Friday, March 14.

SECOND DIVISION.

ALSTON'S TRUSTEES *v.* ALSTON.

Succession—Vesting—Survivorship Clause—Payment Postponed till Expiry of a Liferent—Provision for the Event of a Fiar "not having more than Three Children at the Date of my Death."

X directed her trustees "to hold, pay, and apply" a certain fund for her husband in liferent, and after his death to and for behoof of A, B, C, and D in fee, declaring that in the event of any of the fiars dying before the vesting of the provisions in their favour leaving children, the share which would have fallen to such deceaser should fall to and be equally divided among his children, and that in the event of such predeceaser leaving no issue his share should fall to the survivors, and declaring that in the event of A not having more than three children "at the date of my death," then one-half of the provision in his favour should fall to B. A had more than three children at the date of the death of the testatrix, and he survived her but predeceased the liferenter survived by two sons and six daughters, and leaving a trust-disposition and settlement by which he directed his trustees to divide the residue of his estate in certain proportions among his sons and daughters. The trustees of X after the death of her husband by arrangement paid one-fourth of the fund to the trustees under A's settlement. In a special case presented by A's trustees, his sons and his daughters, *held* that the provisions in favour of the fiars under the settlement of X vested *a morte testatoris*, and that A's trustees were bound to treat the one-fourth of the fund so paid to them as part of the residue of A's estate.

Young v. *Robertson*, February 14, 1862, 4 Macq. 314, *distinguished.*

This was a special case for the opinion and judgment of the Court upon certain questions arising as to the meaning and effect of the trust-disposition and settlement of Mrs Anne Craigie Alston, wife of Robert Findlay Alston.

The testatrix died on 3rd May 1874. By the third purpose of her settlement, dated 6th September 1867, she directed her trustees to "hold, pay, and apply" a fund specified for behoof of her husband in liferent, and after his death "to and for behoof of" four persons named in fee. One of the fiars named was George Alston of Craighead. The third purpose declared that in the event of any of the fiars "dying before the vesting of the provisions herein conceived in their favour, leaving lawful children, the share which would have fallen to such deceaser shall fall to and be equally divided among his children, and in the event of (any of the fiars) dying before the vesting of the said provisions without leaving lawful issue, the share which would have fallen to such deceaser shall fall unto and be divided equally among the survivors, together with the issue of any of them who may have predeceased leaving issue. . . . Declaring that, in the event of the said George Alston not having more than three children at the date of my death, then, and in that event, the one-half of the provisions hereinbefore conceived in his favour shall fall and belong to the said James Brown Alston (another of the fiars) and his issue, in like manner as the provision hereinbefore provided to him."

At the date of the death of the testatrix George Alston had more than three children. He survived the testatrix and died in 1884 survived by the liferenter, and by two sons and six daughters, and leaving a trust-disposition and settlement.

Robert Findlay Alston, the liferenter, died in 1885, and after his death the trustees of Mrs Anne Craigie Alston, by arrangement, paid one-fourth of the fund, which had been liferented by him, to the trustees acting under George Alston's trust-disposition and settlement for behoof of whom it might concern.

By the last purpose of his trust-disposition and settlement George Alston directed the whole residue of his estate to be divided in the following proportions, viz.—Twenty-two parts to his eldest son, eighteen parts to each son other than the eldest, and ten parts to each of his daughters. When the time came for his trustees to give effect to that direction, questions arose as to the manner in which the said payment from Mrs Anne Craigie Alston's estate should be apportioned amongst George Alston's children, and this special case was accordingly presented for the opinion and judgment of the Court.

The parties to the special case were (1) George Alston's testamentary trustees, (2) his two sons, and (3) his six daughters.

The first and second parties contended that the provision conceived in favour of the said George Alston of Craighead in the said trust-disposition and settlement of the said Mrs Anne Craigie Alston vested in him at her death, so that the first parties, his trustees, were bound to treat that provision as part of the residue of his estate, and, as directed by his said general trust-disposition and settlement, to apportion it amongst his children in the following manner, viz.—twenty-two-hundredths to the said George Alston, eighteen-hundredths to the said Robert Charles Wallace Alston, and ten-hundredths to each of his six daughters.

The third parties contended that no right of fee in the said provision vested in the said George Alston of Craighead, their father, and accordingly that the said provision could form no portion of the estate dealt with under his trust-disposition and settlement; that upon a proper construction of the trust-disposition and settlement of the said Mrs Anne Craigie Alston, vesting was postponed until the period of division, *i.e.*, the death of the

said Robert Findlay Alston, the liferenter; and that their father having predeceased the said period of division, the provision destined to him vested not in him but in his eight children as conditional institutes, and fell to be divided equally among them.

The questions of law were—"(1) Did the provision in favour of the said George Alston of Craighead in the trust-disposition and settlement of the said Mrs Anne Craigie Alston, vest in him *a morte testatoris?* or (2) Did the said provision vest in his children as conditional institutes at the period of division?"

Argued for the first and second parties—The present case was distinguished from the typical case of suspension of vesting by a survivorship clause, as in *Young* v. *Robertson*, February 14, 1862, 4 Macq. 314, and *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142, 18 S.L.R. 103. In these cases there was no gift until the period of division; here the words of gift applied both to the liferent and the fee. The provision for the event of George Alston not having more than three children at the date of the death of the testatrix contained a clear indication of intention that vesting should be *a morte testatoris;* and the general rule as to postponement of vesting by a survivorship clause readily yielded to contrary intention—*Bowman* v. *Bowman*, July 25, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959. If two readings were reasonable, that was to be preferred which favoured immediate vesting—*Webster's Trustees* v. *Neil*, March 2, 1900, 2 F. 695, 37 S.L.R. 493; *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, 37 S.L.R. 346. The first question should be answered in the affirmative.

Argued for the third parties—The survivorship clause which followed the gift of the fee referred to the period of distribution, until which period vesting was postponed. The clause referring to the death of the testatrix was intended to take effect only in the event of George Alston not having more than three children at her death, and the effect which it was to have in that event was expressly defined as being to increase the expectancy of James Brown Alston; that event not having occurred, the clause could not be relied upon as indicating any intention whatever apart from it. That clause therefore had no effect on the period of vesting, and could not control the earlier words of the deed according to which vesting was postponed—*Webster's Trustees* v. *Neil, cit. sup.; Neville* v. *Shepherd*, December 21, 1895, 23 R. 351, 33 S.L.R. 248. The case was governed by the decision in *Young* v. *Robertson, cit sup.*

LORD JUSTICE-CLERK—This is a case in which it is very difficult to get at the intention of the testatrix. If it were not for one clause I think that the arguments would be very nearly as strong on one side as on the other. But the clause to which I refer is in these terms:—"Declaring that in the event of the said George Alston not having more than three children at the date of my death, then and in that event the one-half of the provisions hereinbefore conceived in his favour shall fall, and belong to the said James Brown Alston and his issue in like manner as the provision hereinbefore provided to him." Now, that is the only express reference to a date which the testatrix makes in the dispositive clause, and the date is the date of her own death, and it would, I think, be remarkable that she should have made the event of her death apply to George Alston's share in the manner provided in the clause which I have quoted if she did not intend that the date of that event should be the date when the rights of all parties vested. It is, as I have said, a very narrow case, but on the whole I think that vesting here took place *a morte testatoris.*

LORD MONCREIFF—This is an extremely narrow case. What we have to ascertain is the intention of the testatrix as gathered from the deed as a whole. The impression left on me on reading the deed as a whole was that the testatrix intended that the provisions should vest at her death; but we have to consider whether she has used words in law sufficient to effect this purpose. The difficulty arises from this, that the language of the deed in the passage at the foot of page 8 of the case is substantially the same as that which was under consideration in the case of *Young* v. *Robertson.* There is a survivorship clause and a declaration to meet the event of any of the parties first called dying before the vesting of the provisions conceived in their favour leaving lawful issue. In *Young* v. *Robertson* it was decided in regard to a similar clause that the provisions did not vest before the time fixed for distribution, and therefore looking to that decision I do not think that we could have held here that vesting took place before the period of distribution, had it not been for a clause which occurs in a later part of the deed, "Declaring that in the event of the said George Alston not having more than three children at the date of my death, then, and in that event, the one-half of the provisions herein conceived in his favour shall fall and belong to the said James Brown Alston and his issue in like manner as the provisions hereinbefore provided to him." Now, I think there are sufficient grounds for holding that the testatrix had in view one time at which both the vesting and the amount of the shares should be determined, viz., her own death. If it was intended that nothing should vest in George Alston before the end of the liferent, I can see no object in the amount of the share destined to him depending on the number of children which he might happen to have at the date of the death of the testatrix. In my opinion the purpose of the clause was to limit in a certain event the amount which would vest in George at her death.

Looking to the terms of this clause, and bearing in mind that the presumption is always in favour of vesting *a morte testatoris,* that George Alston was a *persona dilecta,* and that the interposition of a liferent is not a reason in itself for postponing

vesting, I am of opinion that the term "vesting," which is open to construction, is sufficiently shown not to be the date of distribution but the date of the death of the testatrix.

I am therefore of opinion that the first question should be answered in the affirmative.

LORD PEARSON concurred.

LORD YOUNG and LORD TRAYNER were absent.

The Court answered the first question in the affirmative.

Counsel for the First and Second Parties —Jameson, K.C.—C. H. Brown. Agent—F. J. Martin, W.S.

Counsel for the Third Parties—Solicitor-General (Dickson), K.C.—Balfour. Agents —Strathern & Blair, W.S.

Friday, March 14.

SECOND DIVISION.

MURPHY *v.* CLYDE NAVIGATION TRUSTEES.

Process — Proof — Jury Trial—Diligence—Recovery of Documents within Eight Days of Trial.

In an action of damages for personal injuries at the instance of a docker against the Trustees of the Clyde Navigation, the pursuer within eight days of the day appointed for the trial of the cause before a jury moved for a diligence to recover documents. The defenders objected, upon the ground that the documents if recovered could only be used for cross-examination, because they could not be put in evidence, as it was now impossible to lodge them eight days before the trial. They maintained that the case was ruled by the decisions in *M'Neill* v. *Campbell*, February 20, 1880, 7 R. 574, 17 S.L.R. 392; and *Livingston* v. *Dinwoodie*, June 28, 1860, 22 D. 1333. The pursuer offered no explanation of the delay in applying for a diligence. He maintained that he was entitled to recover the documents sought for, to make what use he could of them by putting them to witnesses.

The Court (LORD JUSTICE-CLERK, LORD MONCREIFF, and LORD PEARSON) *refused* the motion.

LORD YOUNG and LORD TRAYNER were absent.

Counsel for the Pursuer — Hamilton. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders—Deas. Agents —Webster, Will, & Company, S.S.C.

Thursday, February 27.

FIRST DIVISION.

THE GOVERNORS OF MITCHELL'S HOSPITAL, ABERDEEN, PETITIONERS.

Charitable Trust—Administration—Settlement of Scheme — Cy-pres — Nobile Officium—Trust.

In 1801 certain funds invested in 3 per cent. Government annuities were conveyed to the holders of certain offices and their successors in these offices, under a declaration that they should not uplift or transfer the capital, for the maintenance and clothing, in a hospital built by the donor, of "five widows of and five maiden daughters of decayed gentlemen or merchants or trade burgesses of the city of Old Aberdeen not under 50 years of age, of virtuous and good moral characters, of the names of Mitchell and Forbes in equal numbers, if they are to be found, and in case of a deficiency of either of these two names and descriptions, the number, ten, to be completed from amongst the widows and maiden daughters aged 50 years and upwards of decayed gentlemen, or merchants, or trade burgesses of any other names, those born in Old Aberdeen of the names of Mitchell and Forbes always having the preference." Owing to the very limited number of those having the necessary qualifications a sufficient number of inmates for the hospital could not be obtained, and those who were obtained were consequently maintained at an excessive cost. As the burgh of Old Aberdeen had been merged in the city of Aberdeen, the number of qualified applicants was likely to be still smaller in the future. The Court *approved* a scheme whereby, when the number of inmates fell below ten, (1) widowed daughters and granddaughters of burgesses or widows of sons of burgesses, (2) widows and maiden daughters of residenters within the boundaries of what was formerly Old Aberdeen, and (3) widows or maidens who had lived in Old Aberdeen all their lives or for at least seven years prior to their claim, might be admitted; but *refused* (1) power to employ the surplus funds in giving grants to persons having the necessary qualifications but wishing to live in their own homes; (2) discretionary power at a future date, if sufficient inmates still could not be obtained, to sell the hospital and expend the whole revenue on annuities; and (3) power to invest the capital of the trust in other securities giving a larger return.

By deed of mortification, dated April 15, 1801, and recorded in the Sheriff-Court Books of Aberdeenshire May 25, 1801, David Mitchell of Holloway Down, in the county of Essex, upon the narrative that he,