Tuesday, January 20.

SECOND DIVISION.

SPECIAL CASE—DICKSON AND OTHERS (CORSAR'S TRUSTEES) *v.* CORSAR AND OTHERS.

Succession—Bequest of Residue—Period of Vesting—Discretion of Trustees as to Vesting.

A testator divided the residue of his estate, including his interest in a going business, into two portions—the first (out of which an annuity and other payments were to be made) being appropriated in liferent to his widow, in addition to a house and garden also left her; the second not so appropriated. After satisfying certain legacies and other payments, and setting aside a sum to meet the provisions for his widow, the trustees were to "account for, divide, and pay over" the residue to the testator's children and grandchildren. There was then a provision that "at and upon the decease or second marriage of my said spouse" the subjects to be liferented by her, and the capital stock set apart for her allowances, and "all remaining subjects, funds, and effects belonging to my estate, or the prices or proceeds thereof," should be divided amongst the children, or in the event of their predecease, their issue; "and failing any of my said children by death without leaving lawful issue before receiving the shares hereby provided to them, the said shares shall be divided equally among the survivors of my said children above named or to be procreated, or the lawful issue of those predeceasing, as representing their respective parents, *per stirpes*, in manner above specified; declaring . . . that the shares hereby provided to my said children or grandchildren, named or to be procreated, after the same shall have been ascertained and become payable as above mentioned, shall be paid to them after they shall have respectively attained the age of twenty-one years complete, or if females, upon being married previously; it being hereby specially conditioned and provided and declared to be the essential and true intent and meaning hereof, and according to which my said trustees shall act, . . . that all my children shall share equally in my estate and succession; and that with regard to those dying before receiving implement hereof, their children shall succeed equally to their father's or mother's share; and failing children, the shares of those deceasing shall fall to the survivors and to the children of those predeceased, each child or family being hereby declared to form a distinct class," &c. It was further provided that the income of shares was to be applied for the maintenance of the parties in question "until the respective periods of payment thereof shall arrive." With regard to the testator's interest in the manufacturing business of which he was a partner, it was provided—"As my desire is to secure the prosperity of my sons while remaining partners of the said company, I hereby give to my trustees full discretionary powers as to the time of exacting payment of the said instalments" (in which form his share in the concern was to be paid), "and I hereby express my wish that the payments may not be rigorously enforced so as to put the company to much inconvenience: And my said trustees shall have full liberty to allow the said instalments to remain at interest as above mentioned, if they find this course conducive to the credit and prosperity of the company, and not prejudicial to the other parties beneficially interested herein." . . . .

In a subsequent codicil there was this provision—"My chief desire being for the maintenance and stability of the business, I direct my said trustees, in the event of the same being carried on by my sons, to be as liberal towards the parties composing the company-firm as circumstances will admit, and therefore the company-firm in which my sons shall be engaged shall be allowed the use of as much of my capital remaining at my credit at my decease as can be spared and as the company can find employment for, and that with or without security. . . . Whenever my daughters' interests and provisions can be secured and removed from the risks and losses incident on trade, I hope my sons will enable my said trustees to complete and carry out such security." These provisions to the children were declared to be in lieu of *legitim*.

Held that in regard to the first portion of the estate, which was liferented by the widow, vesting only took place at her death, but that the rest of the estate must be held to have vested at the date of the testator's death.

Observed that in order to suspend the vesting in such a case, either according to the discretion of the trustees, or till the period of the widow's death, the language must be more precise and unambiguous than any to be found in the clauses quoted above.

Observed per Lord Ormidale that the result might have been different if in regard to the children's provisions the testator had used the expression "receiving payment" instead of "receiving implement" hereof.

Counsel for Parties—Patten—J. P. B. Robertson—Wallace—Barclay. Agents—Webster, Will, & Ritchie, S.S.C.—Rhind, Lindsay, & Wallace, W.S.—T. F. Weir, W.S.

Tuesday, January 20.

SECOND DIVISION.

SPECIAL CASE—BRUCE AND OTHERS.

Succession — Testament — Words of Bequest — "Anxious Desire."

A testator left his whole moveable estate absolutely to his wife, with the expression of an "anxious desire," and elsewhere "of a hope," that she should make a will leaving the amount "which may pertain and be resting-

owing to her at the time of her decease" in a certain way. The widow died intestate. *Held* that the whole of the moveable estate passed to her heirs *ab intestato*, and that the expression in the husband's will was merely a recommendation.

James Barclay, farmer, residing in Huntly, died without issue on 31st May 1866, survived by his wife. There was no antenuptial contract. Barclay left the following probative writings:—(1) a testament dated 15th July 1862, dealing with his moveable estate, by which he nominated his wife sole executrix and universal legatory, under the burdens therein contained, with relative codicil thereto annexed, dated 13th March 1865; (2) a probative writing, also dated 15th July 1862, containing recommendations to the executrix under his testament, with probative declaration annexed relating to the codicil, and dated 13th March 1865; and (3) a trust-disposition and deed of settlement of his heritable estate also dated 15th July 1862.

At Barclay's death his widow was confirmed executrix, and entered into possession of his free moveable estate, amounting to about £1988. Mrs Barclay, who had no separate estate, died intestate on 15th December 1878. On the application of some of her next-of-kin, the Rev. Charles Bruce, the first party to this case, was appointed factor upon her estate, and was thereafter confirmed executor-dative *qua* factor. The testator's sister Mary Barclay or Duncan predeceased, and her children Ann and Margaret were the parties of the second part, while Mrs Barclay's heirs *in mobilibus* were the parties of the third part.

The clauses in the probative writings which related to the dispute with which this Special Case dealt were as follows:—*First*, in the testament of 15th July 1862—"But while it is my wish that my said spouse shall enjoy the free and undisturbed use of my said means and estate if she should survive me, it is my anxious desire that as soon after my death as convenient she will execute a testament bequeathing one-half of the means and estate which may pertain and be resting-owing to her at the time of her decease to be divided amongst certain of my relatives to be named by me in a separate writing containing my wishes on that subject." *Second*, in the codicil thereto, leaving a legacy of £50 to his wife's sister, the testator adds—"Which legacy shall be paid out of the half of the means and estate which I have recommended my said spouse to bequeath to certain of my relatives named in a separate writing." *Third*, in a probative writing of the same date as the testament—"Considering that I have . . . executed a testament nominating . . . my spouse, in case she should survive me, to be my sole executrix and universal legatory, and expressing a hope that as soon after my death as convenient she would execute a testament bequeathing one-half of the means and estate which may pertain and be resting-owing to her at the time of her decease, to be paid to and divided amongst certain of my relatives to be named by me in a separate writing containing my views on that subject—it is my anxious wish, and I do hereby recommend, that in making said testament my said spouse will direct," &c.; and then followed a scheme of division of the fund recommended to be bequeathed.

The first and third parties maintained that the testator's whole moveable estate vested in his wife in fee on her survivance, unburdened by any trust in favour of the persons mentioned in the probative writing, or any of them; and that the husband's desire or recommendation not having been carried out by his widow, her executor-dative was not entitled to give effect thereto.

The second parties maintained that the testator's moveable means and estate vested in his wife on her survivance, subject to a trust in favour of the persons mentioned in the probative writing, and subject to an obligation on her to bequeath one-half of the means and estate which might be owing to her at the time of her death to and amongst her husband's relatives, as directed by him as above mentioned, and that her executor and representatives were bound to implement this direction or recommendation.

The question of law submitted for the opinion of the Court was as follows:—"Is the first party bound or entitled to give effect to any extent, and if so, to what extent, to the recommendation contained in the probative writings before mentioned in favour of the second parties?"

Authorities—M'Laren on Wills, i. 324; *White* v. *Briggs*, Feb. 27, 1846, 15 L.J., Ch. 182; *Lamb* v. *Eames*, March 10, 1871, L.R., 6 Ch. App. 597; *in re Hutchinson and Tenant*, May 11, 1878, 8 Ch. Div. 540; *Parnall* v. *Parnall*, July 24, 1876, 9 Ch. Div. 96; Lewin on Trusts, 118; Williams, i. 809; Jarman on Wills, i. 356.

At advising—

Lord Justice-Clerk—There is not here any ambiguity in the bequest to the wife if it stood by itself. It is a bequest to her for her own benefit—in no sense as a trustee or fiduciary. Then there follow upon these specific and distinct words of bequest the words which express a desire that she should bequeath, not one-half of the estate left by the testator, but one-half of what should be left by her at the time of her death. The beneficiary is an absolute beneficiary, and there is nothing in Mr Barclay's words beyond an appeal and a request to his wife to follow his advice. This view is, I think, in accordance with all the modern practice, and with the authorities both in England and here.

Lord Ormidale—There was here a universal and absolute bequest. The recommendation is merely as to what is left at the death of the beneficiary, not of the testator. There is no recommendation to trustees or anything of that kind; it is merely a request directed to another person as to an estate, with even the representative control of which the testator is parting entirely by his own testamentary act.

Lord Gifford concurred.

The Court answered the question in the negative.

Counsel for First and Third Parties—Balfour—Pearson. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for Second Parties—Scott—J. A. Reid. Agent—R. C. Gray, S.S.C.