Counsel for other Claimants—Mackay—Kirkpatrick—Keir—M'Kechnie. Agents—Lindsay, Howe, Tytler, & Co., W.S., and Thomas Carmichael, S.S.C.

Thursday, March 16.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

CULLEN AND ANOTHER *v.* DOWNIE'S TRUSTEES.

Succession—Vesting—Fee and Liferent—Accretion.

A father by an irrevocable bond of provision bound himself to pay to trustees the sum of £36,000, to be held by them for the benefit of his three daughters "and their issue and successors as afterwards pointed out." It was further provided that any daughter marrying in her father's lifetime should receive £12,000, to be settled on herself in liferent and her issue in fee. Each daughter was to enjoy an annuity, calculated at the rate of 3½ per cent. on the sum of £12,000, during her father's life, and was to be entitled to test upon £3000 if she should survive her father and die unmarried. The remainder of the sum of £12,000 in that event it was provided should "accresce and belong to the surviving sister or sisters" and their only brother. In the event of any daughter predeceasing the father it was provided that the whole sum of £12,000 should "accresce and belong" to the surviving brother and sisters. The whole sum of £36,000 it was provided should bear interest from the date of the father's death in the event of his being survived by his three daughters and they still unmarried. The father was survived by his three daughters, who all subsequently died without issue. *Held (per* Lord Rutherfurd Clark) that the last survivor of the daughters had right to so much of the sum of £36,000 as had not been disposed of by the predeceasers, or had fallen to their brother, and that no part of the fund returned to the estate of the father.

By bond of provision, dated 9th June 1834, Robert Downie the elder, Esquire of Appin, on the narrative that for his love, favour, and affection for his children he had resolved to execute the irrevocable bond of provision for their benefit therein written, bound himself to pay to trustees for the benefit of his "sons and daughters after mentioned, and their issue and heirs as after stated," certain principal sums and annuities. He bound himself to pay to trustees, to be held by them for the benefit of his three daughters "Georgina Frances, Roberta Harriet, and Rose Downie, and their issue and successors," as therein pointed out, the principal sum of £36,000. This capital sum was declared payable in manner after mentioned—that is to say, if the whole of his said three daughters should remain unmarried at the period of his death, then the said capital sum of £36,000 sterling should bear interest from and after the day on which that event should take place. For the maintenance and support of his said three unmarried daughters, till the foresaid capital sum for their benefit and that of their issue and successors should become payable, Mr Downie bound himself to make payment to said trustees in behalf of his said daughters, but subject to the conditions therein and after mentioned, of a clear yearly annuity of £420 sterling for each, at the terms and with penalty and interest as therein mentioned, it being declared that the same should come to an end at his death, or as to each daughter on her marriage; and he also bound himself to make payment to said trustees, for the benefit of his son Robert Downie, of a clear yearly annuity of £440 per annum during his own lifetime. It was further provided that in the event of the marriage of any of his said three daughters, the sum of £12,000 should, in the case of each daughter, provided the marriage were approved of by the trustees or a majority of them, be settled and secured on each of said daughters respectively in liferent and their issue respectively in fee, or in the event of their leaving no issue in manner thereinafter mentioned. It was further provided that, on the death of any of his said daughters leaving lawful issue, the fee of the said sum of £12,000, and accumulation of annuities and interest due to her, should vest in her child or children, with a power of apportionment to their mother. The bond of provision thereafter proceeded to provide for the event of any of said daughters surviving their father and dying unmarried, and declared that the daughter so dying should be entitled by will, or other deed under her hand, to dispose of £3000 sterling, part of the foresaid provision of £12,000, and the whole of any accumulation of annuity or interest which may have arisen on her provision; and that in the event of any of his daughters dying after him unmarried, and leaving such will disposing of the £3000, or any part thereof, the remainder of the said sum of £12,000 so destined for her and her children shall accresce and belong to her then surviving sister or sisters before named, and to her brother Robert Downie, all in equal proportions. The bond also provided for the event of any of said daughters dying before their father without having executed any will, when it was declared that the said £12,000 and accumulations shall accresce and belong to her surviving brother and sisters. After providing for the case of any of the said daughters being married and dying without issue, there followed a declaration that in regard to any share or shares of the said several provisions of £12,000 which might devolve on any of said daughters who might survive through the decease of any one or other of them, and through the occurrence of any one of the foresaid events, and in consequence of any of the provisions made as aforesaid, then such share or shares of the said principal provisions so devolving in such events on the surviving sisters or sister should fall and be held for them or her by the said trustees in liferent, and for the children of such daughter or daughters respectively in fee; and that the said liferent should be exclusive of the *jus mariti* and right of administration of their husbands, should be purely alimentary, and not liable to be arrested by creditors;

and should generally in all respects be subject to the same rules as are above laid down with regard to the principal provisions of £12,000 to such daughter before mentioned. The clauses of the bond of provision are quoted *ad longum* in their Lordships' opinions (*infra*).

Mr Downie died on 10th September 1841, survived by a son and four daughters, three of whom were unmarried. Mrs Leny, the married daughter, was not a beneficiary under the bond of provision. He left a trust-disposition and settlement dated 11th April 1840. Miss Rose Downie died in 1842 leaving a trust-disposition and settlement of her whole estate. Robert Downie younger of Appin died in 1843 unmarried and intestate. Miss Roberta Harriet Downie died in 1859, unmarried leaving a disposition and settlement by which she conveyed her whole estate to her surviving sister Georgina, who died on 12th May 1881 unmarried, leaving a trust-disposition and settlement by which she conveyed her whole estate to trustees, including her whole interest under the bond of provision.

Doubts having arisen as to the rights of the beneficiaries under the several deeds above mentioned, an action of multiplepoinding was instituted at the instance of the testamentary trustees shortly after Mr Downie's death. In that action —*Downie and Others* v. *Mackillop and Others*, December 5, 1843, 6 D. 180—it was held that the bond of provision of 1834 was a delivered and irrevocable deed. The trustees of Miss Rose were preferred to the sum of £3000, being part of the principal sum on which she had power to test, and to the further sum of £1440, being her proportion of the accumulated arrears of annuity. The executor of Mr Robert Downie the younger lodged a claim in said process, and obtained decree for the sum of £3000, being one-third of £9000, the remainder of the said provision destined for his sister Miss Rose Downie and her issue, which accresced to him and her two surviving unmarried sisters under the said bond of provision by the death of his said sister.

It was also found to be unnecessary to give any judgment in that process as to the claim to the residue of the fund in said bond in the event of the whole children dying without issue, and the said claim was reserved till the period for determining in what manner it was to be disposed of should arrive, *i.e.*, till the death of the last survivor.

This period had now arrived in consequence of the death of Georgina, and the question whether the fund *in medio* fell on the death of all the daughters into Mr Downie's estate, or whether it belonged to Miss Georgina Frances Downie as the last survivor, was now raised between Mr Downie's trustees and Miss Downie's trustees.

The Lord Ordinary (Rutherfurd Clark) held that it formed part of Mr Downie's estate, and gave effect to this finding in his interlocutor. He added this opinion—"The leading question in this case is, Whether the fund *in medio*, subject to the powers of testing given to the daughters of Mr Downie by his bond of provision, falls, on the death of all the daughters, into his estate, or whether it belonged to Miss Downie as the last survivor? In my opinion it forms part of Mr Downie's estate.

"By the bond Mr Downie intended to make a provision for his daughters. He binds himself to pay the trustees therein mentioned the sum of £36,000, to be held for the benefit of his daughters and their issue, 'as afterwards pointed out.' I do not think that any right of fee is given to any of the daughters, and in the meantime I am speaking only of original shares. They are empowered, if they die unmarried, to test on £3000; if any one marries, £12,000, or a third of the whole provision, is to be settled on her in liferent and her children in fee.

"Hence the unmarried daughters have only a power of testing to a limited extent, and a married daughter who has issue has a liferent only. If she dies without issue she has only a power of testing on one-fourth of the principal sum which on her marriage was settled on her and her children for their respective rights of liferent and fee.

"These provisions seem to me to be inconsistent with the idea that any fee vested in the daughters. It seems to me to be out of the question to hold that they have a fee in money over which they could only test to a limited extent, and which in the event of their being married and having issue was settled on the issue in fee. It is hardly necessary to advert to the further provision, which declares that on the death of a daughter unmarried or without issue her share—subject to a limited power of testing—devolves on the survivors and her brother.

"But it is said that the share of a deceasing daughter without issue 'accresced and belonged' to the daughters, and that these words necessarily imply a right of fee. But the son takes an equal share with the surviving daughters in the devolving share, and there is a marked distinction between the right of the son and the right of the daughters. For the son takes an undoubted fee, while in regard to any share which may devolve on the daughters it is declared that it was only to be held by them in liferent and their children in fee.

"Whatever force might be in the previous words, which declared that a devolving share should 'accresce and belong' to the surviving daughters and their brother, is taken out of them by the subsequent declaration that the daughters are to take a liferent only.

"The true view of the bond therefore seems to be that the daughters had a right to income only, with a limited power of testing on the capital."

Miss Georgina Frances Downie's trustees reclaimed, and argued—That the provision secured in the bond being accepted in lieu of legitim, the bond itself was an onerous deed, and Mr Downie was divested of the provision. There being no clause of return in the bond, the effect was to confer a fee upon daughters dying unmarried and without issue, subject to a restriction on the power of such daughters to test in favour of the "survivors." That restriction became inoperative in the case of the last survivor, who was thus a fiar with uncontrolled power of testamentary disposition, there being no destination-over. The clauses in the bond which restricted the provision to a mere liferent in the person of the daughters were limited to the event of marriage—an event which had not occurred.

Argued for the respondents—The whole scope of the deed is to provide a liferent.

Authorities—*Ramsay* v. *Beveridge*, March 3, 1854, 16 D. 764; *Ferguson's Trustees* v. *Hamilton*

and Others, July 13, 1860, 22 D. 1442—*aff.* 4 Macq. 397; Menzies' Lectures, 3d edit. 460; *Macreadie*, M. 4402; *Fisher* v. *Dixon*, June 16, 1840, 2 D. 1121.

At advising—

LORD PRESIDENT—We have to deal with the construction of the bond of provision executed by the late Mr Downie in 1834. The general scheme of that bond was to set apart £36,000 for the benefit of his three daughters other than Mrs Leny, and in certain circumstances of his only son. There were five children of the marriage—Mrs Leny, three unmarried daughters, and one son. The granter of the bond not only provided the sum of £36,000 for the benefit of his daughters and his son, but he also provided for the maintenance of his three daughters during his own life, giving each an annuity of £420, being 3½ per cent. on £12,000. The question now is, whether the bond disposes of the £36,000 in every event, including the event which has happened, or whether in the event which has happened this sum, or so much of it as is not disposed of by the bond, reverts to the general estate? This depends on a consideration of the clauses of the deed, and in dealing with this matter I take it as a rule that a bond, such as this is, is in doubt to be construed favourably for the grantee; and there are some particular considerations in this deed which lead us in the same direction. Mr Downie binds himself immediately upon his death to pay over £36,000 "for the benefit of my three daughters Georgina Frances, Roberta Harriet, and Rose Downie, and their issue and successors as afterwards pointed out;" and in other parts of the deed he uses phrases of similar import. In the outset of the deed he binds and obliges himself to pay to his trustees, "and that in trust for the benefit respectively of my son and daughters after mentioned, and their issue and heirs as after stated." Then in another part of the deed, where he provides for the advance of £12,000 to daughters who should be married in his lifetime, he speaks of the sum being settled for the benefit of each such daughter; and again the capital sums spoken of in the clauses relating to the annuities payable during the granter's lifetime are spoken of as capital sums settled in the same way. All this points to the intention of the truster that the sum of £36,000 should in every event be used for the benefit of his daughters, and in certain events of his son, and those after them, whether as the descendants of their bodies or as successors otherwise.

Keeping this general point in view, an examination of the clauses shows us that the expressions in them tally with the general idea, and enable us to say that the £36,000 is so settled that it does not in any case revert to the general estate of Mr Downie. One further remark it is proper to make, that there is certainly no express condition that in any event the sum shall revert. There is nothing in the nature of reversion provided.

The first provision is for the occurrence of the marriage of one of his daughters during his own life. He provides for the advance of £12,000. That might occur in the case of each of his daughters, and so the whole might have been advanced. But in all events the £36,000 was to be paid on his death, with interest "from and after the day on which that event shall take place." It is hardly necessary to say that the deed is clearly irrevocable—it starts with an intimation to that effect—but here that is matter of judicial decision, for in the process of multiplepoinding soon after the truster's death the Court found this was a delivered deed, which could not be cancelled without the consent of all the parties for whom it had been granted.

From the date of his death the £36,000 was to be out of his hands altogether, and to be disposed of thus—If a daughter married, £12,000 was to be settled on her in liferent, and on her issue in fee, exclusive of the *jus mariti* and right of administration of the husband. There is a particular provision for the case of a daughter marrying without the consent of the trustees, but I pass over that as having no bearing on the question before us. There is a provision for daughters who do not marry, or marrying die without issue, and as to that class of events Mr Downie expresses himself thus—"In the event of any of my said daughters surviving me and dying unmarried, the daughter so dying shall be entitled, by will, or other deed under her hand, to dispose of £3000 sterling, part of the foresaid provision of £12,000 sterling, and the whole, if any, accumulation of annuity or interest which may have arisen on her provision."

Now, this limited power of testing undoubtedly suggests that as regards that part of the £12,000 on which she was not permitted to test it would be difficult to hold her as fiar. The Lord Ordinary was much moved by this consideration—indeed, it forms the foundation of his judgment. On further consideration, however, its importance is removed, for Mr Downie goes on to provide—"And in the event of any of my said daughters dying before me unmarried and without having executed any such will, then the foresaid provision of £12,000, with such accumulations of interest as may have arisen thereon, or accumulations of annuity, if any, destined for the daughter so deceasing and her issue, shall accresce and belong to her surviving sister or sisters before named, and to their brother Robert Downie, all in equal proportions." And again—"In the event that any of my said daughters shall die after me unmarried, and shall leave a will disposing of the £3000 above alluded to, or any part thereof, then the remainder of the £12,000 so destined for her and her children as above mentioned shall accresce to her then surviving sister or sisters before named, and to her brother Robert Downie, all in equal proportions." And again—"If any of my said daughters should marry, but die without leaving issue surviving her, then such daughter, whether she has survived me or not, shall possess the absolute power and disposal by will of one-fourth of the said principal sum of £12,000 sterling, to whom and in such proportions as she may think proper, and the remainder shall accresce and belong, all in equal proportions, to her surviving sisters before named, and her brother the said Robert Downie; and if any of my said daughters should marry and die without leaving lawful issue surviving her, and without having executed any will or other deed in virtue of the powers above conferred, then the whole of the said sum of £12,000, and any accumulations of interest thereon, or on the said annuities, if any, shall accresce and belong to her surviving sister or sisters before named, and their brother

Robert Downie, in equal proportions."

Now, after reading those clauses we find a motive for restraining the power of testing, and that is to secure the substitution of the survivors. It is to secure the effect of this substitution that the power of testing is confined to a fourth. Let us now, the objection having been removed, consider the effect of the clauses just read. If a daughter dies unmarried without testing, her £12,000 "shall accresce and belong to her surviving sister or sisters before named and to their brother." Now, what is the meaning of "accresce and belong?" It implies a right of property and nothing else. It cannot admit of any other meaning unless there were qualifying words, but there are no such words. The whole of the clauses are expressed in similar terms. On the death of a daughter her share shall accresce and belong to the survivors. I do not suppose that anyone would contend that in the case of the brother, supposing him to have been the last survivor, the money would not have belonged to him absolutely; for it must be observed that the devolving shares are not to accresce and belong similarly to those with regard to which there is a limitation of power to test. In short, a share having once devolved on the survivor, there is no provision for further devolution. It belongs to such survivor absolutely; and if the words "accresce and belong" have this meaning in the case of the brother, what prevents their having the same meaning in the case of a daughter? The original share is vested in this limited way. If the daughter married, it vested in herself and children; if she married and was without issue, then she could only test on £3000, and the balance was to accresce and belong to the survivors. It was in accordance with this view that the appointment took place; for Miss Rose Downie died in 1842, and she had tested on £3000, which was given effect to in the former process of multiplepoinding. But this left £9000 of hers to accresce and belong to the survivors, who were three in number,—Roberta, Georgina, and the son. The son put in a claim for £3000 as his share of the devolved portion. He was successful and got payment. The question is, whether in the same event £3000 did not accresce and belong to each of the sisters? and on consideration of these clauses, I cannot hesitate to affirm it did so, for there is no room for distinction between the benefits on Robert and on the sisters.

But it is said that all the clauses are qualified by a subsequent clause, which imports a distinction between the brother and sisters. It is intended to do so, but this question is, must this hold in every event, or only in the case of daughters married with issue? The terms are:—"But declaring always, in regard to any share or shares of the said several provisions of £12,000 which may devolve on any of my said daughters who may survive, through the decease of any one or other of them, and through the occurrence of any one of the foresaid events, or in consequence of any of the provisions made as aforesaid, then such share or shares of the said principal provisions so devolving in such events on the surviving sisters or sister, shall fall and be held for them or her by the said trustees in liferent, and for the children of such daughter or daughters respectively in fee." Then follows what is clearly parenthetical, and the clause goes on:—"And shall generally in all respects be subject to the same rules as are above laid down with regard to the principal provisions of £12,000 to such daughter before mentioned." Now, it seems to me that the object of this clause is to provide that notwithstanding that the granter of the bond has declared that shares falling by the decease of sisters shall accresce to the brother subject to provisions in case of marriage, these shares shall be settled on the daughters in liferent and their children in fee; and I cannot gather that he intended further to qualify the previous declaration that the shares "shall accresce and belong to the survivor." Now, if that be so, the working out of this deed is not difficult. Robert Downie died in 1843. He could take no further benefit in any further share falling vacant, and the only parties interested after his death were his two sisters, both unmarried, and who never married. Robert had succeeded to £3000 of Miss Rose's, and so had Miss Georgina. Miss Roberta Harriet Downie died in 1857, and bequeathed all her personal estate to Miss Georgina, who has thus the interest of two survivors combined in her one person. Therefore Miss Georgina's trustees are entitled to the whole fund.

Lord Deas—I confess that when first I studied this deed my impression was that the result arrived at by the Lord Ordinary was right. There is no express clause of return in the deed, and there is no such clause implied. But what disposed me to concur in the reasons of the Lord Ordinary was that the fund *in medio* was not disposed of by the truster, and was of the nature of intestate succession.

There is a great deal in what has been said about the nature of a bond of provision, but all that is not sufficient to bring me to such a conclusion, had it not been for the weight I attach to the words in the beginning of the deed, which I think express an intention which runs through the whole of the deed to the effect of controlling the whole, including the clause last referred to by your Lordships. The deed bears that the granter is to pay to trustees, "in trust for the benefit respectively of my son and daughters after mentioned, and their issue and heirs as after stated;" and then Mr Downie binds himself to pay to his trustees "for the benefit of my three daughters. . . and their issue and their successors." Now, it is very material to consider what is the meaning of "successors." If there had been no preceding mention of heirs, it might have meant the successors of the daughters among themselves. But such a meaning is precluded by the words "their issue," which clearly include "heirs." In the same way he continues subsequently—"Being to be held by my said trustees for the benefit of such daughter who may be so married before my death, and her issue or successors." So we see that "successors" each time that term is used includes "heirs," who are mentioned at first. Now, I think it conclusive of this case that what is given to a person's heirs is given to the person himself. That was the principle upon which I went in the case of *Ramsay* v. *Beveridge*, 16 D. 764. But although my opinion was not agreed to in that case, I have no doubt of this principle and of its application here. For that and for other reasons I concur in the conclusion at which your Lordship has arrived.

Lord Mure concurred.

Lord Shand—I concur. We are not informed of the circumstances under which this deed was granted, but I observe that in the previous litigation in 1843 it was stated that the deed was executed by Mr Downie at the solicitation of friends, as he was apparently about to contract a second marriage. The mother of the beneficiaries had died, and unless there were some antenuptial contract in clear terms excluding a share of the goods in communion, the daughters were in a position to claim and share those goods on her predecease. Thus one sees the key to the granting of this deed as an onerous deed. This is also apparent from the declaration in the body of the deed, that these "provisions in favour of my said daughters shall be held as including all sums of money or provisions settled on them, or to which they might be entitled to succeed in virtue of the marriage articles or settlement entered into between me and my late spouse, their mother, and are to be in full of all portion-natural, legitim, or bairns' part of gear, or other right or claim to which they might be entitled *ex lege* in consequence of my death or that of my late spouse."

The deed, therefore, is not only in the form of a personal bond, but is clearly onerous, and I observe it declares itself to be irrevocable. In the next place, it contemplates that the money shall be paid away from the granter's estate; and thirdly, although the framer of the deed had before him every possible contingency, there is no clause suggesting that any part should revert. It appears to me that every presumption is in favour of the right vesting in the children or survivor, and against the view that the money should revert to the estate of the granter. Now, in this view of the presumption, I attach all importance to the words upon which Lord Deas dwelt at the outset of the deed itself. It rather appears to me that the argument of the respondent would render it necessary to strike the word "heirs" out of the deed.

My general view of the deed is that Mr Downie bound himself to pay £36,000 to his three daughters, with contingent right to his son in event of his surviving, and that the fee was given to the children subject to two matters for which Mr Downie desired to provide, viz., firstly, the event of the marriage of a daughter with issue, and secondly, the case of a daughter dying without issue survived by her brother. Now, it appears that all the restrictions are intended for one or other of these purposes and if one of these purposes is no longer to be served the right vests. That there was no purpose in the mind of the granter other than these two purposes we can find in the first clause, to which reference has been made, where again and again there is a provision limiting the right of the daughter to test, and that is invariably followed by the statement of the purpose for which this is done, viz., that the surviving son may get the benefit of the balance. If that clause stood alone there would be no difficulty in the question. The whole difficulty arises from the succeeding clause (quoted *supra*). In regard to that clause, the first observation is that it does not apply to the original shares, but is limited to the accrescing shares. Secondly, when the granter uses the words "subject to the same rules," his meaning was to protect the rights of the child, and the right of the survivor to the accresced money was to be in the same position as the right to the original shares. My opinion is that no part of this fund reverts to the granter of this deed, but that there was a right to dispose of it in the surviving daughter.

The Lords recalled the interlocutor, and ranked and preferred Miss Downie's trustees to the fund.

Counsel for Miss Downie's Trustees—Gloag—Lang. Agents—Ellis & Blyth, W.S.

Counsel for Mr Downie's Trustees—Mackay—Campbell. Agents—Maitland & Lyon, W.S.

Counsel for Miss Rose Downie's Trustees—Mansfield. Agents—Lindsay, Howe, Tytler, & Co., W.S.

Friday, March 17.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

LEES *v.* TOD AND OTHERS.

Public Company—Director—Misrepresentation—Fraud—Annual Report—Auditor.

It will not establish bad faith or dishonesty in a board of directors that they relied upon their manager and auditor for the accuracy of details as to the state of investments and the extent to which shares had been paid up, published in their reports and balance-sheets, the manager and auditor being competent persons and skilled in accounting.

In order to found an action of damages against the directors of a limited liability company at the instance of a shareholder, on the ground of fraudulent misrepresentations contained in reports and balance-sheets, the pursuer must show (1) that these misrepresentations were on material points; (2) that his purchase was induced by them; and (3) that the directors acted dishonestly and in bad faith.

Where it is sought to make directors liable for false and fraudulent statements made by them to shareholders and the public, there must be evidence of *mala fides* or of such insufficient grounds for these statements as to negative the possibility of *bona fides*; mere errors of judgment or false statements made in the belief of their truth will not throw liability upon the directors.

A shareholder of a heritable security company which had gone into liquidation brought an action of damages against the directors on the ground of alleged fraudulent misstatements in the annual reports and balance-sheets of the company, on the faith of which the pursuer stated that he had purchased his shares. The alleged misrepresentation lay in (1) treating as loans by the company on heritable security sums which had either not been lent on heritable security, or of which the securities had been assigned; and (2) in treating as paid up, capital which had not been paid up. The defenders did not deny that as a matter of fact these errors had occurred in the reports and balance-sheets. It was not averred by the