Friday, June 15.

FIRST DIVISION.

SPECIAL CASE—BUCHANAN'S TRUSTEES.

Succession—Accretion — Survivorship — Division per capita.

A truster directed his trustees to divide the residue of his estate into three parts, one of which was to be paid to one of his brothers in the event (which happened) of his surviving him and being then unmarried. The other two parts were to be held for each of his other two brothers in liferent, and for their children also in liferent (subject to a certain deduction), for their behoof "equally, and share and share alike," the fee to go after their death to the "lawful issue whomsoever of the said child or children of my said brothers respectively equally and share and share alike." Failing "the child or children of any of" his "brothers without leaving lawful issue, the share of such child or children" was to be applied for behoof of "the child or children surviving of my other brothers, each family succeeding equally." Each of these two brothers of the truster left several children, and a child of one of them having died without issue, but leaving two sisters, the share liferented by him was claimed by the family of the truster's other brother. *Held* (1) that it did not pass to them, but remained in the family of that child's father; (2) that the liferent of it did not accresce to the two sisters of the deceasing child, but that the fee of it fell at once to their issue *per capita* and not *per stirpes*

George Buchanan died in 1848 leaving a trust-disposition and settlement whereby he conveyed to his brothers Thomas and John Buchanan as trustees his whole estate. He had three brothers Thomas, John, and James, and one sister Mrs Pollok Morris. All of these survived him. By his settlement he directed his trustees, with regard to the free residue of his estate, to invest one-third on undoubted security, and to pay the annual income thereof to his brother James during his life, but for the benefit of his wife and family allenarly, declaring that the income should not be attachable for his brother's debts or deeds, and should not be alienable by him. Another third of the free residue he in like manner directed his trustees to invest under the same declarations and provisions for his brother John during his life, but for the benefit of his wife and family allenarly, and with the same declaration as in the case of James. The remaining third he directed his trustees to pay to his brother Thomas if unmarried at the date of his (the testator's) death, or if he were then married his third was to be treated as the other two-thirds.

The fifth and sixth purposes of the settlement were as follows:—"*Fifth*, That on the death of any of my said brothers leaving a widow, my said trustees shall be entitled, and they are hereby authorised and empowered, to pay such widow the one-fourth of the free yearly income or produce of the third share of the said residue, and that yearly or half yearly as may be most convenient; or if it shall be deemed preferable by my said trustees, they shall be entitled to purchase an annuity in any respectable Insurance Office for her behoof, equal in amount to one-fourth part of the free yearly income or produce of the third share of the said residue, and which provision shall be strictly alimentary for behoof of such widow, and not attachable for her debts, nor liable for her deeds, nor those of any husband she may afterwards marry, whose *jus mariti* is expressly excluded, her own receipt being at all times a sufficient exoneration to my said trustees. *Sixth*, That my said trustees shall hold and manage the remainder of the third share falling to the child or children of each of my brothers, after deduction of the provision for the widow under the immediate preceding purpose of the trust, for behoof of such child or children equally, and share and share alike, and shall apply such part of the interest thereof as shall be necessary for their behoof from the time of their father's decease; and as it is my earnest desire, in consideration of the vicissitudes to which persons engaged in business are exposed, that such share of my means and estate should, as far as possible, be secured as a permanent provision for the families of my said brothers, so I hereby authorise and empower my said trustees, and survivor of them, and the trustees to be nominated and subsumed as aforesaid, if considered advisable so to do, to create and constitute a separate trust or trusts for the management and application of the share of the funds and estate falling to each family, with power to the trustees under said trust or trusts to pay the interests or income of the share of the funds and estate to the child or children of each of my said brothers, yearly or half yearly, as shall be found most convenient, and the whole of such payments being held and considered as strictly alimentary, and not assignable by them, nor attachable for their debts, nor liable for their deeds, nor shall the share of any female fall under the *jus mariti* of any husband she may marry, but her own receipt shall at all times be sufficient to the said trustees, and the said trustees paying over the fee of the said shares, on the death of the liferenters, to the lawful issue whomsoever of the said child or children of my said brothers respectively, equally, and share and share alike: But declaring that failing the child or children of any of my brothers without leaving lawful issue, the share of such child or children shall be paid and applied for behoof of the child or children surviving of my other brothers, each family succeeding equally; and failing the whole children of my said brothers and their issue, the children or child, if only one, of my sister Mrs Pollok Morris, and their issue, shall then succeed to the said funds, means, and estate:| And further, declaring that in every instance the lawful issue of any party intended to derive benefit under the foregoing provisions shall succeed to such share thereof as would have fallen to their deceased parent."

Thomas Buchanan was unmarried at his brother's death, and therefore received payment of his one-third share.

James and John were both married and had issue.

Thomas and John accepted office as trustees, and proceeded to carry out the purposes of the settlement, In pursuance of the authority given them to create, if they thought fit, a separate trust or trusts for the management of the share falling to each family, they constituted a separate trust for the family of James, the trustees being James Buchanan himself and his son James Linberg Buchanan, who discharged the testamentary trustees of the one-third of residue, amounting to £18,695, belonging to that family.

James Buchanan died in 1878 survived by his wife, and by three children, James Linberg Buchanan, Mrs Muchall-Viebrook, and Mrs Von Mosch. After his death his widow received one-fourth of the income of the third share falling to his family, the remaining income being divided by the trustees under the separate trust among his three children in terms of the settlement of George Buchanan. James Linberg Buchanan assumed into the separate trust William Young and Thomas Ryburn Buchanan, M.P.

In 1882 James Linberg Buchanan died unmarried, and the share liferented by him of the one-third of residue falling to his father's family amounted to £6231, and the present Special Case related to the disposal thereof. He left a will which, he being only a liferenter, was effectual only to carry the accrued portion of the current half-year's income. His sisters Mrs Muchall-Viebrook and Mrs Von Mosch claimed that the liferent of this sum of £6231, the share liferented by their brother, accresced to them under George Buchanan's settlement, and the fee of it to their issue.

Mrs Muchall-Viebrook had one child. Mrs Von Mosch had three children. All these children maintained that the fee of the sum accresced to them at once without being subject to the liferent of their parents. The child of Mrs Muchall-Viebrook maintained that the sum fell to be divided *per stirpes*. The children of Mrs Von Mosch maintained that it fell to be divided *per capita*.

In the present Special Case William Young and T. R. Buchanan (trustees under the trust for James Buchanan's family) were first parties; Mrs Muchall-Viebrook and Mrs Von Mosch were second parties; and their children were third parties. These children being all in minority, a curator *ad litem* was, when the case was in the Single Bills, appointed to the child of Mrs Muchall-Viebrook, and a separate curator *ad litem* to the children of Mrs Von Mosch.

The questions for decision between the second and third parties were—"(1) Does the liferent of the share of said one-third of residue enjoyed (subject to his mother's provision) by the said James Henry Linberg Buchanan, or any portion thereof, accresce to his two sisters, the second parties hereto, and the fee thereof to their respective issue, in the same manner and subject to the same conditions as the second parties' original shares of said one-third of residue? Or (2) Does said liferent fall at once to the issue of the surviving children of the testator's brother James Buchanan, the third parties hereto, without being subject to the liferent of their parents, and is the division of the said fee among the said third parties *per stirpes* or *per capita*."

Claims were, however, made to the share of James Linberg Buchanan, constituting the subject-matter of the Case by the children, seven in number, of John Buchanan, and by the children of certain of them who were married and had issue. John Buchanan's children were the fourth parties to the Case, and the children of those of them who were married and had children were the fifth parties. A curator *ad litem* was appointed to them—they being all in minority—when the case was in the Single Bills.

The fourth and fifth parties both maintained that in consequence of the death of James Linberg Buchanan, one of the children of James Buchanan, his share, on a sound construction of George Buchanan's settlement, passed to the family of John Buchanan, under the words "failing the child or children of any of my brothers without leaving lawful issue, the share of such child or children shall be paid and applied for behoof of the child or children of my other brothers." The fourth parties maintained that they were entitled to the fee of the share of James Linberg Buchanan under these words. The fifth parties maintained that they were entitled to the fee equally *per stirpes*, subject to the liferent of their parents, the fourth parties.

The next-of-kin of George Buchanan maintained that the sum in question had not been effectually disposed of by his settlement and fell into intestacy. They were the sixth parties.

The widow of James Buchanan was the seventh party, and maintained that her liferent provision from the share of residue falling into her husband's family was not affected by the death of her son James Linberg Buchanan.

The questions of law other than those given above were—"(3) Does said liferent fall to the children of the testator's brother John Buchanan, the fourth parties hereto, and the fee to their respective issue represented by the fifth parties hereto, in the same manner and subject to the same conditions as in the case of the original shares of their one-third of residue enjoyed by the fourth parties? Or (4) Are the fourth parties entitled at once to the fee of the said share of residue liferented by the said James Henry Linberg Buchanan? Or (5) Has the fee of said share fallen into intestacy, and is the same now payable to the sixth parties, being the representatives of the testator George Buchanan's next-of-kin? (6) Is the provision enjoyed by Mrs C. W. Buchanan, the seventh parties hereto, from the said third share of residue in any way affected by the death of the said James Henry Linberg Buchanan?"

Argued for second parties—(1) The intention of the testator was that the liferent share of one of his brother's children who predeceased the others without issue should go to these others, and not that the fee of it should immediately descend to their children. The families were to take "equally." This intention would here be carried out by construing the words of the settlement according to the ordinary rules of law, since the case was one to which the doctrine of accretion was applicable. The children of each family were treated as a class. Accretion was a *quæstio voluntatis*. (2) It was clear that the family of John Buchanan could not succeed to James Linberg Buchanan's share while any children of the family of James Buchanan were in existence.

Authorities on question of accretion—Stair, iii. 8, 27; M'Laren on Wills and Succession, i. 675-9 (Survivorship); *Paterson*, June 4, 1741, M. 8070; *Torrie* v. *Munsie*, May 31, 1832, 10 Sh. 597; *Robertson* v. *M'Bean*, Dec. 10, 1819, Hume 273; *Tulloch* v. *Welsh*, Nov. 23, 1838, 1 D. 94; *Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H. of L.) 151; *Barber* v. *Findlater*, 13 Sh. 422.

Argued for curator *ad litem* for child of Mrs Muchall-Viebrook (third party)—[*On the question with John Buchanan's family the third parties adopted the second parties' argument*]—(1) On the question of accretion—There were words in this will which were fatal to the application of the doctrine of accretion to survivors of a class. The words "share and share alike" which were found in this deed had always been held to import a several and not a joint gift– Stair, *ut supra*, *Torrie* v. *Munsie*, *supra*; *Rose*, M. 8101. (2) As to the question with the other third parties (children of Mrs Von Mosch)—The succession ought to be *per stirpes*. That was the conception of the whole settlement, in which the testator regarded the interest of families rather than division *per capita*.

Argued for curator *ad litem* for other third parties on the question of the manner of division—[*Adopting the argument of the other third parties as against the second and fourth parties*]—The general presumption is that where there is a gift to a class equally among them, share and share alike, the division is *per capita*—*Macdougall*, Feb. 6, 1866, 4 Macph. 372. No doubt that case was afterwards reversed on the construction of the whole deed, but the general proposition was untouched—6 Macph. (H. of L.) 18.

Other authorities—*Johnstone* v. *Grant*, May 22, 1810; *M'Courtie* v. *Blackie*, Jan. 15, 1812, Hume 270; *Bogie's Trustees*, Jan. 26, 1882, 9 R. 453.

Argued for fourth parties—The condition which according to the settlement was to open the succession to John Buchanan's family had been purified. James Linberg Buchanan, who was a "child of one of my brothers," had died without issue, and his share was therefore destined to the "children of my other brothers." The words "each family succeeding equally" would have had a meaning if the testator's brother Thomas had left issue. They would have shared with John's children.

The curator *ad litem* for the fifth parties adopted the fourth parties' argument that the share in question was destined to John Buchanan's family, but argued that the "share" of a child in the position of James Linberg Buchanan was a liferent share only, and that the fourth parties in succeeding thereto could therefore only take a liferent, leaving their children the fee.

No argument was offered for the sixth parties.

The seventh question was not argued.

At advising—

Lord President—In this Special Case there is an appearance of complexity arising in great measure from the number and variety of the questions appended to the Case, but it appears to me that there are two points for consideration, and the answer to them will go far towards enabling us to answer all the rest. In the first place, there is the question as to the accretion of the liferent provisions among the liferenters, and in the second place, whether the division of the fee among the children is to be *per stirpes* or *per capita*.

The whole matter depends on the trust-settlement of the late George Buchanan, a leading feature of which is the manner in which he disposes of the residue of his estate. Mr George Buchanan had three brothers, James, John, and Thomas, and by the third purpose of his settlement he appoints his trustees to divide the residue into three equal parts, to invest the same in their own names, and to pay the whole income derived therefrom, one-third part to each of his brothers during their respective lives, but for the benefit of their respective wives and families allenarly. In the event of the brother Thomas being unmarried at the testator's death, then the provision was to be paid to him absolutely. This occurred, and consequently Thomas received payment of his share from the trustees. The other two-thirds of the residue therefore belonged to the two remaining brothers James and John, one-third to each. But the provision with regard to them was of this nature—that they should enjoy the liferent of their respective shares, and that when either of them died, if he left a widow, the trustees were empowered and authorised to pay to her one-fourth of the free yearly income or produce of her late husband's share, or if it should be deemed preferable, to purchase an annuity for her. Then comes the sixth purpose of the trust—"That my said trustees shall hold and manage the remainder of the third share falling to the child or children of each of my brothers, after deduction of the provision for the widow under the immediate preceding purpose of the trust, for behoof of such child or children equally, and share and share alike, and shall apply such part of the interest thereof as shall be necessary for their behoof from the time of their father's decease." Now, the general purpose of the testator is announced distinctly enough, the words "child or children" merely providing for the alternative case of only one child or more being born to either brother.

In the event of more than one child being born of the marriage of either of the testator's brothers, the provision is to them "equally, and share and share alike." Now, words used in the deed, to which I shall afterwards allude, make it clear that the character of the testator's brothers' children as regards the residue is no more than that of liferenters, and that the fee is in their issue, but for the moment I stop here in the reading of the deed.

We are concerned in this case only with the share liferented by James. He had a family of three children, one son and two daughters, and he, James, died before any of his children, on 15th April 1878, so that on that event the provision in favour of his children came into operation, and Mr James Henry Linberg Buchanan, Mrs Muchall-Viebrook, and Mrs Von Mosch enjoyed the liferent of their father's share equally among them.

On 12th March 1882 Mr James Linberg Buchanan died unmarried, leaving a will, which, however, has no effect on this question, as he was only a liferenter in this fund. But the question arises whether in consequence of his death his share of the liferent accresced to his

two sisters, or whether the effect of his death was not to set free one-third of the fee in favour of the children of Mrs Viebrook and Mrs Von Mosch? That point is raised by the first question submitted to us. It seems to me that the words of the settlement, so far as I have already read them, are pretty conclusive of the question, for it is provided distinctly that this third share was to be held "for behoof of the children equally, share and share alike," and the interest is to be applied for their behoof from the time of their father's decease.

We must, however, make sure that there is nothing adverse in the settlement to that view; it is therefore necessary to read on from the point where I stopped before. The deed then goes on, "And as it is my earnest desire, in consideration of the vicissitudes to which persons engaged in business are exposed, that such share of my means and estate should as far as possible be secured as a permanent provision for the families of my said brothers, so I hereby authorise and empower my said trustees . . . if considered advisable so to do, to create and constitute a separate trust or trusts for the management and application of the share of the funds and estate falling to each family, with power to the trustees under said trust or trusts to pay the interests or income of the share of the funds and estate to the child or children of each of my said brothers, yearly or half-yearly," and so on, "and the said trustees paying over the fee of the said shares on the death of the liferenters to the lawful issue whomsoever of the said child or children of my said brothers respectively, equally, and share and share alike; but declaring that, failing the child or children of any of my said brothers without leaving lawful issue, the share of such child or children shall be paid and applied for behoof of the child or children surviving of my other brothers, each family succeeding equally." Now, the result of all this is that it is made very clear that not only is the liferent of the fund to be shared equally by the children of James, but that the fee also of each share so liferented is to be enjoyed in equal shares by their children. Now, that being so, I think it is very well settled by a series of cases that when a legacy of this kind in liferent or fee is given "in equal shares" to children there is no room for accretion, while, on the other hand, if the gift is given "jointly," then the presumption is in favour of accretion, though that presumption may be overcome by other words in the deed. Here I think there are no words adverse to the construction that the gift of the liferent and fee in equal shares has the effect of giving each child just its own share and nothing more. I am therefore of opinion that on the death of James Linberg Buchanan the liferent he enjoyed did not accresce to his sisters, but that there was thereby set free a corresponding portion of the fee among the grandchildren of James Buchanan.

Now that enables me to answer the first question, and helps us a considerable way towards answering the others.

The next point is, assuming that part of the fee of the share we are dealing with is to be divided among the children of Mr James Linberg Buchanan's sisters, is the division to be *per stirpes* or *per capita?* One of the sisters has only one child, while the other sister has more; so it is clear that they have an interest in raising the question. I am of opinion that the division should be *per capita.* The whole scope of the deed shows that each child and each grandchild is intended to get just its own share in the fund without reference to any other consideration. I see nothing to suggest that the division should be *per stirpes* so long as there are any descendants of James Buchanan who are entitled to take. It is, however, noticeable that if issue of James Buchanan should fail then his share is to go to the child or children of his other brothers, and in that event the division is to be *per stirpes,* for the words are "each family succeeding equally." That I think affords a strong presumption that in other cases where no such declaration is made it is intended that the division should be made *per capita.*

The third point is raised by the descendants of John Buchanan, who say that the effect of a portion of the fee opening by the death of James Linberg Buchanan is that they are entitled to claim a share of it under the clause last referred to. That is a claim which cannot be listened to. Nothing could be more inconsistent with the whole scope of the deed or the intention of the testator. He declares over and over again that he means one-third of the residue of his estate to belong to the family of each of his brothers, and spares no pains to have it understood that so long as there is a family to succeed they are to have the money. His anxiety is so to settle the residue as to make a permanent provision for James' family; but the effect of this argument would be to take away part of that provision. I have therefore no hesitation in rejecting the claim. That being so, I am not aware that there is any point to be decided except two raised by questions 5 and 6. Question 5 suggests intestacy, for which I can see no room whatever. The point under the 6th question is raised by the widow of James. Though we had much ingenious argument in the case, we have heard nothing on this point, and I do not think anyone has been so ingenious as to be able to tell us how the widow's position could possibly be affected, or even why that question was stated.

Lord Deas concurred.

Lord Mure—I also concur. I felt at one time some difficulty as to the claim made by the children of John Buchanan in consequence of the peculiar provisions of the sixth purpose of the settlement, but on further considering the case I have come to be entirely of the opinion which your Lordship has expressed.

Lord Shand concurred.

The Court pronounced the following interlocutor:—

"Find and declare (1) that the liferent of the share of one-third of residue enjoyed (subject to his mother's provision) by James Henry Linberg Buchanan does not accrue to his two sisters, the second parties to the Special Case; (2) that the said fee in the case mentioned fell at once to the issue of the surviving children of the testator's brother James Buchanan, the third parties to the case, without being subject to the liferent of their

parents; and that the division of the said fee among the said third parties is to be made *per capita;* and the Court answer questions 3, 4, 5, and 6 in the negative, and decern."

Counsel for Second Parties—Wallace. Agents—Russell & Dunlop, C.S.

Counsel for Curator *ad litem*, Third Party (Mrs Muchall-Viebrook's Child)—Macfarlane. Agent—J. P. Wood, W.S.

Counsel for other Third Parties (Curator *ad litem* for Children of Mrs Von Mosch)—C. N. Johnston. Agent—James Marshall, S.S.C.

Counsel for Fourth Parties—Lorimer. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Curator *ad litem* for Fifth Parties—Sym. Agent—J. P. Bannerman, W.S.

Counsel for First, Sixth, and Seventh Parties—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, June 16.

FIRST DIVISION.

[Lord M'Laren, Ordinary on the Bills.

URQUHART *v.* ANDERSON.

Heritable Creditors—Diligence—Poinding of the Ground.

The effect of an action of poinding of the ground is to attach only those moveables which are actually on the ground at the time of the serving of the summons.

Bankruptcy—Judicial Factor—Heritable Creditor—Preference.

A trader was sequestrated, and a judicial factor at the date of the sequestration was appointed by the Sheriff. In order to prevent any preference being established by heritable creditors, he forthwith removed a quantity of machinery and moveable goods from the premises, and being thereafter elected and confirmed trustee he sold them. After the sequestration, but before the confirmation of the trustee, a heritable creditor executed a summons of poinding of the ground. *Held* (*diss.* Lord Shand) that the heritable creditor had not secured any preference over the moveables belonging to the bankrupt estate which had been removed by the judicial factor before the action was served—*reserving* to him any claim he might have against the judicial factor for so removing them.

The Bankruptcy (Scotland) Act 1856 provided by sec. 118 that no poinding of the ground not carried into execution by sale of effects sixty days before the date of sequestration should be available in question with the trustee, provided that no creditor holding a security over the heritable estate preferable to the right of the trustee should be prevented from executing a poinding of the ground, such poinding to be available only for the interest on the debt for the current half-year, and arrear for one year immediately preceding the commencement of such half-year. By sec. 55 of the Conveyancing Act 1874 this provision was repealed, and it was provided that "all heritable creditors who have been in possession under their securities, and whose right to the rents collected by them has not been challenged by action previous to the commencement of this Act, shall be entitled to claim and apply all rents collected by them in such manner as they might have done if the provisions of the section held repealed had not been enacted."

David Hay Macleod, baker, Dundee, granted in favour of David Urquhart, also residing there, a bond and disposition in security for the sum of £495, dated 14th May 1877. The subjects over which the bond was granted were situated in Forfar. The bond and disposition in security was registered on behalf of Urquhart on the 16th May 1877.

Macleod's estates were sequestrated by the Sheriff of Forfarshire upon the 19th July 1882, and at the same time David Anderson, corn merchant, Dundee, was appointed judicial factor upon the sequestrated estate.

On the 21st July 1882 the petition in an action of poinding of the ground against Macleod in the Sheriff Court of Forfarshire was served at Urquhart's instance.

David Anderson, the judicial factor, was elected trustee on Macleod's sequestrated estates on 20th July, and was duly confirmed in that office by act and warrant of confirmation by the Sheriff on 1st August 1882. The action of poinding of the ground was duly intimated to him. On 14th August 1882 the Sheriff-Substitute, in respect of no appearance for either Macleod or Anderson, granted decree in absence against them.

At the date of the petition for sequestration the moveables upon the said ground consisted of a quantity of flour in bags, machinery, baking utensils, vans, and other effects. These Anderson, immediately after his appointment as judicial factor on 19th July, proceeded to remove, and a great portion of them was removed prior to the service of the petition in the action of poinding of the ground on 21st July. After Anderson's confirmation as trustee he proceeded to sell from time to time the various moveables, and the proceeds of these sales amounted to £365, 4s. 8d.

Urquhart claimed in the sequestration that he was entitled to be ranked preferably to the extent of the principal sum of £495 contained in the bond and disposition in security on the prices of the moveable goods which were upon the subjects at the date of the said sequestration, and were removed therefrom by Anderson, all under reservation of a claim of damages in respect of the wrongful interference with and removal of the said moveables. Anderson, the trustee, admitted him to a preferable ranking to the extent of £45, 12s. 6d., "the nett proceeds of the bankrupt's moveable goods, gear, and effects of every denomination which the trustee has learned were upon the subjects referred to in the claimant's claim and relative extract decree at the date of service of the claimant's action of poinding the ground referred to in the said claim," and *quoad ultra* he rejected the claim.

Urquhart appealed against this deliverance to the Sheriff-Substitute, pleading that "the summons in the action of poinding of the ground having been duly executed prior to the election