Counsel for the First Parties — C. D. Murray. Agents — Boyd, Jameson, & Kelly, W.S.

Counsel for the Second and Third Parties —Wilson, Q.C.—W. E. Mackintosh. Agents —Boyd, Jameson, & Kelly, W.S.

Counsel for the Fourth and Fifth Parties — Jameson, Q.C. — Younger. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for the Sixth Parties—Kennedy —Cullen. Agents—Thomas White & Park, S.S.C.

Friday, December 7.

SECOND DIVISION.

GILLIES' TRUSTEES *v.* HODGE.

Succession — Vesting — Liferent and Fee — Gift one of Liferent or Fee—Direction to Hold for Behoof of Beneficiary and his Family — Interest to be Paid Half to Beneficiary, Half to Family — Power to Advance Capital.

A testator directed her trustees, on the death of the survivor of two annuitants, to realise the residue of her estate and divide it into equal shares. Some of these shares were to be paid to certain beneficiaries, some were to be held by the trustees for behoof of other beneficiaries. One of the shares the trustees were directed to hold for behoof of "J. H. and his family, as follows"—to pay the interest of the share to J. H. to the extent of one-half, and the interest of the other half to his children, "and if the said J. H. and his children . . . stand in need thereof, I direct my trustees to expend the capital of said share for and in behalf of the said J. H. and his said children." There was also a provision that if any of the beneficiaries should die before "the division of the said residue," the share to which he would have been entitled if alive should go to his issue, but failing issue to the survivors of the beneficiaries equally.

The two annuitants died before the testator. J. H. and his children survived the testator. Thereafter J. H. died, leaving a trust-disposition and settlement.

Held that the fee of one-half of the share which the trustees were directed to hold for behoof of J. H. and his family vested in him *a morte testatoris*, and that the fee of the other half vested in his children at the same date.

By trust-disposition and settlement, dated 15th April 1879, Mrs Mary Mitchell or Gillies disponed her whole estates, heritable and moveable, to trustees for the purposes therein specified.

By the fourth and fifth purposes of the deed she directed her trustees to hold the residue of her estates in trust, and out of the free annual proceeds to pay annuities to two persons named.

The last purpose of the deed was in the following terms:—"On the death of the survivor of said two annuitants, I direct my trustees to sell and realise the rest, residue, and remainder of my means and estates then in their hands, if they be not already sold, and divide the same into seven equal parts or shares, and pay one of said parts or shares to the said Alexander Hodge; . . . to pay another of said shares to the said William Hodge; to pay another of said shares to the said Helen Hodge or Morrison; to hold in trust for behoof of the said James Hodge one of the said shares, and for behoof of the said Christina Hodge or Gaff another of said shares, and pay him and her the interest of his and her said shares, or the capital thereof, if he or she requires the same, in such portion and at such times as my said trustees may think proper; to hold another of said shares for behoof of the said John Hodge junior and his family, as follows, viz.—for payment of the interest thereof to the said Daniel Hodge, his son, aye and until he attain the age of twenty-one years complete, and on his attaining said age, for payment of the interest of said share to the said John Hodge junior, to the extent of one-half thereof, and the interest of the other half thereof to the children procreated of the marriage between the said John Hodge junior and the deceased Elizabeth M'Laren, and if the said John Hodge junior and his children by the said Elizabeth M'Laren stand in need thereof, I direct my trustees to expend the capital of said share for and in behalf of the said John Hodge junior and his said children, in such proportions and in such way and manner as they may think proper; to hold the remaining share in trust for behoof of the said Daniel Hodge until he attain the age of twenty-one years, and expend the interest thereof for and towards his maintenance or education until he attain that age, at which period his said share shall be paid to him, . . . declaring that, in the event of either of the said Alexander Hodge, James Hodge, William Hodge, John Hodge junior, Christina Hodge or Gaff, Helen Hodge or Morrison, and Daniel Hodge dying before the division of the said residue, leaving lawful issue, such issue shall be entitled to the share, or respective provisions and share, which their deceased parent or parents would have been entitled to if alive, but failing issue, then to and among the survivors equally, but declaring that the issue of the said John Hodge junior, by his deceased wife Elizabeth M'Laren, shall, in his case, only succeed to the share or provisions falling to him, to the exclusion of his children by the second marriage."

Both the annuitants predeceased Mrs Gillies. Alexander Hodge also predeceased her without leaving issue. The other beneficiaries interested in the residue survived her. Daniel Hodge had attained majority at the date of her decease. In particular, John Hodge junior survived her, and died on 18th March 1899, leaving a trust-disposition and settlement, dated 8th March 1899, by which he conveyed to trustees, *inter*

alia, all rights and estate he was entitled to under Mrs Gillies's trust settlement. Up to the term of Martinmas preceding his death, Mrs Gillies's trustees paid to him the income of one-half of the sixth share of the residue.

Thereafter a question arose as to the persons entitled to payment of the share (originally one-seventh, but increased by Alexander Hodge's decease before Mrs Gillies without issue to one-sixth) directed to be held for behoof of John Hodge junior and his family. John Hodge junior's trustees maintained that they were entitled to one-half, and John Hodge *tertius*, one of the children of John Hodge junior and Elizabeth M'Laren, concurred in that view. Mrs Margaret Hodge or Ross, Daniel Hodge, and Miss Grace Hodge, the remaining children of John Hodge junior and Elizabeth M'Laren, maintained that they and John Hodge tertius having survived their father were entitled to payment of the whole one-sixth share.

For the settlement of this question a special case was presented for the opinion and judgment of the Court. The parties to the special case were—(1) Mrs Gillies' trustees, (2) John Hodge junior's trustees, (3) John Hodge tertius, and (4) Mrs Margaret Hodge or Ross, Daniel Hodge, and Miss Grace Hodge.

The questions of law were—"(1) Are the second parties entitled to payment of the one-sixth share of the residue of Mrs Gillies's estate provided in her trust-disposition and settlement to John Hodge (*secundus*) and his family? or (2) Are the second parties entitled to payment of one-half of said one-sixth share? or (3) Are the children of John Hodge (*secundus*) and Elizabeth M'Laren entitled to payment of the whole of said one-sixth share equally among them? or (4) Are said children entitled to payment of one-half of said one-sixth share?"

Argued for the second and third parties—The trustees were directed to divide the estate on the death of the surviving annuitant, and to hold one-half of one share for behoof of John Hodge junior, and the other half for behoof of his family; and power was given to the trustees to expend the capital of the share on behalf of John Hodge junior and his family. Both annuitants predeceased the testator. That being so, the fee of the share had vested *a morte testatoris*—one half in John Hodge junior, and the other half in his children—*Greenlees' Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136.

Argued for the fourth parties—(1) No part of the fee had ever vested in John Hodge junior. The trustees were empowered to dispose of the whole capital of the share. This power of disposal suspended vesting—*Russell* v. *Bell's Trustees*, March 5, 1897, 24 R. 666. There was no fee in anyone until the trustees conferred it. The trustees could now validly exercise the power given them by the deed and advance the whole of the share to the third and fourth parties—*Chambers' Trustees* v. *Smith*, April 15, 1878, 5 R. (H.L.), 151. This they were willing to do. (2) Under the survivorship clause the third and fourth parties having survived their father were entitled to the whole of the one-sixth share.

At advising—

LORD TRAYNER—The testator directed his trustees after the death of two annuitants to realise his whole estate and divide it among certain beneficiaries named. To some of the beneficiaries the share destined to them was to be paid, the shares of other beneficiaries were to be held by the trustees for their behoof. The share with which we are here concerned the trustees were directed to hold for behoof of "John Hodge junior and his family, as follows"—to pay the interest of one-half thereof to John Hodge junior, and the interest of the other half to his children, "and if the said John Hodge junior and his children . . . stand in need thereof, I direct my trustees to expend the capital of said share for and in behalf of the said John Hodge junior and his said children, in such proportions and in such way and manner as they may think proper." There is also a provision that if John Hodge junior should die before "the division of the said residue" his said children should be entitled to the provision and share of the residue which he would have taken had he survived that period. As the two annuitants (on whose death the residue was directed to be divided) predeceased the testator, the period of division was reached when the testator died. John Hodge junior having survived the testator, he accordingly survived the period of division, and therefore the provision made in favour of his children in the event of his predecease never became operative. It was said that we should read "division of the residue" as meaning actual payment of the residue—a reading which I reject as introducing a term which is inconsistent with the plain words of the trust-deed. We have therefore to decide what was the right conferred on John Hodge junior and his children respectively, and when did that right vest. The testator directed the share in question to be held by the trustees for behoof of John and his children. I take that to be equivalent to a gift to John and his children, in accordance with opinions expressed in several recently decided cases, and the gift, in my opinion, was a gift of fee which vested *a morte*. There seems to me to be no reason for holding that vesting was postponed, and without such reason vesting must be held to have taken place *a morte* according to the well-settled presumption of law. I think further that it was a gift of fee for this reason, that if it was not, then the fee was not disposed of at all, and would fall into intestacy, a result which is to be avoided if possible, and in itself rather inconsistent with the fact that the testator was disposing and intending to dispose of his whole estate by his trust-deed. But the question remains, In what proportion was the fee gifted to John and his children? The deed certainly

does not make this clear, but I am of opinion that the deed sufficiently indicates that the fee was to be divided into equal parts, one of which went to John and the other to his children. The fact that the interest of one-half was to be paid to each is an indication of the extent of their respective rights in the capital. It was said that the direction to the trustees to expend the capital, if necessary, on behalf of John and his children was against this view. But I think otherwise. If the trustees were authorised to expend the whole capital for the benefit of the children (which was an argument used in support of the view that they alone were fiars), they were equally authorised to expend the whole capital for behoof of John, the result of which (on the argument I have referred to) would be to confer the whole fee on John. This was not however the testator's intention. She did not, I think, authorise the whole capital to be expended for behoof of the children, for that would have deprived John of the interest of the half, which was carefully guarded for him. In like manner the trustee could not expend the whole capital for behoof of John which would have deprived the children of the interest of one half, as carefully guarded for them. But the trustees could expend the capital destined to John for his behoof, and equally expend the one half of the capital destined to the children for their behoof. That I take to be the meaning and intention of the testator, and on no other interpretation of her deed does it appear to me that her whole directions can be carried out. I think therefore that the second and fourth questions should be answered in the affirmative.

LORD MONCREIFF—I am also clearly of opinion that the one-half of a sixth share of the residue which the trustees were directed to hold for behoof of John Hodge junior vested in him *a morte testatoris*, and that the other half of the said sixth share vested at the same date in the children of the marriage between him and his first wife Elizabeth M'Laren. The scheme of that clause in the deed which deals with the one-sixth share in question makes it clear that the trustees were to hold one half exclusively for the benefit of John Hodge junior. The interest of it was to be paid to him, and the trustees were empowered to expend so much of the capital of said half share for his behoof as they thought fit. I do not think that his children had any interest in that half, or that he had any interest in the half destined to them. Accordingly it would not have been in the power of the trustees to apply any part of the capital of John Hodge junior's half for behoof of his children, or *vice versa*.

It is true that there is no direct gift of the capital to John Hodge junior; but this is one of the class of cases in which a gift of the interest coupled with a power to the trustees to make advances of capital is sufficient to indicate a gift of the capital to the beneficiary. John Hodge junior was a residuary legatee. There was no ulterior destination and no survivorship clause, because the survivorship clause, which was relied on strongly by Mr Vary Campbell, relates solely to the date of division of the residue which is directed to take place on the death of the survivor of the two annuitants. At that date the truster directs her trustees to divide the residue into seven equal parts or shares, and pay the same to or hold them for the beneficiaries as therein directed. That is "the division of the said residue" which is referred to in the deed.

I am therefore clearly of opinion that the second alternative question and the fourth alternative question should be answered in the affirmative; and the first and third in the negative.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

The Court answered the second and fourth questions in the affirmative, and found it unnecessary to answer the other questions.

Counsel for the First and Fourth Parties — Vary Campbell — Craigie. Agents — Coutts & Palfrey, S.S.C.

Counsel for the Second and Third Parties —Wilson, Q.C.—Younger. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Saturday, December 8.

SECOND DIVISION.

[Sheriff of Fife.

BUCHANAN *v.* FINLAYSON.

Parent and Child—Bastard—Filiation—Proof—Presumption Arising from Admission by Defender of Connection after Time of Conception.

Evidence in an action of filiation and aliment where the defender admitted that he had had connection with the pursuer on a date subsequent to the time of conception, upon which *held* (*diss.* Lord Moncreiff) that the pursuer had failed to prove that the defender was the father of her child.

Observations (*per* the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff) as to the effect to be attached to such an admission in actions of filiation and aliment.

Lawson v. *Eddie*, May 24, 1861, 23 D. 876; and *Ross* v. *Fraser*, May 13, 1863, 1 Macph. 783, *commented on.*

Jessie Buchanan, Chapel Hill, Kincardine, brought an action of affiliation and aliment in the Sheriff Court of Fife at Dunfermline against John Finlayson, butcher, Kincardine, in which she claimed aliment for an illegitimate child to which she had given birth upon 13th February 1900, and of which she averred that the defender was the father.