Thursday, May 12.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

SNODY'S TRUSTEES *v.* GIBSON'S TRUSTEES.

(*Ante*, vol. xx. p. 392; 10 R. p. 599.)

Succession—Legitim—Equitable Compensation.

A truster directed his trustees to divide the residue of his estate into three equal portions, one-third to be held by them for the liferent behoof of one of the truster's daughters who was married and had issue, under deduction of a sum advanced by him on behalf of the said daughter and her son. This advance was to form part of the free residue, and on the death of the said daughter the trustees were to divide amongst her children in certain proportions the moneys so held for her liferent behoof. The daughter claimed legitim, and it was held by the Court (*ante*, vol. xx. 392, and 10 R. 599) that the income of the share of residue destined to her and her family vested in the trustees, and was to be applied by them in compensation of the legitim received by her, and that her children had a separate and independent interest in the fee of the provision.

In a question as to the appropriation of the income of the share of residue held by the trustees, the Court found that the daughter's legitim had suffered abatement in consequence of the advance above mentioned being imputed to it, and that the share of residue falling to the children was thereby enlarged to a greater extent than it was diminished by the withdrawal of legitim, and therefore *held* that the children were not entitled to any portion of the income.

Mr Andrew Snody, S.S.C., died on 18th March 1881, leaving a trust-disposition and settlement by which he directed his trustees to divide the residue of his estate into three equal portions, one-third to be paid to the three children of Mrs Wallace, a deceased daughter, in equal shares, under deduction of a sum of £274 advanced to them; another third to be paid to Mrs Gibson, another daughter, whom failing to her children equally. As regarded the remaining third, the trustees were directed to hold it for the liferent behoof of the truster's only other child, Mrs Millar, under deduction of the sum of £1800 advanced by him to her and her son, which £1800 was to form part of the free residue. On Mrs Millar's death the moneys held by the trustees for her liferent use were to be divided amongst her children in certain proportions, it being declared that these legacies were intended to vest at the truster's death.

Mrs Millar claimed legitim.

An action of multiplepoinding was then raised to determine the rights of parties. In this action the Court held (1) that in consequence of Mrs Millar having claimed legitim the income of the share of the residue destined to her and her family vested in the trustees during her lifetime, and was to be applied by them in compensation of the legitim received by her; and (2) that her children had a separate and independent interest in the fee of the provision, which was not affected by their mother's election except in so far as their share of the free residue might be required to contribute along with the other shares of the free residue to satisfy their mother's claim of legitim.

Thereafter the Lord Ordinary approved of a scheme of division, and ranked and preferred the claimants William Somerville Millar and Helen Lewins Millar, Mrs Millar's children, to the sum of £1978, 10s. 2d. in certain proportions, and directed the said principal sum of £1978, 10s. 2d. to be held by the trustees in terms of the settlement, and the income to be applied by them in compensation of the legitim received by Mrs Millar.

The following statement shows the figures dealt with:—

Actual divisible residue					£8,063	1 4
Divisible thus—						
Legitim .	£2,059	3 11				
Less sum due by Mrs Millar to estate .	1,085	17 9				
			£973	6 2		
Gibson's Trustees . . .			2,692	12 6		
Wallace family	£2,692	12 6				
Less . .	274	0 0				
			2,418	12 6		
Millar family	£2,692	12 5				
Less portion of £1800 advanced to them	714	2 3				
			1,978	10 2		
					8,063	1 4
If legitim had not been claimed—						
Actual divisible residue as before . .					£8,063	1 4
Add, as directed by trustees—						
1. Sum to be deducted from share bequeathed to Mrs Millar and family	£1,800	0 0				
2. Do, Wallace family .	274	0 0				
					2,074	0 0
					£10,137	1 4
Divisible as follows—						
One third to Gibson's trustees . . .					£3,379	0 5
Do. to Wallace family	£3,379	0 5				
Less as above . .	274	0 0				
					3,105	0 5
One-third to Millar family	£3,379	0 6				
Less as above . .	1,800	0 0				
					1,579	0 6
					£8,063	1 4
Difference—						
Instead of . .	£3,379	0 5				
Gibson's trustees got .	2,692	12 6				
Loss to Gibsons					£686	7 11
Instead of . .	£3,105	0 5				
Wallace family got .	2,418	12 6				
Loss to Wallaces					£686	7 11
But Millar family got	£1,978	10 2				
Instead of . .	1,579	0 6				
Gain to Millar family					£399	9 8

On 6th November 1886 the Lord Ordinary (M'Laren) pronounced the following interlocutor:—"The Lord Ordinary having considered the cause on the question of the appropriation of the

income of the share of the residue vested in the trustees, and directed by interlocutor of 3d November 1882 to be applied by them in compensation of the legitim received by Mrs Millar, Finds (1) that the said income is to be applied by Mr Snody's trustees half-yearly, or annually as it accrues, towards compensating such of the residuary legatees as have suffered pecuniary loss in consequence of the withdrawal of legitim from the trust-estate, until the amount of such loss and interest shall be wholly made up and compensated by such periodical payments: Finds (2), with respect to Mrs Millar's children, that according to the true construction of the trust-deed these claimants were entitled to a share of residue, burdened with their mother's liferent right, and under deduction of the sum of money stated by the truster to have been advanced by him to or on behalf of Mrs Millar and her son in his lifetime, but that Mrs Millar's legitim has suffered abatement to the extent of £1085, 17s. 9d. in consequence of the said advances being to that extent imputed to legitim, and that the share of residue falling to the children is thereby enlarged to a greater extent than it is diminished by the withdrawal of legitim: Finds therefore that the claimants, Mrs Millar's children, are not entitled to participate in the division of the said income: Finds (3), with respect to the claimants Mrs Gibson's trustees, that according to the scheme of division approved by the Lord Ordinary their loss through the withdrawal of legitim is £686, 7s. 11d., being the difference between £3379, 0s. 5d., the value of their interest, inclusive of the whole legitim fund, and £2692, 12s. 6d., the value thereof after giving effect to Mrs Millar's claim: Finds (4), with respect to Mrs Wallace's children, their loss through the withdrawal of legitim is the like sum of £686, 7s. 11d., being the difference between £3105, 0s. 5d., the value of their interest under the settlement, and £2418, 12s. 6d., the value thereof after giving effect to Mrs Millar's claim: Therefore appoints the said trustees to make payment to the claimants George Gibson and others, trustees of Mrs Gibson, and to Mrs Wallace's children, annually or half-yearly, and in equal shares, of the free surplus income of the trust, until the said two sums of £686, 7s. 11d. of loss, with interest, shall be wholly compensated or extinguished."

Against this the claimant W. S. Millar reclaimed, and argued—That the £1085 was truly a debt due to the trust-estate by the party claiming legitim, and that it had nothing to do in any way with legitim. The loss falling on each of the other two claimants was one-third of the total loss, and the remaining third, or £686, 7s. 11d., was the amount of the loss sustained by Mrs Millar's family. This was a case in which the doctrine of compensation was clearly admissible.

Counsel for the respondents (Snody's trustees) were not called upon.

At advising—

Lord President—This is not a case in which it was necessary for us to call upon the respondents for any reply. The Lord Ordinary has expressed quite clearly the ground of judgment, though I think it is possible to express it even more shortly than he has done.

The doctrine of equitable compensation upon which the appellant has relied can only apply where a case of loss has actually been made out, and if from any cause a party taking under the will obtains more than he would otherwise have got in the ordinary course through a third party claiming legitim, then it appears to me that no case for the application of the doctrine of compensation arises.

Lords Mure, Shand, and Adam concurred.

The Court adhered.

Counsel for Appellant—Pearson—Shaw. Agent—William Asher, S.S.C.

Counsel for Respondents—Darling. Agents—Scott Moncrieff & Trail, W.S.

Friday, May 13.

SECOND DIVISION.

[Sheriff of Fife.

BETHUNE AND OTHERS *v.* DENHAM.

Interdict—Golf Links—Possessory Judgment.

The right belonging to the inhabitants of St Andrews and others of golfing over the Links of St Andrews, or Pilmour Links, was by usage confined to the golfing course, which was marked out by march-stones. In the title of the proprietor of the Links, who derived his right from the Magistrates of St Andrews, was this declaration—"Nor shall it be in the power of any proprietor of said Pilmour Links to plough up any part of the said golf links in all time coming; but the same shall be reserved entirely, as it has been in times past, for the comfort and amusement of the inhabitants and others who shall resort thither for that amusement." In 1881 the proprietor granted, with the concurrence of the grazing tenant, a lease for seven years in favour of certain persons on behalf of the St Andrews Ladies' Golf Club of a small piece of ground forming part of Pilmour Links, lying to the east of the golfing course. It was declared by the lease that the piece of ground so let was to be made use of for the purpose of golfing or putting by the members of the club, and those having permission from the club, but no others. An earlier missive of lease for the same purpose had been granted in 1868, for five years from Martinmas 1867, and from the expiry of that period the right of the club had been continued by tacit relocation.

An inhabitant of St Andrews, not a member of the club, on an occasion in 1885 golfed or putted on the said pieces of ground in the exercise of an alleged right. The club brought an action of interdict against him. The respondent maintained that the proprietor was not entitled to grant an exclusive right to the club of the ground in question. It was proved that the club had been in exclusive possession of the ground since 1867 under the above-mentioned missive and