would get rid of the alleged absurdity of putting Humphrey's children in a better situation than Humphrey himself. But, after all, that is only a topic in this case; it is only one reason for hesitating upon the construction; it is not such a *reductio ad absurdum* as to override the other general purpose and general scheme of the will, which, I agree with my noble and learned friend in thinking, was to exclude the laird of the estate from the legacies, and to give provision to those who were not to succeed under the settlement.

LORD CRANWORTH.—My Lords, I have come to the same conclusion with my noble and learned friends. I do not say that I have not had some doubts and difficulty, but I solve those, to my own satisfaction, in this way:—In the first place, I think it perfectly clear, that the seventh direction in the settlement, in directing all the legacies before enumerated to be paid, does not mean to direct any legacy to be paid absolutely that was only to be paid conditionally under the sixth direction. In my view of the case, the sixth direction is to be imported into the seventh. And therefore it follows that, as under the sixth direction, the £20,000 was to be paid to Humphrey only in the event of his not succeeding to the estate of Levenside, the only question is, Whether, according to the true construction of the deed, Humphrey has succeeded to the estate of Levenside? In my opinion he has. It is perfectly true, and that is what has created a doubt in my mind, that in many other parts of the deed—I think in three or four other parts of the deed—the words "succeeding to the estate" are used as clearly meaning succeeding to the enjoyment of the estate. That the words so mean is obvious by reference to the context in each of these particular passages. But here I think, that the testator means to speak of succeeding to the estate of Levenside as the alternative of what he has, in the previous part in the sixth section, spoken of, namely, the event of his leaving a child. If he leaves a child, he contemplates that as an event in which Humphrey will not succeed to the estate of Levenside; if he does not leave a child, then he contemplates that as an event in which Humphrey will succeed. It may be said, Why does he refer to that at all? Upon that point I agree in what is said by LORD IVORY at the end of his judgment, that that is only a clumsy way of anticipating what he was going to do in the seventh section. He meant, that all his nephews should have greatly increased legacies, but he did not mean that to apply to Humphrey in the event of his succeeding to the estate. Therefore he puts in an express condition annexed to the legacy of £20,000, which probably was not necessary, but he put it in with a view to remove all possible doubt, that the £20,000 is not to go to him in the event of the settler dying without issue.

LORD WENSLEYDALE.—My Lords, I entirely agree in the opinion which has been expressed by my noble and learned friends. We certainly ought not in any case to reverse the decision of the Court below unless we are quite satisfied that that decision was wrong. The decision has been unanimously come to by all the Judges, and I certainly do not feel any difficulty in the case to induce me to think that their opinion was wrong. And, upon the whole, I think, after the argument which we have heard from the counsel for the appellant, that the decision was a right decision. I think it is clear, that the seventh clause in this trust disposition cannot alter this express direction in the sixth clause. I think it is clear, that the sixth clause does not give to Humphrey an absolute legacy, but a conditional one. That condition is, no doubt, very clumsily stated; but it seems to me, that it means no more than in a marked manner to say this: "Mind, I do not give a legacy to Humphrey Ewing unless I leave children." The clause is this: "My trustees shall, in the event of my leaving a lawful child or children, pay the following legacies and annuities, and any other legacies, gifts, or provisions that I may appoint to be paid by any codicil hereto, or by any holograph writing or memorandum clearly expressed of my will, although not formally expressed, viz., to the saids John Crum, Humphrey Ewing Crum, Walter Crum, and James Crum, all children of Jane Ewing or Crum, my sister, and to their respective heirs and assignees, the sum of £20,000 each; but mind this, though I have left all these different legacies to these different people, I do not mean that Humphrey Ewing Crum shall, in the event of his succeeding to the estate of Levenside, be entitled to it." That is, in truth, "Mind, I merely mean this legacy to be given to him in case of my leaving any lawful issue behind me. If I leave no lawful issue behind me, he succeeds to the estate; and in that case I mean him to have no legacy." The condition, as regards his succeeding, is clearly the condition of succeeding to the title of the estate, and not succeeding to the actual possession. The other provisions of the deed, when the word "succeeding" is used, only apply, as shewn by the context, to the actual possession and enjoyment of the estate; but the construction which I should put upon this clause is, that the settler referred to Humphrey succeeding to the title of the estate; and there is nothing in the deed which induces me to doubt the propriety of that construction. I therefore think, that the judgment of the Court below ought to be affirmed.

Mr. Attorney-General.—I trust that your Lordships will give the costs of obtaining the opinion of the Court upon the construction of a will of this kind out of the estate.

LORD CHANCELLOR.—I had the honour to sit in this House upon appeals for nine years with

LORD COTTENHAM and LORD BROUGHAM, and they both, I think, always laid it down as the rule, that the victor should have his costs, unless there was something peculiar in the case. Merely saying that a will is ill constructed is not a reason for departing from the general rule.

Interlocutor affirmed, and appeal dismissed with costs.

For Appellant, Grahame, Weems, and Grahame, Solicitors, London; J. & A. Peddie, W.S., Edinburgh.—*For Respondents,* Melville and Lindsay, W.S. Edinburgh; Loch and Maclaurin, Solicitors, London.

FEBRUARY 20, 1860.

WILLIAM C. WRYGHTE, Official Manager of the Royal Bank of Australia, *Appellant, v.* DONALD LINDSAY, Judicial Factor on the Estate of the late Sir Francis Walker Drummond, Bart. of Hawthornden, and Others, *Respondents.*

Bankruptcy—Sequestration, Competency of—Acts 2 and 3 Vict. c. 41; 16 and 17 Vict. c. 53—Winding up Acts, 11 and 12 Vict. c. 45, and 12 and 13 Vict. c. 108—Call on Contributories—Debt—*A party in Scotland having died, holding shares in an English joint stock company, his representatives confirmed to his estate, including these shares. After his death, the Joint Stock Companies' Winding up Acts* (1848 *and* 1849), 11 *and* 12 *Vict. c.* 45, *and* 12 *and* 13 *Vict. c.* 108, *came into operation. The official manager made a demand against the executor of the deceased shareholder, for payment of a large sum in name of a call, in terms of the acts, and particularly under the* 83*d section of the act of* 1848; *but the executor did not pay the call. The official manager then applied, by direction of the Court of Chancery in England, in terms of the acts* 2 *and* 3 *Vict. c.* 41, *and* 16 *and* 17 *Vict. c.* 53, *for sequestration of the estate of the deceased shareholder in respect of the call.*

HELD (affirming judgment), *That the claim made under the call was not a "debt" in the sense of the act* 2 *and* 3 *Vict. c.* 41, *and sequestration refused as incompetent.*[1]

This case, which was reported by the Lord Ordinary to the First Division, was virtually disposed of by the Court on 18th July 1856; but doubts having occurred whether the Court could, in the first instance, pronounce an interlocutor, they remitted to the Lord Ordinary to do so, and his Lordship thereafter pronounced an interlocutor refusing the application for sequestration. On a reclaiming note by the petitioner, the Court adhered on the grounds previously expressed by their Lordships.

The petitioner appealed to the House of Lords on the following grounds:—1. The proceedings for winding up the affairs of the bank in the Court of Chancery conclusively established that the estate of Sir Francis Walker Drummond was liable to the appellant, as official manager, for the sum of £14,000, the amount of the call, and that this sum formed a debt against his estate. 2. Even if the proceedings in Chancery under the winding up were not conclusive, and could be examined by the Court of Session, the respondent, as representing the estate of Sir Francis Walker Drummond, was rightly inserted in the list of contributories, and the estate of Sir Francis was liable for the sum of £14,000, the amount of the call in question. 3. The liability for a call constituted a debt against the estate of Sir Francis Walker Drummond, in respect of which it was liable to be sequestrated under 2 and 3 Vict. cap. 31. 4. The proceedings of the appellant in the Court of Session, as well as in the Court of Chancery, were in all respects regular and proper; and the Court of Session ought to have directed the Lord Ordinary on the Bills to grant sequestration of the estates of Sir Francis Walker Drummond.

The respondents supported the judgment of the Court of Session on the following grounds:—1. The appellant, as official manager, had no right or title to apply for sequestration of the estates of the deceased Sir Francis Walker Drummond. As official manager, he could adopt no steps excepting those authorized or warranted by the Statutes, and these did not warrant an application for sequestration in Scotland. 2. The call, in respect of which the appellant sought sequestration to be awarded, was not such a debt as under the Scotch Bankrupt Statutes warranted sequestration. It was in its nature contingent, and did not necessarily imply that any debt whatever would ultimately be found due by the party upon whom the call was made. 3. Even supposing the appellant's title and the debt claimed to be unexceptionable, the debt was

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[1] See previous reports 19 D. 55: 28 Sc. Jur. 660. S. C. 3 Macq. Ap. 772: 32 Sc. Jur. 360.