Friday, March 18.

SECOND DIVISION.

SPECIAL CASE—SCOTT (SCOTT'S EXECUTOR) *v.* SCOTT'S TRUSTEES.

Succession — Vesting — "Survivors" — Period of Apportionment among Testator's Children to be Completion of Certain Contracts.

A testator who at the time of his death had certain contracts in course of execution directed his trustees to carry them on, and on the completion of them to value and then "fix and determine, divide and apportion," his estate "among the whole of my children, or the survivors of them, or their issue; declaring that in case of any of my children having predeceased the period of apportionment leaving lawful issue, the issue of such predecessor or predecessors shall be entitled, equally among them *per stirpes*," to their parent's share. Two sons having died without issue while the contracts were still uncompleted, *held* that no right under the settlement had vested in them.

William Scott, contractor, Leith, died on 4th June 1875. He had been twice married, and was survived by his second wife, and by five sons and two daughters of the first marriage and one son and six daughters of the second marriage. Mr Scott left a trust-disposition and settlement by which he bequeathed his whole estate, heritable and moveable, in trust for the following purposes:—(1) payment of debts; (2) "For the purpose of my said trustees or trustee entering upon, performing, and carrying out to a conclusion, for behoof of my family as after mentioned, all contracts or agreements, whether for the making or finishing of docks, railways, or other works, in which I may be engaged at the time of my death, it being my wish and instructions that the completion of such contracts shall be entrusted to and carried out by or under the superintendence of John Best, who has long acted as my foreman or assistant, and my sons John and William Scott, with the advice and counsel of my said other trustees, and that my trustees shall give to the said John Best and my said sons, for their time and trouble in superintending the performance of my part of said contracts, such allowances or salaries as they may consider fit and proper, or as may be agreed upon between the general body of my trustees and those undertaking such superintendence as aforesaid, and that my said trustees shall have it in their power, in case of the said John Best or my said sons or either of them declining or being unable duly and timeously to complete the said contracts, to employ other competent persons to complete the same at the expense of my estate." By the third purpose the trustees were directed to hold and manage the whole of the testator's means and estate, including the contracts as aforesaid, and the farm of Balnakiel in Sutherlandshire, leased and stocked by him, until the termination of the said contracts, and from the profits of the estate, after the allowances to his sons John and William and to Mr Best provided for in the preceding purpose, and a similar allowance to another son for managing the farm, to pay from the proceeds to his widow, or some other fit person, such annual sums as they should think adequate for the maintenance and upbringing of the children who might be at the time unable to maintain themselves; "and it shall be no objection on the part of any person or persons interested in my succession, under this deed or otherwise, although it should turn out after said contracts shall have been completed and wound up, that my trustees in fixing the allowances and sums to be paid as above directed, have encroached upon the capital of the trust estate, but the said capital shall in such case, when the same or the residue thereof comes to be divided as after mentioned, suffer a diminution in the shares thereof falling to my children or their issue, to the extent of the sums which my trustees may have so paid in excess of the income or produce of the trust-estate for the purposes aforesaid." The fourth purpose was as follows—"Upon the completion of said contracts my trustees shall have the whole of the trust-estate under their charge valued by competent persons to be appointed by themselves, and shall, after setting aside a portion thereof to meet the provisions made in favour of my said wife by our contract of marriage, or such increased provisions to her as my said trustees may in virtue of the powers hereinafter conferred upon them, fix and determine, divide and apportion, the free amount of the trust-estate, including accumulations of income, if any, among the whole of my children, or the survivors of them, or their issue, in such way and manner that the proportions falling to sons and their issue shall, as compared with the proportions falling to daughters or their issue, be as eight to five; Declaring that in case of any of my children having predeceased the period of apportionment leaving lawful issue, the issue of such predecessor or predecessors shall be entitled, equally among them *per stirpes*, to the share or shares which would have fallen to their parent or parents had he or she or they survived said period; and that in making such division or apportionment my trustees shall, if required to do so by my said son Andrew, allocate and convey to him as part of his share, one-half of the benefit of the tenant's part of the lease of said farm of Balnakiel at a valuation to be put thereon by competent persons selected and appointed by my said trustees." Fifthly he directed his trustees, "as soon as convenient after making such division and apportionment to convey and pay over to those of his children who might have attained majority, or in the case of daughters have attained majority or been married, the shares so apportioned to them, "but with this qualification, that in case of any of my children who may have received their shares in said apportionment dying before the extinction of said provisions without leaving issue, the share or shares of these children in said reserved portion of the trust-estate shall accresce to and devolve upon the others or their issue in the proportions above mentioned."

At the date of Mr Scott's death in June 1878 there were several contracts in course of execution by him, including one large contract for the formation of a new dock at Leith. The lease of Balnakiel was also current. The estate consisted of railway shares, and stock-book and other debts, contractor's plant, and the stock on the farm of Balnakiel, amounting in all to £119,325, 18s. 7d.

On 12th July 1877 the testator's son Andrew Scott died intestate and unmarried. On 24th April 1879 his son William Scott died, also intestate and unmarried. At that date the contracts were still current. Another son of the testator, John Scott, was appointed executor-dative of his deceased brothers. A question then arose between him as their executor and the trustees of the testator as to the vesting of the provisions to the testator's children under the trust-deed, he maintaining that the shares of William and Andrew had vested in them and had passed to him as their executor; the trustees maintaining that there could be no vesting in any child who had predeceased the completion of the contracts, the period at which under the trust-deed the provisions to children were to be apportioned. This case was therefore presented—John Scott, as his brother's executor, being the first party, and the trustees the second parties.

The question of law was—"Upon a sound construction of the trust-deed of Mr Scott, did one share of his trust-estate vest in each of his sons William and Andrew; and did these shares pass to the first party as their executor-dative foresaid?"

The first party argued—It was not to be presumed that the testator meant that if any of his sons died married or unmarried while the contracts were unfinished they should take nothing under his will—*Maitland's Trs.* v. *M'Dermaid*, 15th March 1861, 23 D. 732; *Henderson's Trs.* v. *Henderson*, 8th Jan. 1876, 3 R. 320. The testator in the second purpose made a gift to his family. The second purpose said—"for behoof of my family as after mentioned." In such cases as *Young* v. *Robertson* (*infra*) the destination-over was not to a whole family but to a grand-nephew. The delay of apportionment till the completion of the contract was for the ascertainment of the amount of the bequest, and had no reference to the persons to be benefited. Suppose all the contracts were completed save one trifling one, would that stop the vesting of this large estate? On the effect of destinations to issue the case of *Sloane* v. *Finlayson*, 20th May 1876, 3 R. 678, was an authority for the first party. Though decided against vesting, it was so decided by reason of the very special terms of the deed to be construed—see also *Elliot*, 11 Macph. 735. The case of *Snell's Trs.* v. *Morrison*, decided by Lord Shand in 1875, and rep. 20th March 1877, 4 R. 709, was in point, as was also *Gray* v. *Garman*, 2 Hare 268, there cited. As a question of intention it was improbable that the testator should have cast aside both the date of his death and the date of payment as the term of vesting, and taken so strange a one lying between them as the date of completion of certain contracts.

Argued for second parties—The first party must in order to succeed construe "survivors" as persons surviving the testator, and not the period of apportionment. That could not be the meaning of the word as the testator had used it. It was correlative to the expression used just afterwards, "children having predeceased the period of apportionment." Such a meaning of the words "survivor of them," as the first party gave it, would make it quite superfluous. In order to make a destination-over suspend vesting there was no doubt it must be a destination-over other than the law would imply. But the destination here answered that test. That answered the cases quoted on the other side as to destinations-over to children of legatees—*Provan* v. *Provan*, 14th Jan. 1840, 2 D. 298; *Johnston* v. *Johnston*, 9th June 1840, 2 D. 1038; *Young* v. *Robertson*, 4 Macq. 314.

At advising—

Lord Craighill—The Special Case now before us is presented by John Scott, the executor-dative of the deceased William and Andrew Scott, one of whom died in 1877 and the other in 1879, of the first part, and the trustees of the deceased William Scott, contractor in Leith, father of William and Andrew Scott, whose executor is the first party, of the second part. The question of law is, whether upon a sound construction of the trust-deed of Mr Scott one share of his trust-estate vested in each of his sons William and Andrew, and whether these shares pass to the first party as their executor-dative. Mr Scott made the trust-disposition and settlement—the terms of which we are to construe—in May 1875, and he died on the 4th of June following. He was twice married, and was survived by his second wife, and by five sons and two daughters of his first marriage, and one son and six daughters of the second marriage. What we have now to do is to arrive as nearly as we can at the will of the testator as expressed in his trust-deed. We must take all the light we can from the cases which have been decided on the interpretation of wills, and also from any rules of construction which may exist and be applicable; but the thing to be determined is, what according to the terms of the trust-disposition was the will of the testator? In this case it may be that such and such conditions and provisions are parts of the will by which the succession is to be regulated, but the testator was entitled to do what he thought best, and when we come to the conclusion that anything was intended by the testator effect must be given to that intention.

The first purpose of the trust-deed is the ordinary purpose of payment of debts. The second purpose is not often found in deeds brought up for our consideration. Mr Scott was a large contractor, and had at the date of his trust-deed, and also at the time of his death, certain heavy contracts unfinished, and what he did was to instruct the trustees to take up those contracts which he had current at the date of his death and to carry them out. He pointed out as the persons by whom the trustees were to be assisted in so doing his two sons, one of whom had acted as a manager, and he intended that through their instrumentality the contracts should be carried out to their completion. There were three classes of persons to be provided for under the trust-disposition. The wife was to get so much, and the trustees had a discretion to increase the amount, and to such of the children as could not support themselves they were directed to make all necessary allowances. They were to do this as they thought best, even if the capital were encroached upon, and it was to be no objection in the mouth of any of the beneficiaries that there had been such encroachment, for the trustees had powers from the testator to draw upon the capital at their discretion. This power of encroachment was made matter of argument at the bar by the counsel for the first parties,

who said that it indicated a purpose that the fee should vest *a morte testatoris*, because it was a provision for an allowance to the children. The difficulty of that view is that the children were not all alike to take, but only those who could not support themselves, and by the second and third purposes there is a power to make payment to the sons for work to be done. And so I think that so far not much aid can be obtained in interpreting the settlement. Another view of the third clause is that put to us by counsel on the same side, that there was no provision in the trust-deed at all for any of the children intended ultimately to be beneficiaries. It was said with a great deal of force—"It is surely a very improbable thing for a man to make no provision for the children by whom he is to be survived until the date of the apportionment, and who may die before that time arrives. They will get no money at all if they do not get it in the meantime." I do not think that there is much in that view either. It rather appears to me that we cannot derive much light on the interpretation of the fourth, which is the pregnant clause, from the second or third. The fourth clause is to this effect—[*his Lordship here quoted the clause*]. The parties of the second part say that this direction is only for the benefit of children alive at the time of apportionment, or the issue of those who predecease that period, if there be such issue, and they found upon the word "survivors" as leading to that result.

The contention on the other side is that the true intention of the trust was that all the children should take a vested interest *a morte testatoris*, and between those views we have to determine. Undoubtedly there is a strong presumption for the view that the testator meant to confer a benefit on his children as early as possible, unless there is some reason to come to a contrary conclusion, and it is difficult to come to a conclusion as to what should influence a man to do otherwise. But *a priori* presumptions come to little, for the testator's will must be sought in the language he uses, as little aid is to be derived from looking to the peculiarity of the period fixed for apportionment, and consequently of vested interest. It is not in many settlements that such a period as we have here could be directed, but here contracts were to be carried on, and here, we might say, apportionment is to be only at that time for the purpose of giving a right to the children who are then alive. Looking to the words here it seems to me not the purpose of the testator to give a vested interest to his children from his death, but only to give it to those who are alive at the time of apportionment or the issue of the predecessors. One difficulty of the first party is, that if we read the clause as he desires us to do, it will be to give no meaning to the word "survivors" at all. There is no need of it if it only means survivors at the testator's death.

And I think this is well shown by the authority of the well-known case of *Young* v. *Donaldson*. There this contention was maintained, and the decision of the House of Lords was that those were meant who were alive when the apportionment or distribution or payment was to take place. We must walk in the light of that case, and would do so even if words were not used by the testator which makes the authority of that decision almost unnecessary to be invoked. For we have here this declaration—"Declaring that in case of any of my children having predeceased the period of apportionment leaving lawful issue, the issue of such predecessor or predecessors shall be entitled, equally among them *per stirpes*, to the share or shares which would have fallen to their parent or parents had he, she, or they survived that period." Here we have the key furnished to what is spoken of as "survivor." The survivors are those who have not predeceased the period at which the testator has appointed them to invest. The one clause explains the other, and I may add that this view—the view against any presumption of vesting at his death—is strengthened by the subsequent provision relative to the share of the estate which was to fall to the widow.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

The Court answered the question put to them in the negative.

Counsel for First Party—Asher—Keir—Millie. Agents—M'Caskie & Brown, S.S.C.

Counsel for Second Parties—D.F. Kinnear, Q.C.—Mackintosh. Agent—T. J. Gordon, W.S.

Saturday, March 19.

FIRST DIVISION.

[Lord Adam, Ordinary.

HENRY *v.* MORRISON.

Jurisdiction — Appeal from Sheriff — Value of Cause—Competency.

An action *ad factum præstandum*, viz., for delivery of certain I O U's, is competent in the Court of Session, though the sum contained in them is under £25.

Mr Henry, S.S.C., raised an action against D. A. Morrison, the only conclusion of the summons (besides that for expenses) being for delivery of fifteen I O U's for small sums therein specified, the total sum contained in them amounting to £16, 18s. 6d. It appeared that the defender, who was at one time cashier and book-keeper to the pursuer's firm, had obtained possession of these I O U's, which bore to be granted by Mr Scott, the pursuer's partner, and had raised an action in the Sheriff Court against Mr Scott, which was still in dependence, for payment of their contents.

The pursuer pleaded — "The documents libelled being the property of the pursuer, and the defender having illegally taken them away from the pursuer's office, and continuing wrongfully to retain possession thereof, the pursuer is entitled to decree in terms of the conclusions of the summons."

The defender pleaded—"(1) The action is incompetent."

The Lord Ordinary (ADAM) repelled the defender's first plea, and added the following note:—"The first question in this case is, Whether the action is incompetent under the 28th section of