Counsel for the Pursuer — Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

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*Wednesday, June 4.*

## SECOND DIVISION.

## COWAN'S TRUSTEES *v.* COWAN.

*Succession — Vesting — Liferent or Fee — Direction to "Divide Among" Followed by Direction to Hold and Invest for Liferent Allenarly and Children in Fee.*

A testator directed his trustees to "divide equally among" certain named children the residue of his estate, and with regard to the share of residue which might "effeir or belong" to P., one of his sons, he further directed them to "hold and invest the same in their own names for behoof of the said" P. for his liferent use allenarly, "whom failing for behoof of his wife" so long as she might remain unmarried after his decease, and, after the decease of the longest liver of P. and his wife, or of her entering into a second marriage, whichever should first happen, to divide the share of residue in question equally among the lawful issue of the said P. P. survived the testator and died unmarried. *Held* that a defeasible fee of the share of residue in question vested in P. *a morte testatoris*, and, the contingency of divestiture not having occurred, was *in bonis* of him at his death.

Alexander Cowan, farmer, Fintry, the sole surviving trustee and executor under the trust-disposition and settlement, dated 6th May 1878, of his father, the deceased Andrew Cowan senior, farmer, Fintry, *first party;* the said Alexander Cowan as an individual, *second party;* Mrs Mary Cowan or Jardine, wife of Peter Jardine, farmer, Fintry, a daughter, and one of the residuary legatees of, the testator, with her husband's consent as her curator and administrator-in-law, *third party;* Mrs Mary Dobbie Cowan or Sinclair, wife of Duncan Sinclair, shepherd, Fintry, with her husband's consent as her curator and administrator-in-law, and others, the sole surviving children of the late David Cowan, farmer, Fintry, a son of the testator, but not one of his residuary legatees, *fourth parties,* presented a Special Case as to the meaning of a clause in the testator's settlement dealing with the disposal of a share of the residue of his estate liferented by his son Peter Cowan, who died unmarried on 9th July 1911, leaving the residue of his estate to his brother Alexander Cowan, the second party.

The trust-disposition and settlement provided, *inter alia*—"In the fifth place, I direct and appoint my said trustees to set apart and to invest . . . for behoof of my son Peter Cowan the sum of One thousand pounds sterling, and to pay to him half-yearly during his life for his liferent and alimentary use allenarly the whole interest or income that may be derived therefrom, and in the event of the said Peter Cowan dying and being survived by his wife, I will and appoint that she shall so long as she continues unmarried receive half-yearly for her liferent and alimentary use allenarly the interest or income which may be derivable on said sum of One thousand pounds sterling, and after the decease of the longest liver of the said Peter Cowan and his wife, or of her entering into a second marriage, whichever of these events shall first happen, I direct and appoint my said trustees to divide the said sum of one thousand pounds equally among the lawful issue of the said Peter Cowan—Declaring, however, with regard to this last-mentioned legacy, that I give my trustees a full discretionary power, in the event of the said Peter Cowan being desirous to establish himself in business, to advance and to pay to him for that purpose such sum as my trustees may consider proper, but in no case to exceed the sum of Five hundred pounds, and whatever sum my said trustees shall think proper to advance to my said son not exceeding Five hundred pounds as aforesaid, shall be imputed as part payment of said legacy of one thousand pounds and which will proportionally reduce the liferent of said legacy to the said Peter Cowan or his wife, and also the amount to be divided ultimately among the children of the said Peter Cowan. And the rest, residue, and remainder of my said means and estate I direct and appoint my said trustees to divide equally among the said James Cowan, Peter Cowan, Andrew Cowan, and Alexander Cowan, and the said Helen Cowan, Isabella Cowan, and Mary Cowan; and in the event of any of my said residuary legatees dying leaving lawful issue, such issue shall succeed equally to the share which would have fallen to the parent if alive, and in the event of any of my said residuary legatees predeceasing me and without leaving lawful issue, the share of the predeceaser shall be divided equally among my said residuary legatees who shall survive me; and with regard to the portion of residue which may effeir or belong to the said Peter Cowan, I will and appoint that my said trustees shall hold and invest the same in their own names for behoof of the said Peter Cowan, whom failing for behoof of his wife so long as she may remain unmarried after his decease, and for behoof of the lawful issue of the said Peter Cowan, in the same way and manner as is provided in regard to the sum of One thousand pounds mentioned in the fifth place hereof, only it shall not be in the power of my said trustees to break upon the capital of the portion of residue that may effeir to the said Peter Cowan with the view of making any advance to him to establish him in business or otherwise."

The second party *maintained* that the

fee of Peter Cowan's share of the residue vested in fee in Peter Cowan, and was carried to the second party as his residuary legatee.

The third party maintained that the share in question fell into residue on the death of Peter Cowan, and was divisible among those of the residuary legatees who survived Peter Cowan, or alternatively that it fell into intestacy and was divisible among the heirs of the testator alive at the death of Peter Cowan.

The fourth parties contended that the fee of the share in question formed intestate estate of the testator, and fell to be divided according to the law of intestate succession among his whole next-of-kin as at the date of Peter Cowan's death, or alternatively as at the date of the testator's death.

The *question of law, inter alia*, was—"Did the fee of the share of residue which effeired to the late Peter Cowan (*a*) vest in him, or (*b*) fall into residue, or (*c*) form intestate estate of the testator?"

Argued for the second party—Under the testator's will Peter took a vested right in his share of the residue, subject to defeasance in the event of his having children. There was an initial gift of the fee in unqualified terms to him, and the subsequent restriction to a liferent did not cancel the initial gift, but only qualified it so far as necessary—*Tweeddale's Trustees* v. *Tweeddale*, December 16, 1905, 8 F. 264, 43 S.L.R. 193; *Stewart's Trustees* v. *Stewart*, January 22, 1896, 23 R. 416, 33 S.L.R. 297; *Mackay's Trustees* v. *Mackay's Trustees*, June 8, 1897, 24 R. 904, 34 S.L.R. 683; *Dunlop's Trustees* v. *Sprot's Executor*, March 9, 1899, 1 F. 722, 36 S.L.R. 531.

Argued for the third and fourth parties—There was no direct gift of the fee to Peter. A direction to "divide among" along with a subsequent direction to hold for the liferent use allenarly of the beneficiary did not give the beneficiary a fee. In all the cases cited for the second party there were direct words of gift such as "convey" or "pay"—*Logan's Trustees* v. *Ellis*, February 7, 1890, 17 R. 425, 27 S.L.R. 322; *MacGregor's Trustees* v. *MacGregor*, 1909 S.C. 362, 46 S.L.R. 296. There was no accretion of this share, and as it was undisposed of by the testator's settlement it fell into intestacy—*Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191, 23 S.L.R. 830. The case of *Storie's Trustees* v. *Gray and Others*, May 29, 1874, 1 R. 953, 11 S.L.R. 552, was cited on a question with which this report is not concerned.

At advising—

LORD DUNDAS—[*After a narrative of the facts of the case*]—The first question put to us in the case is—"Did the fee of the share of residue which effeired to the late Peter Cowan (*a*) vest in him, or (*b*) fall into residue, or (*c*) form intestate estate of the testator?" No argument was submitted to us in favour of the second of these contentions. As between the first and third of them I am of opinion that the first must prevail. I think the case falls within the principle of a well-known series of cases—I shall allude to some of them presently—of which the earliest important example is *Lindsay's Trustees* (1880, 8 R. 281), and one of the latest is *Tweeddale's Trustees* (1905, 8 F. 264). I use the word "principle" in the sense in which Lord President Dunedin (in *Tweeddale's Trustees*) considered it "convenient, if not strictly accurate, to speak of the principle of so-and-so as laid down in a case or a series of cases." In the same case Lord Low said—"The principle recognised in all these cases seems to me to be, that where there is a direct bequest, or a direction to trustees to pay or convey to a daughter, in terms which, according to the natural meaning of the language used, import a gift, that gift will not be recalled by a subsequent direction to the trustees to hold the fund for or settle it upon the daughter in liferent for her liferent use allenarly, and her children in fee, except in so far as may be requisite to give effect to these purposes, and, accordingly, if there are no children, the fee will vest absolutely in the daughter and be *in bonis* of her at her death." It may be worth while to note that the provision there in question was declared to be purely alimentary. I think the principle thus stated applies, *mutatis mutandis*, to the present case. I cannot accept the argument that there are here no sufficient words of original gift to Peter Cowan of his share of residue to bring the case within the doctrine expressed by Lord Low. I consider that the direction to the trustees to "divide" the residue "equally among" the beneficiaries imports, according to the natural meaning of the language used, a gift to each of his share; and one may note, for what it is worth, the use of the word "belong," which is used disjunctively along with "effeir" in regard to Peter's share. It seems to me that "divide among" is as good a phrase of gift as the words occurring in some at least of the series of cases to which I have alluded. In *Lindsay's Trustees* (*supra*) the residue was directed to be "divided equally among" the truster's whole children, the shares to vest at his death. In *Dalglish's Trustees* (1889, 16 R. 559) the direction was to divide into equal shares to be paid to the beneficiaries. In *Logan's Trustees* (1890, 17 R. 425) the residue was to "belong to and be divided among" the children in equal proportions. In *Stewart's Trustees* (1896, 23 R. 416) the direction was to convey equally among them, share and share alike. In *Mackay's Trustees* (1897, 24 R. 904), the direction was to "divide or convey or pay and make over" to and among the children equally. In *Dunlop's Trustees* (1899, 1 F. 722) the trustees were directed to hold and set apart the principal sum of £10,000 which the truster left and bequeathed to the children of his deceased sister. In *Tweeddale's Trustees* (*sup. cit.*) the direction was to "make payment." By way of contrast it may be worth while to refer to *Muir's Trustees* (1895, 22 R. 553), where the trustees were directed to retain the whole residue for behoof of the

truster's children, and to divide the same amongst them in certain proportions, the shares of sons and daughters respectively being to be set aside and held and invested and otherwise dealt with as after mentioned, and as regards the shares falling to sons the trustees were directed to hold and invest the same in their own names as trustees for behoof of the sons respectively in liferent, for their alimentary liferent uses allenarly, and for behoof of their respective issue in fee, but with power notwithstanding to make advances in their discretion to the sons out of the capital of their respective shares. The Court held that the trust deed did not import an absolute gift of the capital of their shares of residue to the sons. But Lord M'Laren, who gave the opinion of the Court, stated the general rule as follows—"If a testator begins by making an unqualified division of his estate or residue amongst children, and then by a subsequent clause empowers his trustees to retain the shares of one or more of them, and to pay the income to the child or children for life, and the fee or capital to their issue, it may very well be that the power is only given to the trustees for the protection of the immediate beneficiaries. Accordingly if one of these should die without issue, and leaving a will, it may be held that the original gift was not displaced but its effect only suspended during the lifetime of the beneficiary, and for his or her protection. . . . It is, however, essential to the proper application of this principle of construction that there should be an independent unqualified gift to the immediate beneficiary, capable of taking effect when the special trust fails or is exhausted." Again, in the recent case of *MacGregor's Trustees* (1909 S.C. 362), where the residue was directed to be held "in trust for behoof of such of my children as shall survive me, . . . . equally, share and share alike, subject to the conditions following viz. . . . in the case of my daughters I direct my trustees to retain and hold their shares, original and accrescing, for their liferent alimentary use allenarly, . . . . and for the issue of their bodies equally among such issue in fee," the Court held that the share of a daughter who survived the truster but died unmarried had not vested in her, because, as the Lord President put it, "you must first find words which purport to bestow a certain gift or interest. Now here there is no direct provision of a gift or interest at all." It seems to me, therefore, that as matter of construction of the settlement before us, and in the light of the authorities, we must hold (adapting Lord Low's criterion to the present circumstances) that the testator's settlement imported a gift to Peter Cowan of his share of residue which was not recalled by the subsequent direction to hold and invest it for his liferent alimentary use and for that of his widow, if he had left one, and for his children in fee, except in so far as it might be requisite to give effect to these purposes, and accordingly, that as Peter Cowan was never married, the fee vested absolutely in Peter, and was *in bonis* of him at his death.

[*His Lordship then dealt with another question, with which this report is not concerned.*]

The LORD JUSTICE-CLERK, LORD SALVESEN, and LORD GUTHRIE concurred.

The Court answered head (*a*) of the first question in the affirmative, and heads (*b*) and (*c*) in the negative.

Counsel for the First and Second Parties—D. P. Fleming. Agents—Duncan Smith & M'Laren, S.S.C.

Counsel for the Third Party—Pitman. Agents—Wishart & Sanderson, W.S.

Counsel for the Fourth Parties—A. M. Mackay. Agents—A. & A. S. Gordon, W.S.

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*Wednesday, June* 4.

## SECOND DIVISION.

[Sheriff Court at Airdrie.

## M'ARA AND OTHERS *v.* ANDERSON.

*Right in Security—Bond and Disposition in Security—Action of Maills and Duties—Default in Payment of Principal—Action Raised within Three Months of Service of Schedule of Intimation, Requisition, and Protest under Titles to Land Consolidation (Scotland) Act* 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 119 *and Schedule FF* (2).

The creditor in a bond and disposition in security in the form prescribed by the Titles to Land Consolidation (Scotland) Act 1868, and containing a warrant for registration in the usual form, served a schedule of intimation, requisition, and protest on the debtor in the form given in Schedule FF (2) of the Act, requiring him to pay the principal sum due under the bond, with the usual notice that failing payment within three months he might proceed to sell. Ten days after service of the schedule, no default having occurred in payment of interest and no further demand for the payment of the principal having been made, the creditor raised an action of maills and duties in order to enter into possession of the security subjects. The debtor having pleaded that the action was incompetent, *held* that service of the schedule was sufficient to put the debtor in default in payment of the principal until payment was made, and that the action was therefore competent.

The Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), section 119, enacts—"The import of the clauses of the form of No. 1 of the Schedule FF occurring in any bond and disposition in security . . . shall be as follows:— . . . The clause of assignation of rents shall be held to import an assignation to the