

Counsel for Mrs A.—Dean of Faculty (Clark, Q.C.) and Crichton. Agents—Duncan & Black, W.S.

Counsel for Mrs B. and Others—Fraser. Agent—John Galletly, S.S.C.

R., Clerk.

Saturday, June 26th.

## SECOND DIVISION.

### CAMPBELL'S TRUSTEES, v. CAMPBELL.

*Succession—Direction to Purchase Land—Vesting.*

A testator left a sum of money to his trustees, with directions to them to purchase lands adjoining his estate, so far as an eligible purchase could be obtained. Although contemplated, no deed of entail of his estate was ever executed, and upon his death the testator was succeeded by his grandson, at that time Major, who was served heir and infest. This grandson died without issue, and "left and bequeathed" his whole estate, heritable and personal, to a brother, who was served his nearest lawful heir in special and also his heir in general. The second brother, also dying without issue, conveyed all his estate, heritable and moveable, to trustees, the rents and interest of the same to be paid to his wife during her life, and thereafter to the other party to the case. Neither of the two grandsons of the original testator wished land to be purchased with the sum of money laid aside, and accordingly no land was purchased. In a question between (1) the original trustees, (2) the trustees of the last proprietor, (3) the heir under his will,—*Held* that the dividends on the sum of money fell to be paid to the widow of the last grandson, and not to the heir succeeding on her death, as the fund vested in fee simple in the person of the first grandson on the original testator's death, and thence through him, under his will, and that of his brother, successively in the persons therein named, and that consequently the heir claiming could only do so under the testament of the last proprietor, which testament gave the entire liferent to the widow.

This was a Special Case for the opinion and judgment of the Court. The parties to the case were as follows:—1. The trustees of Sir Archibald Campbell of Succoth, Baronet, of the first part, 2. The trustees of Sir George Campbell of Succoth, Baronet, of the second part, and 3, Sir Archibald Spencer Lindsey Campbell, now of Succoth, Baronet, of the third part.

By contract of marriage, dated 12th July 1824, between the late John Campbell, younger of Succoth, eldest son of the honourable Sir Archibald Campbell of Succoth, Bart., with consent of his father, and Anna Jane Sitwell, the estate of Garscube was settled upon the heirs of the marriage, whom failing, as therein mentioned. The destination is as follows:—"The said Sir Archibald Campbell, with consent of the said John Campbell, disposes and conveys to himself, and, after his decease to the said John Campbell, his eldest lawful son, and the eldest and other son or sons to be procreated of the marriage hereby contracted

between the said John Campbell and the said Anna Jane Sitwell successively in their due order of seniority, and the heirs-male of their bodies respectively; whom failing, to certain other parties whom failing, to the other heirs-male of the body of the said Sir Archibald Campbell; whom failing, to the heirs-female of the body of the said Sir Archibald Campbell, &c. By this contract of marriage power was given to John Campbell to alter the order of succession, as therein mentioned. It was declared to be in the power of Sir Archibald and John Campbell during their joint lives, or of the survivor, to entail the estate. By trust-disposition and settlement, dated 27th October 1830, and registered in the books of session 24th February 1847, Sir Archibald conveyed to the trustees therein named the estate of Cumlodden in Argyleshire, the lands of Gilshochhill and others in the counties of Lanark and Dumbarton, and houses in Park Place, Edinburgh; as also all his moveable and personal means and estate. This trust-disposition directs the trustees to invest the residue in the purchase of lands as near and convenient as can be reasonably had to Garscube, and until an eligible purchase could be made to invest the residue on heritable security, or in Government stock, or Bank of Scotland or Royal Bank stock, so far as it is not already in these stocks, or in the stock or shares of the Forth and Clyde or Union Canals. The said trustees are further directed to accumulate the free yearly interest and profits of the residue, and the yearly rents of the lands mentioned and of the houses in Edinburgh, and the yearly rents of any lands purchased, and to invest the accumulations in the purchase of lands, and that so long as the heir succeeding to Garscube and others under the destination contained in the contract of marriage should be a minor. The deed proceeds as follows:—"And providing that in virtue of the powers reserved to me in the said contract of marriage between the said John Campbell and Anna Jane Sitwell, I shall execute an entail of the lands and estate of Garscube and others upon the series of heirs mentioned in the said contract, then and in that case my said trustees shall execute an entail or entails of the said lands of Gilshochhill, Lochburn, and parts of Burnhouse, and lands of Bonville (if I have not done so), and of the estate of Cumlodden, if it shall be thought more advisable not to sell that estate, and also of the whole lands to be purchased by them, and by the said entail or entails they shall dispose the said lands to the same series of heirs as are called to the succession of the said estate of Garscube and others, in terms of the destination contained in the said contract of marriage;—and providing no such entail of the lands of Garscube and others shall be executed by me, then my said trustees shall dispose and make over in fee-simple to the person, and to the series of heirs appointed by the said contract of marriage to succeed to the said lands of Garscube and others, the said lands of Gilshochhill, Lochburn and parts of Burnhouse, the lands of Bonville, and the estate of Cumlodden, providing it shall not be sold, and the lands that my said trustees shall have then purchased, to the person succeeding to me in the said lands of Garscube, on his attaining majority, but always with and under the conditions contained in the said contract of marriage; and in case the heir who shall succeed to the said lands and estate of Garscube shall have attained the age

of majority before the whole residue and remainder of the said trust-estate and the accumulations thereof shall be invested in land, my said trustees shall pay to the said heir succeeding to the said estate of Garscube, from the date of his majority, or from the date of his succession, if he shall happen to be major before he succeeds, the whole interest and profits that shall arise upon such part of the said residue, remainder, and accumulations, until the said whole residue, remainder, and accumulations of the said trust-estate shall be invested in the purchase of lands, together with the rents of the lands until they shall be made over to him in manner foresaid, and that yearly or half-yearly as the said interests and rents shall become due.' By supplementary deed, dated 26th November 1838, Sir Archibald declared that his trustees should not be obliged to invest more than £30,000 of the residue (over and above the price of Cumlodden, if sold) in the purchase of lands, as directed in the trust-deed, but that the investment of any further sum should be entirely at their own discretion. Again, on 16th March 1840 Sir Archibald made an addition to this supplementary deed, by which he declared that his trustees should not be obliged to invest more than £10,000 sterling in the purchase of land as directed by his trust-deed, but that the investment of any further sum should be entirely at their own discretion, as in the circumstances they should deem most beneficial. Sir Archibald Campbell, the truster, died on 9th July 1846, and was succeeded by his grandson Sir Archibald Islay Campbell, who had previously attained majority.

Sir Archibald Campbell made no entail of any of his estates, nor was the estate of Cumlodden sold. His trustees entered upon the management of the trust, and during the lifetime of Sir Archibald Islay Campbell they fulfilled the whole of the purposes of the trust with the exception of the direction to purchase land, no eligible purchase in the neighbourhood of Garscube having offered itself. The trustees, however, retained in their hands sufficient funds for the purchase of land.

Sir Archibald Islay Campbell was served heir to his grandfather on 10th January 1848, and was infeft in the lands and barony of Garscube, Succoth, and others on 14th September 1849. He died without issue on 11th September 1866. By his will, dated 7th May 1864, he 'left and bequeathed' his whole estate, heritable and personal, to his brother George, afterwards Sir George Campbell, Baronet, the only other child of the marriage between John Campbell and Anna Jane Sitwell.

Sir George Campbell was in 1867 served nearest lawful heir in special of Sir Archibald Islay Campbell, his brother, in the lands and barony of Garscube, Succoth, and others, and likewise his heir in general. He also died without issue on 17th February 1874. By his trust-disposition and settlement, dated 22d October 1873, he conveyed to trustees, the second parties, all his estate, heritable and moveable, directing them to pay over to Lady Margaret Anna Maria Borough or Campbell, his wife, in the event of her survivance, and while she should remain a widow, the whole annual produce and rents of the residue and remainder of his means and estate, heritable and moveable, an annuity being directed to be settled on her in the event of her marrying again, and on the death or second marriage of his wife, and failing issue by his marriage with her, his trustees were to convey

the free residue of his means and estate to the third party, Sir Archibald Spencer Lindsey Campbell, and the eldest heir-male of his body, whom failing, to the series of heirs therein set forth.

Neither Sir Archibald Islay Campbell nor Sir George wished any land to be purchased. They preferred the larger dividends and interest obtained from the stocks; and during their respective lives they received the annual interest or proceeds arising from the whole stocks, and from time to time the trustees of Sir Archibald Campbell, their grandfather, made over different portions to Sir Archibald Islay Campbell, and to Sir George Campbell, successively, of the capital of the stocks. And in 1868, the trustees of Sir Archibald Campbell made over to Sir George Campbell the whole remaining stocks in their names, with the exception of £10,000 of the stock of the Forth and Clyde Navigation Company, which was the minimum sum required to be laid out in the purchase of land.

Sir George Campbell having by his trust-disposition and settlement given to his widow, in general terms, the liferent of his whole estates, heritable and moveable, so long as she shall remain a widow, the question arises whether the parties of the second part, for behoof of lady Campbell, have right to the interest of the fund set apart for the purchase of land, and to the rents of the land when purchased, or whether the land, when purchased, and the interest of the fund until such purchase shall be made, belong to the person who is for the time the heir entitled to succeed to the lands of Garscube and others under the destination contained in the contract of marriage. That person is Sir Archibald Spencer Lindsey Campbell, now of Succoth, Bart., the third party to this case, the eldest son of the late George Ramsay Campbell, second son of Sir Archibald Campbell, the truster. Sir Archibald Spencer Lindsey Campbell is thus the heir-male of his grandfather Sir Archibald Campbell.

The questions on which the opinion and judgment of the Court were desired by the parties were:—

"1. Until the said L.10,000 be laid out in land, do the dividends and interest arising therefrom fall to be paid to the parties of the second part, and through them to Lady Campbell, Sir George's widow; or to the party of the third part, as the heir pointed out by the contract of marriage referred to in the trust-deed of his grandfather Sir Archibald Campbell.

"2. Providing the parties of the first part now proceed to lay out the said sum of L.10,000 in the purchase of land, does the said land fall under the trust-disposition and settlement executed by the late Sir George Campbell, and are the parties of the second part entitled to dispose of the rents, and afterwards of the land itself, in terms of Sir George Campbell's trust-deed; or, do the said lands, with the rents thereof, fall to the party of the third part, as heir foresaid?

At advising.

LORD NEAVES—My lords, this case has been very distinctly and ably stated to us, and I have come to a very clear opinion on the matter. No doubt, as circumstances have turned out, the position of parties is very different from what it might have been expected to be, and this owing to these premature deaths, first of John Campbell younger of Succoth, and subsequently of his two sons Sir Archibald Islay and Sir George, without

issue. Lord Succoth from time to time by successive deeds diminished the minimum sum of money which he directed his trustees to lay out in land, and reduced it from L.30,000 ultimately to L.10,000. He also contemplated the execution of an entail, but he never carried out that intention. I cannot doubt that in the person of Sir Archibald Islay Campbell, on his attaining majority, all the rights in this estate vested, and these rights he transmitted to his brother, Sir George, who became the beneficiary in fee simple. The *jus crediti* was vested in him, and he took it up by drawing the interest of the money and the rents and profits of the lands. My Lords, I am of opinion that Sir George had acquired a complete right to the beneficial interest in this fund, and that he could do with it as he wished, and therefore I should be for answering both questions in favour of the widow.

LORD ORMIDALE—I am of the same opinion. I have no doubt that the whole estate, this L.10,000 and everything else, became vested in Sir Archibald Islay Campbell on his attaining majority. There is a principle of law which has often been recognised, and to which effect has been given in many cases, that if a testator bestows upon his trustees a discretionary power to do a certain thing without fixing an exact time within which that thing is to be done, then in a question of vesting that thing is to be held as done when the time arrives at which the testator contemplated its performance. I may here allude to a case in Bell's Appeal Cases (vol. 6. p. 612), where the principle is well illustrated.

LORD GIFFORD—My opinion coincides with that of your Lordships. The provision in Lord Succoth's will really does not admit of much difficulty when carefully examined. (His lordship read the clause quoted *supra*.) The trustees did make over the lands, but they kept the L.10,000, and paid Sir Archibald Islay Campbell the proceeds until 1866, when he died, he having preferred the interest instead of buying land, as he might undoubtedly have done. The absolute right to this money vested in him, and in like manner it vested in Sir George, his brother, together with the whole of the rest of the estate. Then by his trust-deed in 1873 Sir George disposed of the whole, and it is as the cousin of Sir George, and under his will, that the new Baronet takes. As Lord Succoth's heir, the only way in which he could have a right to this fund, he cannot possibly take.

LORD JUSTICE CLERK—I concur. The question truly is whether the direction to the trustees suspended the vesting. Had there been a period fixed the position of matters might have been very different; the obligation on the trustees to buy land might have been enforced. But that is not so, and I am clear that vesting took place in the person of Sir Archibald Islay Campbell, then above 21, immediately on his grandfather Lord Succoth's death.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel on the Special Case, are of opinion and find that (1st) until the L.10,000 referred to in the Special Case be laid out in land, the dividends and interest arising therefrom fall to be paid to the parties of the second part, and through

them to Lady Campbell, Sir George's widow; and (2d) that if the parties of the first part now proceed to lay out the said sum of L.10,000 in the purchase of land, the said land will fall under the trust-disposition and settlement executed by the late Sir George Campbell, and the parties of the second part are entitled to dispose of the rents, and afterwards of the lands itself, in terms of Sir George Campbell's trust-deed; allow the expenses connected with the Special Case, of all the parties thereto, to be paid out of the L.10,000, and decern, and remit to the auditor to tax the expenses and to report.”

Counsel for Sir Archibald Campbell's Trustees—J. A. Crichton. Agents—Tait & Crichton, W.S.

Counsel for Sir A. S. L. Campbell—H. J. Moncreiff. Agent—A. M. Hare, W.S.

## HOUSE OF LORDS.

Monday, June 7.

(Before Lord Chancellor Cairns, Lords Chelmsford Hatherley, O'Hagan, and Selborne.)

STEUART V. ROBERTSON.

(*Ante*, xi. 427.)

*Marriage—Consent de presenti.*

Circumstances in which the subsequent words and conduct of the parties to an irregular marriage by *de presenti* consent before witnesses,—*held* (*rev.* judgment of the Court of Session) sufficient to over-ride the meaning of the words of consent.

This was an appeal from a judgment of a majority of the whole Court, establishing the respondent's marriage with the late Major Steuart. The circumstances have been already reported.

The defender appealed.

On pronouncing judgment—

LORD CHANCELLOR—My Lords, in the litigation in Scotland out of which this appeal arises a majority of the learned Judges have determined that a marriage, valid according to Scotch law, was proved by the female respondent Margaret Wilson, now Robertson, to have taken place between herself and the late Major Steuart.

The late Major Steuart was the eldest son of Sir William Drummond Steuart of Grandtully and Murthly, Baronet, now deceased, and the heir-in-tail of landed estates of considerable value. The question of the marriage might and would have involved the title to succeed to those estates had a son of the respondent by Major Steuart lived. That son died an infant, and the present litigation, although deeply important as regards the status of the parties, and the view which it presents of the law of marriage, involves a moderate amount of personal property only. The contest as to this is between the respondents and the appellant as the general donee and executor of Sir William Steuart. The appellant disputes the fact of marriage.

The marriage sought to be established is what is termed an irregular one. It is not founded on