The Court recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to refuse the note of suspension (with power to decern for the expenses incurred in the discussion in the Inner House).

Counsel for Suspender — J. P. B. Robertson —Dickson. Agent—James Coutts, Solicitor.

Counsel for Respondents—Trayner — Rhind. Agents—P. Morison, S.S.C.

Wednesday, July 11.

SECOND DIVISION.

SPECIAL CASE—SMITH'S TRUSTEES AND OTHERS.

Succession — Testament — Legacy — Defeasance— Bequest of Moveables—Resolutive Condition.

It is competent to attach a resolutive condition to a bequest of the fee of moveables so as to make the right defeasible in a certain future event.

A testator made, *inter alia*, the following bequest to his widow—"I appoint that she get yearly during her life £120, to be paid half-yearly . . . and also all the household furniture, &c., and everything in the house at my death, . . . provided she remains unmarried, but in the event she marries, the annual allowance to be reduced to £50, with neither free house nor furniture, nor anything but the £50 per annum." *Held* that she took a right of fee in the furniture, &c., subject to forfeiture in the event of her marrying again.

Succession—Vesting—Payments to Legatee to be in Discretion of Trustees.

A testator directed his trustees that £1000 should be invested or left in stock, and given in such sums and way and times as the trustees might think best for his nephew, "he having no control or right to interfere with the trustees anent the same, under forfeiture of all claim to the same." The nephew survived the testator, but died without having got payment of any sum from the trust. *Held* that no right had vested in him under the will.

A testator directed his trustees that his niece (who survived him) should "receive £1000, to be invested . . . on stock," the interest to be paid half-yearly . . . and also that she should receive a third of the residue of his estate, "to be put under the same arrangement" as the £1000, "to prevent her money going to another family at her death." *Held* that the niece was entitled to have both bequests paid over to her for her own absolute use and disposal.

Charles Smith died on 21st April 1882, survived by a widow but no children. He left the following deed of settlement (dated 6th March 1882), which was holograph and signed by him:—"I, Charles Smith, late merchant tailor, Aberdeen, presently residing at 49 Victoria Street, Aberdeen, being anxious to settle my affairs during my lifetime, I hereby appoint the following persons to be my executors and trustees—Jane Smith, my wife, and Charles Smith, my nephew, and John Black, husband of my niece, and Alexander Ramage, rector of the Free Church Normal College, Aberdeen, with full power to act in all matters arising at and after my death, to arrange for my funeral, and to pay all deathbed and funeral and other expenses; and notwithstanding that we had a marriage settlement, I wish to give my wife a more liberal settlement: I appoint that she get yearly during her life £120, to be paid half-yearly, the first half-yearly payment to be made at the first term six months after my death, with a proportionate sum from the time of my death to the first payment, and that she also get £50 for mournings, and also all the household furniture, beds, bedding, pictures, books, plate, and everything in the house at my death, except my gold watch, chain, &c., and that she also get the occupation of the house 49 Victoria Street we live in during her life, free of rent and landlord's taxes, provided she remains unmarried, but in the event she marries, the annual allowance to be reduced to £50, with neither free house nor furniture, nor anything but the £50 per annum, my house property to remain as security for my wife's payment; and I wish her to act in the letting the houses, keeping in repair, drawing the rents, &c., under and with the advice of the trustees; and I appoint Charles Smith, my nephew, to get £2000 in cash, or in stock at valuation, at the first term six months after my death; and I also appoint my niece Margaret Baird Smith or Black to receive £1000 in cash or stock to that value, at the first term six months after my death, for her own use, and to remain under her own control; and I also appoint that Christina S. Copland, my niece, and teacher, to receive £1000, to be invested or kept invested in stock, the interest to be paid half-yearly, the first payment to be made at the first term six months after my death; and I also appoint that £1000 be invested or left in stock of that value and given in such sums and way and times as the trustees may think best for John Smith, my nephew—he is abroad—he having no control or right to interfere with the trustees anent the same, under forfeiture of all claim to the same. I also appoint that Sarah Lunan or Smith, widow of my late brother John Smith, receive £20 yearly, to be paid monthly in equal sums, the same to include house rent and all other payments, and to be continued during the pleasure of the trustees, or to be paid in such sums and in such manner as they think fit. I also appoint that Charles Lawson Smith, my grandnephew, get, when of age, my gold watch and chain, and £1000, the interest to begin at the death of my wife. And I also appoint that my two grandnieces, daughters of my nephew Charles Smith, and my second-named trustee, get £500 each set apart to them at the death of my wife, and the rest of my residue to be divided as follows:—Charles Smith, my nephew, to receive two equal third shares, Margaret Baird Smith or Black, my niece, one-third part of the residue, and my niece Christina S. Copland, to receive the other third, to be put under the same arrangement as her first-named sum of £1000, to prevent her money going to another family at her death. The above settlement of my affairs, written by me and signed on the 6th day of March 1882 years."

The parties nominated accepted of the offices of trustees and executors, and gave up an inven-

tory of the deceased's personal estate to the amount of £6275, 8s. 11d. His heritable estate, including the house in Victoria Street, was of the annual value of about £245.

The marriage-settlement mentioned by the testator was an antenuptial contract between himself and his wife, by which he made certain provisions (less than those provided by the settlement) for her in the event of his predeceasing, which she accepted in full of her legal rights.

The testator's niece Miss Copland was a daughter of a sister of the testator who predeceased him. Her father afterwards married again, and then also predeceased the testator, leaving a family by his second marriage. The only child, besides Miss Copland, of the first marriage was a son Alexander, who was an inmate of a lunatic asylum.

John Smith survived the testator, but died unmarried and intestate before the date, of this Case, and without having received any payment from the estate. His next-of-kin were Charles Smith, his brother, and Mrs Black and Sarah Smith, his sisters.

They maintained that his legacy had vested in him, and so passed to them as his next-of-kin. The residuary legatees maintained that it had lapsed.

To have this question decided, and also for the ascertainment of the right under the settlement of the widow and of Miss Copland, this Special Case was adjusted between the trustees of the first part; Charles Smith, as an individual, of the second part; Mrs Jane Smith, the widow, as an individual, of the third part; Miss Copland, of the fourth part; Mrs Black, of the fifth part; Charles Lawson Smith, of the sixth part; and Sarah Smith, of the seventh part.

The Case narrated the facts above set forth, and stated also that the widow had accepted the provisions of the deed of settlement in her favour in full satisfaction of her provisions under the marriage-contract.

The questions of law for the opinion and judgment of the Court were:—"I. (1) Has the third party a power of absolute disposal of the household furniture, beds, bedding, pictures, books, plate, and other articles in the house at the testator's death? or (2) Is the said bequest subject to defeasance or forfeiture in the event of her entering upon a second marriage? or (3) Is her right to the said household furniture and other articles limited to a bare liferent, the fee thereof being held by the first parties for behoof of the third party's executors and assignees in the event of her remaining unmarried? II. (1) Is the fourth party entitled to require the first parties to pay over to her, for her own absolute use and disposal, the sum of £1000 and the share of residue bequeathed to her by the said deed? or (2) Are the first parties bound to invest the same in their own names during the life of the fourth party for payment to her of the interest or dividends thereof, but subject to her power of disposing of the same by deed to take effect after her death, and, failing disposal, for behoof of her legal representatives? or (3) Are the first parties bound to invest the same in their own names for behoof of the fourth party in liferent, and of her issue, if any, in fee, and failing issue, subject to her power of disposal? or (4) Is the fourth party's right under the said deed limited to a bare liferent, and if so, does the fee of the said bequest of £1000 and share of residue, or either of them, fall to be held by the first parties for behoof of the testator's next-of-kin or of the other residuary legatees? III. Did the sum of £1000 provided to the late John Smith vest in him? IV. In the event of the testator's widow being alive when the sixth party attains majority, will the latter be entitled to immediate payment of the legacy of £1000 bequeathed to him by the said deed, or will payment thereof fall to be deferred until her death? V. Does the residue fall to be divided in the proportion of one-third thereof to each of the parties of the second, fourth, and fifth parts, or in the proportion of two-fourths thereof to the party of the second part, and one-fourth thereof to each of the parties of the fourth and fifth parts?"

Argued for parties of the first part—The widow's right to the furniture was only one of liferent, or if it was more than that, it was no more than a conditional fee which resolved on a given event. In the latter case it was a valid legal provision, and the widow could not claim an absolute right of disposal of the furniture. There was no authority that such a resolutive condition was invalid as to moveables. It was a legal condition attached to the bequest, and in one way or other—either by holding the right given a liferent or a defeasible fee—it must be made effectual so as to produce forfeiture of the furniture in the event of second marriage, as was the plain intention of the testator. (2) Miss Copland's right also was only one of liferent—a right to call on the trustees to pay her revenue of the sum bequeathed. The intention of the testator was to exclude her provision going by her intestacy or disposition out of the family, and this could only be done by limiting her right to one of liferent. There was an implied fee to her children in the exclusion of her half brothers and sisters. John Smith took no right beyond what the trustees chose to give him, and therefore nothing was transmitted to his representatives—*Burnside* v. *Donaldson*, June 20, 1829, 7 S. 735.

For party of the second part—The bequest of residue was unintelligible as it stood, but one thing was clear from it, that Charles Smith was to get twice as much as each of the other two, into whatever fractions the whole was divided. Had he meant them all to share equally he would have said so.

For party of the third part—The widow's right was at all events one of fee, whether defeasible or not. The third alternative—that it was a liferent—was untenable on the terms of the will. It was meant to be an unrestricted fee, for there was no destination-over—*Robertson*, July 20, 1869, 7 Macph. 1114.

For party of the fourth part—This was a right of fee, for no interest was created in anyone else; the only right given was to her. The intention to exclude was not sufficiently definite to limit the fee.

For party of the fifth part—The fifth party had two claims, one as a representative of John Smith and the other as residuary legatee. John Smith was meant to take a bequest of capital, which the trustees were directed to make over to him; it was not in their discretion to give or with-

hold. It had therefore vested in him before his death. The only disputed right of the seventh party was in the same position. As to the bequest of residue, the intention evidently was to divide equally. The division was three—the "two"-thirds was a clerical error for "one"-third.

At advising—

Lord Justice-Clerk—This case raises some points of nicety. I shall shortly state the opinion at which I have arrived on the different questions.

As to the first question, in regard to the widow's right to the furniture, I am of opinion that she is not restricted to a bare liferent, but that she is restricted, or rather is subjected, to the obligation, in the event of her entering into a second marriage, of renouncing her right thereto. I had not so much doubt on this point of the testator's intention as on the point whether we should look so far into the future as to lead us to determine the question now. Though I had some difficulty on the latter point, I think there is no practical difficulty in giving effect to the clear intention of the testator by holding that the widow shall forfeit both the occupation of the house and the possession of the furniture on her second marriage.

The determination of the second question is one of difficulty from the words used by the testator, but from the consideration that there is no other party in right of this sum, and from the general language of the deed, I think the right there given was intended to be one of fee, and though the testator has indicated some wish or desire that the succession to it should be restricted in a particular way, he has not carried it far enough to limit the right of fee given to the legatee.

On the third question I think that no sum whatever vested in John Smith. I think the words of the deed import solely a discretion in the trustees, and that John Smith has right under them to only so much as the trustees might choose to give him, and to nothing except that.

The fourth question I think was not pressed.

On the fifth question I think the practical and equitable result of a construction of the testator's language is that Charles should take a double share, and that though he speaks of "third" and disposes of four of them, yet his intention was that Charles should take two shares, that is to say, double the share of each of the others, the result of which will be that he will take one-half and the others one-fourth each.

Lord Craighill—I am entirely of the same opinion. I have carefully considered all the questions, and can find no escape from the conclusions at which your Lordship has arrived.

Lord Rutherfurd Clark—I am of the same opinion.

Lord Young was absent.

The Court pronounced the following interlocutor:—

> "The Lords . . . are of opinion and find, *Firstly*, and in answer to the first question therein put, that the right of the third party to the subject of the bequest is a right of fee, subject to forfeiture in the event of said third party entering into a second marriage: *Secondly*, and in answer to the second question, that the fourth party is entitled to require the first parties to pay over, for her own absolute use and disposal, the sum of £1000, and the share of residue bequeathed to her by the testator: *Thirdly*, and in answer to the third question, that the sum of £1000 provided to the late John Smith did not vest in him: *Fourthly*, that it is unnecessary to answer the fourth question, it not being insisted in by the parties: *Fifthly*, and in answer to the fifth question, that the residue falls to be divided in the proportion of two-fourth parts thereof to the party of the second part, and one-fourth part to each of the parties of the fourth and fifth parts," &c.

Counsel for Parties of the First, Second, and Sixth Parts—Mackay—W. Campbell. Agents—J. & A. F. Adam, W.S.

Counsel for Party of the Third Part—Patten. Agents—J. & A. F. Adam, W.S.

Counsel for Party of the Fourth Part—Moody Stuart. Agents—Auld & Macdonald, W.S.

Counsel for Parties of the Fifth and Seventh Parts—J. A. Reid. Agent—R. C. Gray, S.S.C.

Wednesday, July 11.

SECOND DIVISION.

[Sheriff of Fife.

ROBERTSON *v.* THE LOCAL AUTHORITY OF CULTS.

Public Health — Water-Rates — Assessment— "Domestic Use" — "Domestic Animals" — Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 101), *sec.* 89.

Held that an inhabitant of a special water supply district who keeps cows and sells their milk is liable to a special assessment for water-rates in respect of them, and is not exempt on the ground that they are domestic animals, and that the water taken for them is for domestic use.

Question, Whether in the event of the inhabitant refusing to pay the additional assessment so imposed, the local authority would be entitled to the remedy of cutting off the water supply from him by disconnecting the private service pipe from the main?

Section 89 of the Public Health Act provides, *inter alia*—(1) "The local authority, if they think it expedient so to do, may acquire and provide or arrange for a supply of water for the domestic use of the inhabitants, and for that purpose may conduct water from any lake, river, or stream; may dig wells; make and maintain reservoirs; may purchase, take upon lease, hire, construct, lay down, and maintain such water-works, pipes, and premises; and do and execute all such works, matters, and things as shall be necessary and proper for the aforesaid purpose." . . . (3) "The local authority, if they have any surplus water after fully supplying what is required for domestic purposes, may supply water from such surplus to any public baths and wash-houses, or for trading or manufacturing purposes, on such terms and