Friday, January 8.

SECOND DIVISION.

KINSEY-MORGAN'S TRUSTEES *v.* CAMPBELL.

Succession — Testament — Revocation — Implication from Recital in Codicil.

A testator executed a trust-disposition and settlement whereby he bequeathed one-half of his estate to his son and the other half to his widow in alimentary liferent and to his daughter in fee. He subsequently executed a holograph codicil which proceeded on the following narrative:—"As expressed in my last will and testament, that should my wife survive me she is to be liferented in whatever means I may be possessed of, and at her death the same to be divided between my son and my daughter, I wish that to be carried out." No material change of circumstances had occurred between the dates of the execution of the two deeds, and there was no apparent intention in his later deed to revoke the previous testamentary dispositions. At the time when he executed the later deed the testator did not have the earlier one in his possession.

Held that the narrative of the codicil was merely a false recital of the terms of the trust-disposition and settlement, and did not enlarge the widow's liferent or revoke the gift to the son.

Succession — Trust — Constitution — Precatory Trust.

A testator bequeathed to his son a portion of his estate which consisted of shares in two companies of which the testator was a director. It was the intention of the testator that his son should succeed him in the management of the companies. He subsequently executed the following codicil—"I hereby specially desire that at the death of my son, should he die without issue, his portion shall pass to my daughter. In the event of my daughter predeceasing her brother this portion shall pass on to her issue."

Held that the gift to the son vested in him absolutely, the codicil merely expressing an earnest request that he would dispose of the portion of the estate which had been bequeathed to him, in the manner indicated.

Mrs Campbell and others, the testamentary trustees of the deceased Robert Campbell, who died on 29th December 1913, *first parties;* Buchanan Campbell and another, the antenuptial marriage-contract trustees of Mrs Kinsey-Morgan, the only daughter of the deceased, *second parties;* the said Mrs Kinsey-Morgan as an individual, *third party;* Miss Beatrice Margaret Kinsey-Morgan, the only daughter of the said Mrs Kinsey-Morgan, and her father as her guardian, *fourth parties;* the said Mrs Campbell, the widow of the deceased, as an individual, *fifth party;* and the said Buchanan Campbell, the only son of the deceased, as an individual, *sixth party*, brought a Special Case for the opinion and judgment of the Court of Session.

By a *trust-disposition and settlement*, dated 23rd January 1912, the testator provided—"But these presents are granted in trust always for the purposes following, namely, . . . *In the second place*, in the event of my wife the said Mrs Margaret Lyon or Campbell surviving me, I direct my trustees (*First*) to implement the provisions in her favour contained in the contract of marriage between us, . . .; (*Second*) To make payment as soon as may be after my death to my said wife of the sum of Five hundred pounds sterling as a provision for mournings and in name of interim aliment down to the first term of Whitsunday or Martinmas occurring six months after the date of my death; (*Third*) From and after the said term of Whitsunday or Martinmas I direct my trustees to pay to my wife the free income of one-half of the residue of my estate ascertained as at said term in manner after mentioned, which income shall be paid to her at such times and in such proportions as my trustees may think most convenient, declaring that my trustees shall, subject to the directions after written with reference to the prospective share of my son Buchanan Campbell, in the event of his surviving me, be the sole judges as to the investments to be set aside to be liferented by my said wife, but that as part of the said provision my wife shall, in her option, be entitled to continue to occupy the house number seven Lansdowne Crescent, Edinburgh, or any other house which may be owned and occupied by me at the time of my death, but under the burden always of the payment by her, so long as she enjoys the liferent, of all feu-duties and casualties, rates, taxes, and assessments, and all necessary repairs for the said subjects, or, in the option of my said wife, my trustees may realise or let the said house and pay the income so provided to my wife as part of the foregoing provision; and which whole provisions shall be for my said wife's alimentary use only, and shall not be subject to her debts or deeds, nor liable to the diligence of her creditors: *In the third place*, I direct my trustees, subject to the foregoing purposes and to the provisions after written, to hold and apply the residue of my means and estate in equal shares for behoof of my son Buchanan Campbell and my daughter Beatrice Campbell, now Mrs Augustus Kinsey-Morgan, and the issue of such of them as may die before attaining a vested interest leaving issue, and to account for and pay over the same, as follows:—(*First*) In the event of my son the said Buchanan Campbell surviving me I direct my trustees to make payment to him at the first term of Whitsunday or Martinmas occurring six months after the date of my death of one-half of the residue of my estate valued as at that term, under the express declaration that my said son shall take as part of his share my holding of ordinary shares in my firm of Messrs T. B. Campbell

& Company, Limited, and of the Coatbridge Tinplate Company, Limited . . . ; and in the event of the foregoing shares not amounting to the said half share of residue, my trustees shall convey to my said son, either in cash or in securities, the balance due to him; or in the event of the said shares representing more than one-half of the residue, my son shall in like manner be bound to repay the excess to my trustees; (*Second*) In the event of the survivance of the said Buchanan Campbell, the remaining share of the trust estate shall be held by my trustees as aforesaid for the liferent use of my wife Mrs Margaret Lyon or Campbell in satisfaction of the foregoing provision of liferent, and on her death for payment to my daughter Beatrice Campbell, or failing her to her issue; (*Third*) In the event of the predecease of the said Buchanan Campbell survived by issue my trustees shall, subject to the payment of the income of one-half thereof to my said wife Mrs Margaret Lyon or Campbell during her life as aforesaid, hold the whole free residue of my estate for behoof of the said Beatrice Campbell or her issue and the issue of the said Buchanan Campbell; and (*Fourth*) In the event of the predecease of the said Buchanan Campbell without issue or survived by issue who shall not take a vested interest, my trustees shall, immediately on such failure, pay and make over to my daughter the said Beatrice Campbell, if she shall then be alive, the one-half of the residue which is thereby set free; declaring, with reference to the foregoing provisions of residue in favour of my children, that, except as hereinbefore provided, the said shares shall be payable on the death of my said wife, or as the remoter issue attain the age of twenty-five years respectively after the death of my said wife, and that the said shares shall not become vested interests in such children or remoter issue until the terms or times of payment above mentioned; and that if either of my children predecease the period of vesting leaving issue, such issue shall be entitled amongst them, if more than one, to the share whether original or accreseing as after mentioned which, or an interest in which, their parent would have taken if alive, and in the event of either of my children predeceasing the period of vesting without leaving issue who survive to take, the share which would have fallen to such predeceasing child shall accresce and be payable to or held for behoof of the survivor or the issue of any predeceasing in the same manner and subject to the same conditions as their original share; . . : And *in the fourth place*, failing my son and daughter and their issue, my trustees shall upon such failure pay to my said wife during her life the free income of the whole trust estate, and on her death or on said failure of issue who shall take a vested interest, should that occur at a later date, they shall pay over the whole residue of my estate to the scheme of the Church of Scotland for augmenting the small livings of the Church. . . ."

The testator also left a *codicil*, written by himself and witnessed by two domestic servants, dated 13th October 1913, in these terms:—'As expressed in my last will and testament, that should my wife survive me she is to be liferented in whatever means I may be possessed of, and at her death the same to be divided between my son Buchanan Campbell, W.S., and my daughter Beatrice Campbell (now Mrs Beatrice Campbell or Kinsey-Morgan), I wish that to be carried out; but I hereby specially desire that at the death of my son, should he die without issue, his portion shall pass to my daughter Beatrice Campbell or Kinsey-Morgan, wife of Dr Kinsey-Morgan of Hillcote, Richmond Hill, Bournemouth. In the event of the said Beatrice Campbell or Kinsey-Morgan predeceasing her brother, this portion shall pass on to her issue."

The Case stated—"2. The said trust-disposition and settlement superseded an earlier settlement executed by the testator in 1903. At the said date the testator was a partner in the firm of T. B. Campbell & Company, of which he became sole partner in 1909. In that year the said firm was converted into a private limited company under the name of T. B. Campbell & Company, Limited. The testator at the date of incorporation of said company was appointed managing director and chairman for life, and he held substantially the whole ordinary shares. The testator's only son Buchanan Campbell also became a director at the date of the said company's incorporation. The testator was also at the date of his death a director of a private limited company called the Coatbridge Tinplate Company, Limited. The testator's holdings in said two companies together amount in value to approximately one-half of the trust estate. By his settlement of 1903 the testator *inter alia* gave his wife, should she survive him, the liferent of his whole estate. But in 1912, being desirous of simplifying the administration of his trust, and considering that the ordinary shares in the said two companies were unsuitable for trustees to hold, and also being desirous that his said son, who since he became a director had given continuous and special attention to the company's business, should immediately after his death have the full control and management of T. B. Campbell & Company, Limited, for his own interest and profit, the testator executed the first-mentioned trust-disposition and settlement and destroyed the settlement of 1903. The said trust-disposition and settlement of 1912 remained in the custody of the testator's law agent until the testator's death, and the testator did not possess a copy thereof.

"7. On the testator's death there was found amongst his papers in a sealed envelope the said holograph codicil . . .

"8. The testator was survived by his widow Mrs Margaret Lyon or Campbell, by his son the said Buchanan Campbell, W.S., who married Jane Margaret Steele on 15th October 1907 and has no issue, and by a daughter Beatrice Campbell, who married Augustus Kinsey-Morgan, M.D., Bournemouth, on 19th January 1911, and has issue

a daughter Beatrice Margaret Kinsey-Morgan, born 29th October 1912. By antenuptial contract of marriage, dated 18th and registered in the Books of Council and Session 30th both days of January 1911, entered into between the said Augustus Kinsey-Morgan, M.D., and the said Beatrice Campbell, the latter conveyed to the trustees thereby appointed certain funds and the whole other estate, heritable and moveable, real and personal, which she might acquire or succeed to during the subsistence of the marriage."

The *questions of law* were—"(1) On a sound construction of the testator's trust-disposition and settlement and codicil, is the fifth party entitled to the liferent of (*a*) the whole of the said trust estate, or (*b*) one-half only of the residue of said estate, or (*c*) the whole of the testator's moveable estate? (2) Is the liferent to which the fifth party is entitled absolute or for her alimentary liferent allenarly? (3) In the event of alternative (*c*) of the first question being answered in the affirmative, has the testator's heritable estate fallen into intestacy? (4) Did the sixth party on the death of the testator acquire a vested right to (1) one-half of the residue of the testator's whole means and estate in conformity with and subject only to the provisions of the first clause of the third purpose of the said trust-disposition and settlement and free of any liferent in favour of the fifth party, or (2) one-half of the testator's whole means and estate subject only to the liferent of the fifth party, or (3) one-half of the testator's moveable estate subject only to the liferent of the fifth party?"

Argued for the sixth party—(1) Properly read the codicil was not inconsistent with the will, but even if it was inconsistent it did not have the effect of revoking it. The codicil did not purport to be a new will. The terms in which the codicil was expressed were the outcome of a false recollection of the terms of the will, and a *falsa demonstratio* in the recital of a previous bequest did not imply its revocation — *Grant* v. *Grant*, March 1, 1851, 13 D. 805; *re Margitson*, *Haggard* v. *Haggard*, 1882, 48 L.T. 172; *Foxwell* v. *Van Grutten*, [1897] A.C. 658, at 691; *Smith* v. *Fitzgerald*, 1814, 3 Vesey & Beames 2, *per* Grant, M.R., at 7; *re Smith*, 1862, 2 Johnson & Hemming 594, *per* Wood, V.C., at 598; M'Laren on Wills, 3rd ed., p. 317; Jarman on Wills, 6th ed., p. 627; Theobald on Wills, 7th ed., pp. 742 and 750. In any event, the words "whatever means I may be possessed of" did not include heritage — *Forsyth* v. *Turnbull*, December 16, 1887, 15 R. 172, 25 S.L.R. 168; *Maclagan's Trustees* v. *Lord Advocate*, 24th June 1903, 11 S.L.T. 227. (2) The latter part of the codicil merely expressed a precatory trust and did not affect the legal rights of the sixth party under the will—*Robertson* v. *Robertson*, November 24, 1846, 9 D. 152, *per* Lord Fullerton at 158; M'Laren on Wills, 3rd ed., at 347.

Argued for the second, third, fourth, and fifth parties—(1) The will and the codicil were inconsistent, and the Court was less inclined to reconcile a will and a codicil than it was to reconcile two parts of the same will. Since the two deeds were irreconcilable the later deed ruled, and the bequest contained in the previous one was revoked—*In the Estate of Bryan*, [1907] P. 125; M'Laren on Wills (3rd ed.), p. 317; Jarman on Wills (6th ed.), p. 623. The words "whatever means I may die possessed of" included heritage. (2) The latter part of the codicil made the testator's daughter a conditional institute and postponed vesting in his son. There was a strong presumption against substitution in mixed estate — *Peacock's Trustees* v. *Peacock*, March 20, 1885, 12 R. 878, *per* Lord Young at 881, 22 S.L.R. 588, at 590; *Bryson's Trustees* v. *Clark*, *&c.*, November 26, 1880, 8 R. 142, 18 S.L.R. 103.

LORD SALVESEN—We have had a very full argument in this case, but I think in the end there is not really any difficulty in disposing of it.

In 1912 Mr Campbell, the testator, left a well-considered trust-disposition and settlement of a simple kind, under which in effect he left one-half of his estate to his son to be paid to him on the expiry of six months; the other half to be held by the trustees for behoof of his daughter and to be liferented by his widow. There were, of course, other dispositions in regard to the destination of the fee of the one-half of the estate in the event of his daughter predeceasing the liferentrix, in which case it was to go to her children.

A large part of his estate, approximately one-half, consisted of shares in two private limited companies of which he had been a director, and he expressed great anxiety that his son should take his place, and that the share of the estate which the trustees were to hand over to him should include all the shares which he held in these two companies. If the value of the shares exceeded one-half of the whole estate the son was to account for the excess. If, on the other hand, the value of the shares was less than one-half of the estate which he left at his death then the trustees were to make up the deficiency. At the time when the will was executed the testator's son was married and his daughter was also married, but neither had issue. Between the date of the will and that of the codicil Mrs Morgan's child was born, but that was the sole change of circumstances which occurred between the execution of the one document and the other. It is stated in the case that the testator did not have a copy of his will in his possession. It had been drawn up by a firm of conveyancers in whose possession it remained ever since, and that might go a long way to account for the manner in which the codicil is expressed. I may also add that the codicil is written by the testator himself, apparently in his own house, and is witnessed by two domestic servants.

The codicil commences by saying — "As expressed in my last will and testament." In its first part, therefore, it purports to be a recital of the leading provisions of his last will and testament. On a strict examination of the recital I think it is plain either

that the testator was imperfectly acquainted with the contents of his last will, or that he was not capable of giving accurate expression to what these contents were. Some ingenuity has been lavished upon this part of the case by counsel for the sixth party, but his argument does not convince me that it is possible to say that this narrative is an accurate, or even an approximately accurate, statement of what is contained in the will.

But the important point, to my mind, is that neither in the narrative nor elsewhere does the codicil betray the smallest intention on the part of the testator to alter his testamentary dispositions except in so far as the clause is concerned which is introduced by the words "I specially desire." In short, I gather from reading this codicil that it was executed only because it had occurred to him that his son might die without issue, there having been up to that time no issue of his marriage, and in that case it was his desire that the son's portion should not pass out of the family but should go to his sister or her issue. I can see no other reason why this codicil was executed except to give expression to that desire.

It is impossible to hold—what the second, third, and fourth parties maintained—that the false recital or inaccurate narrative of the previous will is to operate as a complete alteration of its most essential provisions by converting a liferent, alimentary, of one-half of the estate in favour of the widow into a liferent, unrestricted, of the whole estate; which implies, of course, a revocation of the immediate gift of fee to the son, and, in short, changing the whole scheme of the settlement which he had made with such care. I think the words "I wish that to be carried out" must refer to the last will and testament, and cannot be construed as meaning "I wish the provisions of my last will and testament as I have stated them in the preceding clause to be carried out," because that would mean that he was effecting a change—a radical change—upon the settlement, whereas he was professing simply a desire that the provisions of the settlement should be carried out. Accordingly, I cannot read this inaccurate narrative in the codicil as importing an additional gift to the widow or a revocation of the benefits which had been bestowed upon the son.

The question remains, Can any effect be given to the last part of the codicil? It has been clearly pointed out to us how very difficult it would be to give effect to that part in the way maintained for all but the sixth party without turning completely upside down the provisions which the testator had made on behalf of his son. The testator by his will had given his son an absolute gift of the shares in the two companies in which he was a director, with the intention, as stated in the case, that the son should succeed him in the management of these two companies. If, as the second parties maintained, the effect of that expressed desire was to reduce the son's interest to a liferent, it would of course defeat the whole intention of the testator, because the trustees would then be the owners of the shares which I understand they have formal power to hold under the settlement, and would control the companies, of both of which the deceased was substantially the owner.

I think the true interpretation of this last clause is just that it constitutes a request—an earnest request—to his son in the event of his having no issue to leave his share of the estate which he received from his father to his sister or her children, but that as the share of the estate vests in the son, and has already vested in the son under the will, the request can have no effect in law, and it must be left entirely to the judgment and discretion of the son whether he will give effect to his father's wishes as expressed in this codicil. In short, it does not effect a revocation of the absolute gift already conferred upon the son or in any way limit or restrict his rights as a fiar.

The result is that I think we must answer the questions—1 (*a*) in the negative, (*b*) in the affirmative, and (*c*) does not require to be answered. Then as regards 2 we must answer to the effect that the liferent is for the widow's alimentary use allenarly. The third, I think, is superseded, because, as I propose, we should answer the first head of the first question in the negative instead of in the affirmative. As regards the fourth, the first head would fall to be answered in the affirmative, and that makes it unnecessary to answer the second and the third.

LORD GUTHRIE—I am of the same opinion on all the different points. The most important question argued to us was the question of revocation, all the parties except the testator's son maintaining that the will of 1912 was revoked by the codicil of 1913, except in so far as concerned the trust machinery provided by the will. It seems clear that there was nothing in the circumstances of the parties to suggest any probability that the testator did intend to revoke in 1913 what he had done in 1912—as Lord Salvesen has said the only change of circumstances being the birth of a child, a daughter, to his daughter Beatrice.

But it was said that the case of *Grant*, 13 D. 805, and the passage in Jarman on Wills, i, 627 (6th ed.), showed that the recital in a later testamentary writing of a gift erroneously said to have been contained in a former deed will by itself confer a gift. It seems to me that there is no absolute rule to that effect, but that each case must depend on the proper construction to be put on the words used. But however that may be, Mr Murray was right in saying that the law quoted does not touch the case before us. We are dealing with an erroneous recital which, if the contention for the widow be correct, not only confers a gift not contained in the previous deed, but in effect revokes a gift expressly conferred by the previous deed. There is nothing either in the terms of the deeds or the state of the authorities to support such a case of implied revocation.

LORD JUSTICE-CLERK—I entirely concur in the opinions which your Lordships have expressed. In particular, I assent entirely

to the view expressed by Lord Salvesen as to the meaning and effect of the latter part of the codicil. The testator had evidently come to think that as his son had no children, and might not have any by his marriage, it would be a right and proper thing that in such an event the money should ultimately go to his daughter and her children, and he so expressed his desire. That is a request, not a bequest.

LORD DUNDAS was absent, being engaged in the Extra Division.

The Court pronounced this interlocutor—

"... Answer branch (*a*) of the first question of law in the negative and branch (*b*) thereof in the affirmative: Find it unnecessary to answer branch (*c*) thereof: Answer question second by declaring that the liferent to which the fifth party is entitled is for her alimentary liferent allenarly: Find it unnecessary to answer the third question: Answer branch (1) of the fourth question in the affirmative: Find it unnecessary to answer branches (2) and (3) of said fourth question. . . ."

Counsel for the First and Sixth Parties—Murray, K.C.—Normand. Agent—William Hugh Hamilton, W.S.

Counsel for the Second, Third, Fourth, and Fifth Parties—Macphail, K.C.—Maconochie. Agents—Traquair, Dickson, & MacLaren, W.S.

Thursday, January 21.

SECOND DIVISION.

[Lord Skerrington, Ordinary.
[Lord Anderson, Ordinary.

MITCHELL'S TRUSTEES *v.* MITCHELL'S TRUSTEES.

Succession — Will — Uncertainty — Residue Clause—Direction to Trustees to Make Payments out of Residue to such of Testator's Children and Grandchildren as they might Think most Deserving.

A testator, after empowering his trustees to pay certain special legacies to his children, directed them "from time to time, as they think proper, to make such special payments out of the free residue and remainder of my estate to such of my children or children's children as they may think most deserving, with special instructions to relieve any of them who may appear to be in want, provided always that they have not brought themselves into such circumstances by their own misconduct. My great desire is to assist merit and thrift, and not to acknowledge indolence or folly." *Held* that the clause was not void from uncertainty. *Opinions* that the bequest was a charitable one.

Succession — Accumulations — Thellusson Act (39 and 40 Geo. III, cap. 98).

The Thellusson Act, sec. 1, provides that no one shall thereafter settle any real or personal property by will or otherwise in such a manner that the interest thereof shall be "accumulated for any longer time than the life . . . of any such . . . settler . . ., or the term of twenty-one years from the death of any such . . . settler, and in every case where any accumulation shall be directed otherwise than as aforesaid such direction shall be null and void. . ."

A testator, after directing his trustees to carry out certain trust purposes, appointed them from time to time, as they might think proper, to make such special payments out of the residue of his estate to such of his children or children's children as they might think most deserving, with special instructions to relieve any who might appear to be in want, provided their circumstances were not due to their own misconduct. A period of twenty-one years having elapsed from the truster's death, during which the trustees had accumulated the revenue of the residuary estate, owing to the fact that they were not satisfied that any cases existed which warranted payment out of the trust funds—*held* (*rev.* judgment of Lord Anderson, Ordinary) that as the accumulations had not resulted from any direction, express or implied, and were not a necessary consequence of the direction given, the Thellusson Act did not apply to prevent such accumulations.

The Thellusson Act (39 and 40 Geo. III, cap. 98) is *quoted supra in second rubric.*

James Napier Hotchkis, W.S., St Andrews, and others, the testamentary trustees of the late Robert Mitchell, quarrymaster, Strathkinness, Fife, *pursuers and real raisers*, brought an action of multiplepoinding and exoneration against themselves as trustees and against William Isles Mitchell and others, *defenders*, for the determination of certain questions arising under the residue clause of Mr Mitchell's trust-disposition and settlement. Claims were lodged by the trustees and by the children, grandchildren, and representatives of deceased children, of the truster.

The *trust-disposition and settlement* contained the residue clause quoted *supra in first rubric* and this clause—"And in order to prevent the failure of the discretionary powers hereby conferred in consequence of the office of trustee lapsing, I request my trustees, as soon as their number is by resignation or otherwise reduced below three, to assume other trustees with the same powers as are hereby conferred upon themselves."

The claimants other than the trustees pleaded, *inter alia*, that the residue clause of the testament was void from uncertainty, and that the residue, in consequence, fell into intestacy.

On 12th June 1912 the Lord Ordinary (SKERRINGTON) found as regards the residue clause that the same was not void from uncertainty, and therefore that, subject to the provisions of the Thellusson Act,