Counsel for Pursuer—Comrie Thomson—James Reid. Agents — Macpherson & Mackay, W.S.

Counsel for Defenders — Jameson — Younger. Agents—Reid & Guild, W.S.

Thursday, June 23.

SECOND DIVISION.

HERON MAXWELL *v.* MAXWELL HERON.

Bankruptcy — Father and Child — Provisions to Children—Effect of Bankruptcy of Father on Rights of Children Entitled to Receive Provisions at his Death.

In the antenuptial contract of marriage, dated in 1868, of A B, heir-apparent of an entailed estate, he himself and the heir in possession of the estate bound and obliged themselves and the succeeding heirs of entail to pay the child or children of the marriage who should be alive at the death of A B and should not succeed to the entailed estate, and to the representatives of the children predeceasing A B, certain provisions proportioned in amount to the number of children or representatives of children surviving.

In 1877 A B succeeded to the entailed estate. In 1883 he disentailed the estate, and in the course of the disentail proceedings he granted a bond and disposition in security, in which he bound and obliged himself and his heirs, &c., to make payment of a sum similar in amount to the provisions to younger children and their representatives contained in his contract of marriage at the first term of Whitsunday or Martinmas which should happen twelve months after his death, to trustees therein named in trust for payment to the said younger children and their representatives in such proportions, if more than one child, as he should appoint in writing, and failing such appointment, equally.

In 1887 the estates of A B were sequestrated, and the estates over which the bond and disposition in security extended were sold by the trustee in the sequestration. At that time there were alive two younger children of the marriage—a girl born in 1870, and a boy born in 1878—and their rights under the bond were valued at £2510, 11s., and this sum was paid over to the trustees under the bond.

Held that the trustees were bound to retain the money and accumulate the interest until the first term of Whitsunday or Martinmas which should happen after the death of A B.

By antenuptial contract of marriage dated 12th November 1868, entered into between John Maxwell Heron (therein named John Heron Maxwell), of the first part, and Margaret Stancomb, second daughter of William Stancomb of Fairleigh Castle, near Bath, in the county of Somerset, of the second part, the said John Maxwell Heron, as heir-apparent of the entailed estate of Heron, and Michael Maxwell Heron, as heir of entail in possession of said entailed estates, for their respective interests, in contemplation of the said John Maxwell Heron's marriage to the said Margaret Stancomb, and of certain provisions by a deed in English form referred to in the said antenuptial contract of marriage, and in exercise of the powers in regard to provisions to children contained in the deed of entail of the said estates, as well as those granted by the Entail Amendment Act 1868 (31 and 32 Vict. cap. 84), bound and obliged themselves, and the whole heirs of entail succeeding to them in the said entailed estate, "to make payment of the provisions following to the child or children to be procreated of the said marriage who shall be alive at the death of the said John Heron Maxwell and shall not succeed to the said entailed estate; and to the representatives of those children who shall predecease the said John Heron Maxwell, claiming right in virtue of special settlement by marriage-contract the following provisions, bearing interest in terms of the statute, and payable one year after the death of the said John Heron Maxwell, *videlicet*, if one such child, the sum of £4000, if two such children, the sum of £5000, and if three or more such children, the sum of £6000, or such other sum less as shall not exceed three years' free rents of the said entailed estate of Heron at the time of the death of the said John Heron Maxwell, after deducting all public burdens, interest of debts, and the yearly amount of other burdens of what nature soever affecting or burdening the said lands and estate, or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or yearly value thereof to the heir of entail in possession."

Three children were procreated of the marriage, viz., Violet Bridget Maxwell Heron, born 15th May 1870; Guy Maxwell Heron, born 8th June 1871, who was the heir entitled to succeed to the entailed estate of Heron after his father; and Basil Montague Maxwell Heron, born 18th June 1878.

Michael Maxwell Heron died on or about 4th April 1877, and was succeeded in the estates by John Maxwell Heron, who on 6th March 1883 presented a petition to the Court of Session for their disentail. In the course of the procedure therein a curator was appointed to Violet Bridget Maxwell Heron and Basil Montague Maxwell Heron, and a bond and disposition in security, dated 30th October 1883 and recorded 14th April 1884, was granted by John Maxwell Heron in favour of Frederick William Burgoyne Heron Maxwell, James Howden, and Thomas Roworth Parr, being the parties at whose instance it was provided by the said contract of marriage that execution should pass for implement of the provisions therein conceived in favour of the issue of the marriage. By the said

bond and disposition in security, which proceeds on the narrative of the said contract of marriage, of the disentail proceedings, and that it was right and proper that he, John Maxwell Heron, should grant the same in order to secure the provisions to the said younger children contained in the said contract of marriage, John Maxwell Heron bound and obliged himself, and his heirs, executors, and representatives, to make payment to the said parties as trustees, at the first term of Whitsunday or Martinmas which should happen twelve months after his death, of the sum of £6000, with interest thereon at the rate of 5 per cent. from the date of his death to the term of payment, and half-yearly, termly, and proportionally thereafter during the not-payment; but it was declared that notwithstanding the obligation therein contained that if at the date of his death there should be only two children surviving of the said marriage who would not have succeeded to the said estates, or the lawful issue of two such children, or the representatives of two such children, claiming right in virtue of special settlement by marriage-contract, the obligation therein contained should be and the same was thereby restricted to the sum of £5000; if there should be only one such child or issue or representative as before mentioned, the obligation should be and the same was thereby restricted to the sum of £4000; and if he should not be survived by any child or issue or representative as before mentioned, the provision should lapse. By the bond and disposition in security it was further declared that the same was granted to the trustees, and should be accepted by them "in trust for payment to the children of the said marriage surviving me" (John Maxwell Heron) "who would not have succeeded under said . . . deed of entail to the said entailed lands and estate, or in the case of such of them as shall predecease me, their lawful issue or representatives claiming right in virtue of special settlement by marriage-contract of the sums to be received by them in such proportions if more than one as I shall appoint by any writing under my hand at any time of my life, and failing such appointment the same shall be divided amongst them equally."

The estates of John Maxwell Heron were sequestrated on 11th July 1887, and the estates over which the bond and disposition in security extended—then held in fee-simple—were sold by the trustee in the sequestration. At that time the rights of Violet Bridget Maxwell Heron and Basil Montague Heron under the bond were valued by the trustee in the sequestration, in terms of the Bankruptcy Acts, at £2510, 11s., after taking into account all the contingencies mentioned in the marriage-contract. This valuation was concurred in by the trustees under the bond and disposition in security, and in the ranking and division of the claims of the heritable estates, the trustees, for behoof of the said two younger children, were ranked and preferred by the Court for the above sum, and the same was paid over to and was at this date held by the trustees for them.

Questions having arisen as to whether the children were entitled to payment of the sum with interest thereon now, or whether the trustees were bound to retain said principal sum until the first term of Whitsunday or Martinmas which should happen one year after John Maxwell Heron's death, and meanwhile either to accumulate the interest thereon or to pay or apply the same to or for behoof of said younger children, the present case was submitted for the opinion and judgment of the Court. When the case was presented John Maxwell Heron was 55 years of age.

The first parties to the case were the trustees under the bond and disposition in security. The second parties were Violet Bridget Maxwell Heron and Basil Montague Maxwell Heron, and John Maxwell Heron as curator-at-law to the latter, who was still in minority. The third parties were Guy Maxwell Heron and George Dunlop, his *curator bonis*.

The first parties maintained that the sum in question was the value, ascertained at the time of ranking, of a sum which was not due to the second parties until one year after the death of the said John Maxwell Heron, and that it should remain in their hands as trustees with accumulation of interest until that date.

The second parties, on the other hand, contended that the said sum being the present value of a contingent claim ascertained in terms of the Bankruptcy Statutes, was now payable to them, and required that the sum should now be paid to them. In any case, they contended that the interest on the principal sum should be at present paid over to them.

The third parties concurred with the first parties in maintaining that the sum in question was not due to the second parties until one year after the death of the said John Maxwell Heron, and that it should therefore remain in the hands of the first parties as trustees foresaid with accumulation of interest until that date.

The questions at law were—"(1) Are the second parties now entitled to payment, and are the first parties bound on demand to pay said sum of £2510, 11s., with the interest accrued? or (2) Are the first parties bound to retain the said principal sum until the first term of Whitsunday or Martinmas which shall happen one year after the said John Maxwell Heron's death? and (3) In the event of question 2 being answered in the affirmative, are the first parties bound to accumulate the interest of the principal sum with principal; or are they entitled meanwhile to pay or apply said interest to or for behoof of the second parties?"

Argued for first and third parties—The trustees were bound to retain the sum till after John Maxwell Heron's death, or at least until his son Basil attained majority. The bankruptcy of John Maxwell Heron, although it had reduced the amount of the provision, had no effect on the date at which it was to be paid.

Argued for the second parties—The bond

and disposition in security only created a simple trust; on payment being made to the trustees at the father's death they were immediately to pay it over to the children who survived the father, and no provision was made for the trustees retaining the money in their own hands. The bankruptcy of the father brought about the same result as if he had died. The Bankruptcy Act 1856 (19 and 20 Vict. c. 79), sec. 53, contemplates the valuation and out-and-out payment of a contingent claim. The payment had been made here for a contingent claim, and the second parties were entitled to have the money handed over to them immediately.

At advising—

LORD YOUNG—I do not think the character of the funds in the hands of the trustees has been in any way altered by the sequestration of the estates. I think these funds are to be dealt with in terms of the bond. Under the bond the trustees were to pay nothing if all the children predeceased the father, and if any of the children survived, they were to pay in proportion to the number surviving. When the bankruptcy occurred, the estate was burdened conditionally and provisionally with the sum of £5000, and as the estate had to be cleared of this burden, the only way to do so was the mode adopted, viz., to have the value of the rights under the bond ascertained and the sum paid over to the proper parties.

The sum thus came into the hands of the trustees in lieu and place of the bond which they originally held, and, except as regards the amount to which the children are entitled, I do not think the bankruptcy alters the possession or in any other way affects the rights of the children. Who these may be when the period of payment comes we cannot tell. Although one of the children is major, one is minor, and therefore it is not in the power of the parties to come to an arrangement themselves to have the money paid at once. If both were major, there would probably not be much difficulty in the circumstances, though there might be some, as children might, even yet, possibly be born.

I think, therefore, that the trustees are not entitled to hand this money over to the two younger children. I think the trustees must hold this money for the purposes for which they held the original bond, and deal with it as trust money, and account for it to the persons entitled to it when the time comes for payment. I am of opinion that they are bound to retain the principal sum and accumulate the interest until the first term of Whitsunday or Martinmas which shall happen after the death of John Heron Maxwell.

LORD RUTHERFURD CLARK, LORD TRAYNER, and the LORD JUSTICE-CLERK concurred.

The Court answered the first question in the negative, the second question in the affirmative, the first alternative of the third question in the affirmative, and the second alternative of the third question in the negative.

Counsel for the First Parties—Howden. Agents—J. & F. Anderson, W.S.

Counsel for the Second Parties—Cooper. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Third Parties—Blackburn. Agents—Macandrew, Wright, & Murray, W.S.

Thursday, June 23.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

HAMILTON *v.* INGLIS.

Succession — Construction — Division per capita or per stirpes.

A testator directed her trustees "to pay the whole residue of my means and estate equally between the said John Inglis and the said children of the said Daniel M'Neil, equally between them." John Inglis was a nephew of the testator; Daniel M'Neil the husband of her niece. *Held* that John Inglis was entitled to one-half of the residue, and that the other half fell to be divided equally among the children of Daniel M'Neil.

Mrs Marion Adam or Wilson, widow, No. 63 Abercromby Street, Glasgow, who died on 2nd May 1884, left a trust-disposition and settlement dated 15th April 1884, by which she conveyed her whole estate to John Adams, Comely Park Street, Glasgow, and Samuel Hamilton, merchant there, and the acceptors and survivors of them, as trustees and trustee for the purposes therein mentioned. The third purpose was in the following terms—"To pay the whole residue of my means and estate equally between the said John Inglis and the said children of the said Daniel M'Neil, equally between them." John Inglis was a nephew of the testator, and Daniel M'Neil was the husband of Mrs Margaret Inglis or M'Neil, a niece of the testator and a sister of John Inglis.

After all the purposes of the trust-deed had been carried out by the trustees except the third purpose, there remained a free balance of £782, 4s. 2d.

Questions having arisen among the parties interested as to the meaning of the third purpose of the deed, an action of multiplepoinding and exoneration was raised by Samuel Hamilton, the surviving trustee under the trust-deed, in order to have it decided how the residue was to be divided. The residue formed the fund *in medio*.

John Adams Inglis, named John Inglis in the trust-deed, lodged a claim in the said action in which he claimed to be ranked and preferred to one-half of the fund *in medio*. He maintained that the