Thursday, November 5.

SECOND DIVISION.

SPECIAL CASE—JAMES JACK (CLELAND'S TRUSTEE) AND OTHERS.

Succession—Vesting—Annuitant.

Terms of trust-settlement under which *held* that the residue had vested in the residuary legatees, and was divisible amongst them in the lifetime of an annuitant.

This Special Case was presented under the following state of facts:—(1) The said deceased William Cleland died, without issue, on or about 22d August 1854, leaving a trust-disposition and settlement, dated 21st September 1847, and with codicil thereto, dated 14th December 1853, registered in the books of Council and Session 20th September 1854. The said James Jack, the first party to this case, is now the sole surviving trustee under this deed. (2) The second parties to this case are the residuary legatees named in the said trust-disposition, and they are the whole children of the deceased Mrs Agnes Cleland or M'Nab, who was a sister of the said deceased William M'Nab, the testator. She survived her brother, and died on November 1866. The said second parties have all issue at present alive. (3) The third party to this case is also a sister of the testator, and she is represented in this case for her interest as an annuitant to the amount of £52 per annum under said trust-disposition, but she has no interest in the questions to be now submitted to the Court, and it is hereby stated on her behalf that she will consent to accept of such provision for her annuity as may be arranged between the first and second parties hereto, and she is thereupon ready to discharge any right which she may have to insist upon the trust being kept up. (4) Mrs Mary Williamson or Cleland, the testator's wife, who survived him, died in May 1866, and, as before mentioned, Mrs M'Nab, his sister, died in November 1866. These were the two liferenters of the estate, and the same is now held by the trustee for behoof of the parties who may be found to be entitled to the residue thereof, subject to the burden of the annuity of £52 to Miss Cleland, as before mentioned. (5) The parties of the second part contend that the residue has now vested in them, and they call upon the trustee to denude in their favour—due arrangement being made for payment of the said annuity—but the trustee is not satisfied that the residue has so vested.

The question presented to the Court was—"Whether the residue of the said trust-estate has now vested in the second parties, and whether the trustee is entitled now to divide the estate amongst them, under arrangement for payment of Miss Cleland's annuity?"

The fourth, fifth, and sixth purposes of the trust-deed were as follows:—"In the *fourth* place, I direct and appoint my said trustees to make payment to my sister Elizabeth Cleland of a free yearly annuity of £52 sterling, payable quarterly, at the terms of Whitsunday, Lammas, Martinmas, and Candlemas, by equal portions, beginning the first term's payment of said annuity at the first of these terms that shall happen after my death, and so forth quarterly thereafter during all the days of her life, with the legal interest thereof from the respective terms of payment till paid: In the *fifth* place, I appoint my said trustees, after investing the foresaid sum of £900 for behoof of my said spouse in liferent, and securing her in the liferent of the subjects in manner above mentioned, and paying the said annuity provided to my sister, to account for and pay over the annual free residue arising from my heritable and moveable estate, after deducting the expense incurred in the management of this trust, to my sister Mrs Agnes Cleland or M'Nab, spouse of William M'Nab, druggist in Peebles, whom failing, to her children, share and share alike; declaring that in the event of either or both of the said Mrs Mary Williamson or Cleland and Elizabeth Cleland predeceasing the said Mrs Agnes Cleland or M'Nab, the provisions hereby settled upon my said spouse and sister Elizabeth Cleland shall devolve upon and be liferented by the said Mrs Agnes Cleland or M'Nab; and declaring also that in case the annual free proceeds shall not amount to the sum of £40, it will be in the power of the said trustees, if they think proper, to borrow money either on bill or personal bond, or on the security of my heritable estate, sufficient to make the annual allowance to my sister, the said Mrs Agnes Cleland or M'Nab, during her life, equal to the said sum of £40 sterling, but the said trustees shall not have the power to burden my said estate for said allowance so as ultimately to affect the provisions conceived in favour of my said spouse and my sister the said Elizabeth Cleland; and *lastly*, upon the death of the said Mrs Mary Williamson or Cleland and Elizabeth Cleland and Mrs Agnes Cleland or M'Nab, I appoint and direct my said trustees to sell and dispose of my whole heritable estate particularly and generally before conveyed, or such parts thereof as may then remain unsold, with the household furniture and others liferented by my said spouse, and that either by public roup or private sale, as to them shall seem proper, and after payment of the expense attending said sales, and other expense of management, my said trustees shall divide the free proceeds thereof, along with my other means and estate, equally among John M'Nab, William M'Nab, and Mrs Jane M'Nab or Hedderwick, my nephews and niece, children of the said Agnes Cleland or M'Nab, and the survivor of them, share and share alike, declaring always, as it is hereby expressly provided and declared, that in the event of any of the said John M'Nab, William M'Nab, and Mrs Jean M'Nab or Hedderwick predeceasing their said mother, and leaving lawful issue, the share which would have fallen to such of them predeceasing, had he or she survived her, shall be equally divided among his or her issue then in life."

At advising—

LORD ORMIDALE—I think it is sufficient for the determination of this case if we ascertain the meaning of the words "and the survivor of them" in the last purpose of the trust. To what survivorship does he refer—is it not the liferentrix alone, but also the annuitant. I think we cannot hold that. The truster goes on to say "in the event of any of the said John M'Nab, William M'Nab, and Mrs Jean M'Nab or Hedderwick predeceasing their said mother and leaving lawful issue, the share which would have fallen to such of them predeceasing, had he or she survived her, shall be divided amongst his or her issue."

To my mind this indicates that the survivorship meant is that of the mother, and if so there is no difficulty, because we have the three *nominatim* legatees surviving their mother, and in my view the vested right of these legatees is not affected by the annuitant being also alive. She is willing to take her annuity if properly secured. I am for answering the question in the affirmative.

LORD GIFFORD—This question has two branches, whether the residue has now vested and is now divisible. Both should be answered in the affirmative. I think on a sound construction of this trust settlement that the residue has vested in the three *nominatim* residuary legatees. The only difficulty is the use of the word survivor in connection with the gift, for if it referred to the period of division it would stop vesting, according to the case of *Young*. But I think the testator himself has interpreted his own meaning to be that it referred to the mother, so that there is really no contingency to stop vesting. The testator does not direct the trustees to divide until the death of the annuitant. The question is, does he intend to suspend vesting thereby. I cannot read the clause so. His intention was to secure the interests of the liferentrix and annuitant.

LORD NEAVES concurred.

Counsel for First Party—G. Smith and Balfour, Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Second and Third Parties—Solicitor-General (Watson) and Mackintosh. Agents—Mitchell & Baxter, W.S.

Thursday, November 5.

SECOND DIVISION.

[Sheriff of Fife.

M'DONALD *v.* GILRUTH.

Filiation—Physical Incapacity—Medical Evidence.

In an action for filiation and aliment of an illegitimate child, the defence was a general denial of the pursuer's statements, and an allegation of physical incapacity. The fact of connection was proved, but the defender maintained that he was incapable of having fruitful connection. The Sheriff-Substitute allowed a proof, and on the report of three medical men assoilzied the defender. The Sheriff reversed, on the ground that the defender had not proved it was impossible he could have been the father of the child.

The Court adhered, and were unanimously of opinion that the medical evidence admitted was insufficient to verify the defence,—LORD NEAVES holding that the admission of medical evidence where the defence did not amount to total incapacity was unprecedented and inexpedient.

Counsel for Appellant — Rhind. Agent—Wm. Officer, S.S.C.

Tuesday, November 10.

SECOND DIVISION.

[Lord Gifford, Ordinary.

BUCHANAN *v.* STEWART.

Recompense—Amelioration.

Where a trustee on a sequestrated estate completed certain buildings to which the bankrupt had no title but merely a personal claim against an investment company, who had made advances to the bankrupt, *Held* that the trustee was not entitled to recompense from the investment company for the money beneficially expended on the subjects.

The summons in this suit, at the instance of James Buchanan, Alexander Forbes, and William Leckie, trustees of the Fourth Provident Property Investment Company, enrolled under 6 and 7 Will. IV., c. 32, against James Wilkie and William Stewart, trustees on the sequestrated estate of the said James Wilkie, concluded that it should be found and declared that the Fourth Provident Investment Company and the pursuers, as trustees, were creditors of James Wilkie at the date of his sequestration on 18th December 1868, and still are such creditors, in respect of advances on loan made by the said Company to James Wilkie as a member or shareholder of said company, and in respect of interest and penalties, and that the said company, and the pursuers, as creditors of James Wilkie, and feudally vested in certain subjects (specified), were and are entitled to sell said subjects, and out of the price to repay the amount of said advances, amounting to £685, 11s. 9d., as at 18th December 1868, with interest, fines, and penalties according to the rules of the company and that William Stewart, trustee foresaid, should be decerned and ordained to remove from said subjects, and as trustee and individually should be ordained to hold just count and reckoning with the pursuers with respect to the rents and profits of said subjects since the date of his appointment, and to make payment of the sum of £500, or such other sum as shall be ascertained to be the amount of said rents and profits, with interest.

The pleas in law for the pursuers were—"(1) The pursuers being creditors of the said James Wilkie, as above mentioned, and holding *ex facie* an absolute conveyance to the property in question, are entitled, in respect of the rules of the company, and *separatim* of their common-law rights, to remove the defender therefrom, to draw the rents thereof, and to sell the subjects for payment of their debt. (2) The defender having failed to pay the pursuers either the principal or interest, and having disputed their claims to the rents, the present action is necessary, and the pursuers are entitled to retain the expenses out of the prices of the property. (3) The defender having collected the rents of the property, he is liable to account therefor to the pursuers, and he is personally liable in the rents received by him, and he is liable in expenses to the pursuers. (4) In respect of the stipulations of the bond condescended on, the balance or charge against the said James Wilkie is conclusively ascertained by the stated account made out from the books of the company, and signed as aforesaid, and the defender is barred from disputing or quarrelling the said balance. (5) The defender's statements are not relevant,