Friday, June 4.

SECOND DIVISION.

SPECIAL CASE—KINNEAR *v.* KINNEAR'S TRUSTEES.

Succession—Trust-disposition—Direction to entail Moveables.

A, by his trust disposition and settlement, directed his trustees, in the event, which did occur, of the heir first entitled to succeed to the estate of Kinloch having attained the age of twenty-one at the date of the testator's decease, and after payment of certain provisions, &c., to settle and secure his lands and estate of Kinloch, and the plate, paintings, and other plenishings in the mansion house thereof, by deed or deeds of strict entail, on a series of heirs. In a Special Case, to which the trustees and the institute of the deed of entail were parties,—*Held* that the trustees were bound to include in the deed of entail to be executed by them both the heritable subjects and the plate, paintings, and plenishing.

The parties to this case were (of the first part) John Boyd Kinnear, eldest son of the late Charles Kinnear of Kinloch, and (of the second part) the trustees and executors of the said Charles Kinnear. The facts were as follows:—

The late Charles Kinnear died on 9th April 1874, leaving certain testamentary writings by which he disponed to his trustees his lands and estate of Kinloch and others therein particularly described, lying in the parish of Collessie and sheriffdom of Fife; as also all other lands and heritable estate of every description which should belong to him at the time of his death, but excepting always therefrom his lands and estate of Kinnear and Hawkhill and others, lying in the parish of Kilmany and sheriffdom of Fife, to which he had succeeded, and which he then held under settlements of strict entail.

The testator further thereby conveyed to his said trustees his whole moveable means and estate of every kind and denomination, heirship moveables included, which should belong to him at the time of his death.

It was by the said trust-disposition and settlement declared that the same was granted in trust for the ends, uses, and purposes therein mentioned, and, *inter alia*, to the end that so soon after Mr Kinnear's death as conveniently might be, his whole moveable estate and effects thereby conveyed might be realised and uplifted, and also that his lands and heritable estate of every description thereby conveyed (excepting his said lands and estate of Kinloch as therein before specially described, with the furniture, silver-plate, paintings, bed and table linen, and other plenishing in the mansion-house thereof at the time of his decease) should be sold and disposed of by his trustees, and that the produce and prices of the same, together with the rents of his lands of Kinloch while they should be held by his trustees, and be vested in their persons, should be applied to the uses and purposes therein mentioned.

The testator by the said trust-disposition and settlement and codicils directed his trustees, in the event, which did occur, of the heir first entitled to succeed to the estate of Kinloch, being the party hereto of the first part, having attained the age of twenty-one years at the date of the testator's decease, and after payment of the expenses, debts, legacies, and provisions specified in the trust-disposition and codicils, to settle and secure his lands and estate of Kinloch therein specially before conveyed, and the plate, paintings, and other plenishing in the mansion-house thereof, and also the lands, if any, which might have been up to that time purchased by them, under the directions therein before contained, by deed or deeds of strict entail, whereby they should dispone and convey the same heritably and irredeemably to John Boyd Kinnear, his eldest son (the party hereto of the first part), and the heirs-male of his body, whom failing, to Charles George Hood Kinnear, his second son, and the heirs-male of his body; whom failing, to the other heirs and substitutes therein specified:

The trustees were directed to execute the said deed of entail under certain conditions, prohibitions, reservations, and provisions, including those necessary to constitute a strict entail, and it was directed that the deed of entail to be executed by the trustees should be so framed as to bind the institute in whose favour the same is directly granted, as well as the heirs of entail, and should contain all clauses necessary to render the same a strict, valid, and effectual entail according to law, any special directions as to clauses therein contained in no wise derogating from the power of the trustees to amend the same, and add new clauses for effectually carrying out his intention and desire.

The widow of the testator did not retain the mansion-house and furniture, &c., of Kinloch, but elected to accept an additional amount and sum of money provided to her in such an event. The trustees having paid or provided for all the provisions, &c., in the trust-deed and codicils, proposed to execute a deed of entail of the estate of Kinloch and others as directed, and they proposed to include in the deed of entail the plate, paintings, and other plenishings in the mansion-house of Kinloch. To this Mr Boyd Kinnear (the institute and party of the first part in this case) objected, and contended he was entitled to a conveyance or delivery of these articles in fee simple.

The questions submitted for the opinion of the Court were:—"Whether Mr Boyd Kinnear (the party hereto of the first part) is entitled to obtain forthwith from the trustees (the parties hereto of the second part) a conveyance or delivery of the plate, paintings, and other plenishing in the mansion-house of Kinloch, in fee simple? Or, Whether the trustees are bound to include in the deed of entail to be executed by them, not only the heritable subjects which the truster directed to be entailed, but also the said plate, paintings, and plenishing?"

Authorities—*Gordon*, 4 D. 501; *Veitch*, 25th May 1808, F.C.; *Earl of Leven*, M. 3217; *Baillie*, 21 D. 838; 11 and 12 Vict., c. 36, sec. 43; *Maule*, F.C., 2d Dec. 1817.

At advising—

LORD NEAVES—This belongs to a class of delicate cases, where a testator makes a deed in favour of a certain party, and after his death it is proposed that the directions of the testator shall not be followed out, because they would be un-

availing if carried out. There is such a principle in our law, and the case of *Gordon* is an illustration of it. It was tried by a declarator, and the question was whether the party was to get the property in fee simple, or whether the directions of the testator were to be followed out. That is what the party of the first part wants here, and the question is, whether the case of *Gordon* is a precedent? If this case were identical with that of *Gordon's*, Mr Kinnear would have his right independent of the form of the action, but *Gordon's* case turned on a matter not included here. If our ground is to be that the directions of the testator if carried out would be unavailing, we must be quite clear these directions would be unavailing, and that we have the proper contradictors in the field. In the case of *Gordon* the Court held, on an axiomatic view of the law, that a destination to A and his heirs whatsoever is not an entail, and that in ordering an entail to be made in such terms the Court would be ordering a nullity, an entail suicidal of itself. The Court viewed such a deed as a nullity, to be disregarded. Can we say that the deed here imports such a nullity, such a self-contradiction, as to entitle us to disregard and supersede it? I cannot go so far. I give no opinion as to the possibility of a limited entail of such articles, because it is not necessary, and the parties are not all here. But I think the nullity of securing articles of this kind by a limited entail is not of such a kind as to entitle us to grant the demand made in contradiction of the testator's wish for a tailzied succession. I think the current of decisions on this point not so clear as to warrant this in such a case as we have here. The law is not so clear and plain in favour of Kinnear as to induce us to act on the case of *Gordon;* and I am for answering the first question in the negative, and the second in the affirmative.

The other Judges concurred.

Counsel for Party of the First Part—M'Laren. Agents—Melville & Lindesay, W.S.

Counsel for Party of the Second Part—Adam. Agents—Tods, Murray, & Jamieson, W.S.

Friday, June 4.

SECOND DIVISION.

[Lord Young, Ordinary.

FORRESTER AND COWIE *v.* ROBSON'S TRUSTEES.

Policy of Assurance—Copartnery—Evidence.

The companies of Forrester & Robson and George Cowie & Sons applied to an Assurance office for a loan of £3500, which was granted on the security of a policy of insurance for £5000 on the life of Robert Robson, one of the partners of the former company, repayable by instalments in five years. The policy was opened and assigned to the Assurance Company, who lent the money in 1870. The company of Forrester & Robson was dissolved two years afterwards on an agreement between Robert Robson and Robert Forrester, under which Robson retired with a sum of money and Forrester took the company property and its obligations, and after that date Forrester alone paid the instalment of interest on the loan and the premiums. Robson died in 1874, when the debt had been reduced to £1419. In an action at the instance of Forrester and Cowie & Sons against Robson's Trustees,—*held* that the policy was an asset of the company, which created it for company purposes, and was not the property of Robson individually.

The summons in this suit, at the instance of Robert Forrester of Carbeth, and Messrs George Cowie & Sons, Airdrie, and Archibald and Richard Cowie, sole partners of the firm of Cowie & Sons, against Mrs Forrester or Robson, widow of the late Robert Robson, coalmaster, Glasgow, and the other trustees and executors of the said Robert Robson, concluded for declarator that it "ought and should be found and declared, by decree of the Lords of our Council and Session, that the pursuers, in the proportions of 4-7ths to the pursuer Robert Forrester, and 3-7ths to the other pursuers, are entitled to, and to be paid, the sum of L.3570, 9s. 4d. sterling, being the proceeds of a policy of insurance on the life of the said Robert Robson with the English and Scottish Law Life Assurance Association for the sum of L.5000, numbered 12,954, and dated 22d December 1870, after deducting therefrom the sum of L.1429, 10s. 8d., being the balance remaining due to the said Assurance Association at 27th October 1874, of an advance made by them to the firms of Forrester & Robson, coalmasters, Glasgow, and the said George Cowie & Sons, in security of which advance the said policy was assigned to said Assurance Association, and which sum of L.3570, 9s. 4d. was deposited in the joint-names of the pursuers' and the defenders' agents with the British Linen Banking Company, Edinburgh, on said 27th October 1874, and the interest that may accrue thereon from 27th October 1874 till payment."

The facts, so far as material, are set forth in the following interlocutor of the Lord Ordinary:—

"3*d February* 1875.—The Lord Ordinary having heard counsel for the parties, and considered the proof, record, and conjoined processes, in the action at the instance of Robert Forrester and George Cowie & Sons, repels the defences for Robson's Trustees, and finds, decerns, and declares in terms of the conclusions of the summons; and in the relative counter action at the instance of Robson's Trustees, sustains the defences, assoilzies the defenders Robert Forrester and George Cowie & Sons from the conclusions of the action, and decerns: Finds the defenders, Robson's Trustees, liable in expenses in both actions; and remits the account thereof, when lodged, to the auditor to tax and report."

"*Opinion.*—The material facts of this case are hardly disputed on the record, and in the debate after the proof the parties were quite agreed upon them. They are as follows:—The companies of Forrester & Robson and George Cowie & Sons having occasion to borrow L.3500, applied to the Scottish Law Life Assurance Office, who agreed to lend them the money on the security of a policy of insurance for L.5000 on the life of Robert Robson, one of the partners of the former company, the money being repayable by instalments in five years. The policy was accordingly opened and assigned