ingly the committee requested the Presbytery to take Mr Hastie on trials for ordination to the office of the ministry, and suggested that the "ordination" should take place at an early date. He was taken on trials accordingly. The questions appointed to be put to all ministers previous to ordination were put, and he was ordained in ordinary form to the office of the ministry. The minute of Presbytery bears as part of it also, that he was "inducted to the office of Principal of the General Assembly's Institution at Calcutta." So far as I can see, the Presbytery of Edinburgh had no warrant in the terms of the extract minutes of the Foreign Mission Committee, containing the limited request above quoted, for proceeding to induction of the pursuer to any office, and if that proceeding could have had any such marvellous effect as to convert an engagement terminable at six months' notice into an engagement for life, it was clearly unauthorised, and therefore could have no such effect. The so-called induction, indeed, seems to me to have been a mistake altogether, proceeding on some supposed analogy between the case and that of a presentee to a benefice in Scotland, while there is no true analogy between the cases.

But, finally, suppose the induction to have been all regular and in order it could never have the effect, for which the pursuer contends, of giving him his office for life. It was, in any view, besides ordination to the ministry, merely an act of recognition of his admission to his office—admission which could properly proceed only from the Foreign Mission Committee of the Church. The pursuer points to other cases of induction, to the ordinary case of a presentee before the abolition of patronage, or of a minister called or elected to a new charge under the recent statute, and because in these cases induction it is said gives an office *ad vitam aut culpam* the same result must follow in his case. For the reasons so fully stated by your Lordship, I consider the term "induction" as now commonly used means admission to the office only. But the important consideration is that it is not by the admission or induction that the right to use office for life is given. That right is inherent in the nature of the office itself—a permanent charge with a right to stipend from the heritors which is a permanent fund, and the right is conferred not by the act of the Presbytery admitting to the charge, but by the presentation or the call or election under the statute, which no doubt must receive the sanction of the Presbytery, which indeed the Presbytery in ordinary circumstances is bound to give. There is no analogy or similarity between such a presentation or election to a benefice of the church, and the precarious office of a missionary and Principal of the Church's Institution in Calcutta—precarious because there is no permanent fund like the teinds payable to the minister of a parish, for the Church's Mission Scheme to India may fail for want of the annual voluntary contributions which support it—and precarious because the parties have wisely provided by their contract that the service of the missionary and Principal or teacher shall terminate by six months' notice on either side. A clergyman presented or elected to a benefice carries in his hand to the Presbytery his title to a *munus publicum* with a right to an office *ad vitam ad culpam*. The pursuer had no such office, and his engagement or contract expressly excluded any such right, and so his argument on the effect of induction or admission to his office by the Presbytery entirely fails.

It may be that the proceedings of the Foreign Mission Committee in suddenly terminating their connection with the pursuer paying him six months' salary was a harsh measure, or at least an act in which due consideration was not shown towards his feelings. On the other hand, it may be that the conduct of the pursuer in the management of the mission made it necessary summarily to bring his connection with the mission to an end. Any question of this kind is not before the Court, and I have no opinion in regard to it. But one thing is to my mind abundantly clear, and that is that the Foreign Mission Committee in what they did acted entirely within their legal rights, and in the result they are therefore entitled to succeed in this action.

LORD ADAM concurred.

LORD MURE was absent.

The Court pronounced this interlocutor:—

"Adhere to the interlocutor of the Lord Ordinary, and refuse the reclaiming-note: Further, having considered the minute for the pursuer, No. 103 of process, tendered by him at the close of the debate on the reclaiming-note on 23rd May 1889, craving leave to add a new plea to to his summons, Refuse the desire thereof," &c.

Counsel for the Pursuer (Reclaimer)—Party. Agents—Welsh & Forbes, S.S.C.

Counsel for the Defenders (Respondents)—Sir Charles Pearson—Low. Agents—Menzies, Coventry, & Black, W.S.

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*Tuesday, June 4.*

## SECOND DIVISION.

### STRACHAN'S TRUSTEES *v.* WILLIAMSON AND OTHERS.

*Succession—Trust of Special Fund—Joint Gift of Income in Liferent with Power of Disposal failing Children.*

A testator directed his trustees to hold £60,000 of his estate in trust "as a special fund for the sole use and behoof of the four daughters of my brother . . . the survivors and survivor of them, share and share alike . . . in trust for the alimentary use and behoof of the said four daughters, the survivors or survivor of them severally and respectively in liferent."

He further directed his trustees—"that the interest or annual income arising from said special fund . . . shall only be divided and annually paid over to the said four daughters, the survivors or survivor of them, share and share alike, for their personal maintenance and support allenarly during their respective lives, . . . and that, subject to said liferent

the said fund shall be held by my said trustees and executors for behoof of the respective child or children lawfully begotten of the said four daughters or either of them, to the extent of their respective mothers' share in said special fund in fee, and that immediately and not burdened with a liferent to the surviving daughters, and failing child or children, to such person or persons, and in such way and manner, all as each daughter may direct and appoint by or in any writing under her hand however informal the same may be, and that either burdened or unburdened with a liferent to the surviving daughters as may be expressed in such writing."

These four nieces survived the testator. The first deceaser left neither children nor deed of nomination. The next left children. *Held* that she properly liferented one-third of the special fund from her predeceasing sister's death until her own, and that her children were entitled under the trust-deed to the fee of that third, unburdened by any liferent to their surviving aunts.

The late Patrick Strachan, York Place, Portman Square, London, died on 31st July 1872, leaving a last will and testament by which he bequeathed his whole estate to trustees whom he appointed his executors. By the sixth article of said will he directed his trustees to hold the sum of £60,000 "as a special fund for the sole use and behoof of the four daughters of my brother . . . Jane, Barbara, Helen Patricia, and Georgina, the survivors and survivor of them, share and share alike . . . in trust for the alimentary use and behoof of the said four daughters, the survivors or survivor of them, severally and respectively in liferent." By the seventh article he further directed "that the interest or annual income arising from said special fund of sixty thousand pounds sterling, . . . shall only be divided and annually paid over to the said four daughters, the survivors or survivor of them, share and share alike, for their personal maintenance and support allenarly during their respective lives, and that, subject to said liferent, the said fund shall be held by my said trustees and executors for behoof of the respective child or children lawfully begotten of the said four daughters or either of them, to the extent of their respective mothers' share in said special fund in fee, and that immediately and not burdened with a liferent to the surviving daughters, and failing child or children, to such person or persons, and in such way and manner, all as each daughter may direct and appoint by or in any writing under her hand however informal the same may be, and that either burdened or unburdened with a liferent to the surviving daughters as may be expressed in such writing; . . . and I further direct that the residue or remainder of my whole estate, when its sterling value is ascertained and secured at the period more particularly described and provided for as aforesaid, over and above the said special fund of £60,000, or the equivalent of that sum as aforesaid, shall be paid over to my nephew, John Strachan, presently a merchant in Liverpool, for his sole use and benefit."

The testator was survived by the four nieces mentioned above. Miss Jane Strachan, one of the said nieces, died unmarried and intestate on 12th March 1881, and Mrs Georgina Strachan or Williamson died on 21st April 1887, survived by two pupil children, William Frederick Williamson and Constance Rose Williamson. Mrs Barbara Strachan or Haynes, and Mrs H. P. Strachan or Thackeray, the remaining two nieces, were still alive, but had no children. The revenue of the trust funds was equally divided among the four nieces until the date of Miss Jane Strachan's death, and thereafter was divided among the survivors.

Difficulties having arisen as to the construction of the provisions of the will, a special case was prepared for the opinion of the Court by (1) the trustees, (2) the two daughters of the deceased niece Mrs Georgina Strachan or Williamson, and their guardians, (3) the two surviving nieces, (4) the representatives of the heirs *in mobilibus ab intestato* of the testator, (5) the testator's residuary legatee, and (6) the heirs *in mobilibus ab intestato* of the deceased niece Miss Jane Strachan.

The questions submitted were as follows—"(1) Are the second parties entitled to a conveyance of one-third of the said special fund of £60,000, or are they entitled to a conveyance of only one-fourth of the said fund? (2) Are the third parties entitled to the liferent of the one-fourth which was payable to Miss Jane Strachan? (3) Are the fourth parties entitled to the fee of Miss Jane Strachan's one-fourth of the trust fund, and if so, is their right burdened with a liferent in favour of the surviving nieces of the testator? (4) Is the fifth party entitled to Miss Jane Strachan's one-fourth share of the trust fund, as residuary legatee of the testator, and if so, is his right burdened with a liferent in favour of his sisters? Or (5) Are the sixth parties entitled to Miss Jane Strachan's one-fourth share of the trust fund as next-of-kin of Miss Jane Strachan, and if so, is the right burdened with a liferent in favour of the surviving nieces of the testator?"

Argued for second parties—They were entitled to one-third share of the fee, because the settlement gave it "to the extent of their mothers' share," and Mrs Williamson was rightly liferented in one-third. It was clear that in the joint gift of income there was an implied survivorship in the event of a niece dying without children, and without disposing of the fund by will. The words "severally" and "respectively" were not necessarily fatal to implied survivorship—*Barber* v. *Findlater*, February 6, 1835, 13 S. 442; Bell's Prin. 1879. The express power to disburden of an accrescing liferent implied survivorship where the power was not exercised—*Tulloch* v. *Welsh*, November 23, 1838, 1 D. 94, where Lord Moncrieff points out that words of severance in a joint gift must be controlled by the context. The words "share and share alike" were merely demonstrative of the mode of distribution. Besides, in a gift of income, "survivors" did not primarily mean surviving the testator; hence there was an express survivorship in the gift of income. No such consideration existed in the case of *Paxton's Trustees*, *infra*.

Argued for third parties—The second parties were only entitled to an immediate conveyance of a fourth, and the fourth, the liferent of which had been set free by the death of Miss Jane Strachan, fell to be paid to them and the

survivor of them in liferent from and after the date of the death of their sister Mrs Williamson.

Argued for the fourth parties — (1) The residuary legatee was excluded by the terms of the deed. The residuary clause was not a bequest of residue in the ordinary sense, that being a bequest of a whole estate burdened with the debts and legacies—*Storie's Trustees* v. *Gray and Others*, May 29, 1874, 1 R. 953. The residuary clause carried only the residue as ascertained at a particular date, in a particular way, and "over and above the said special fund of £60,000." The residue and the special fund were here as distinct and separate as if there had been two separate trust deeds. (2) The beneficiaries in the special provision (the second, third, and sixth parties) were equally excluded by the terms of the deed. The terms of the bequest to George Strachan's daughters in the *sixth* trust purpose implied merely a liferent. Though words importing fee occurred, they were restricted to a liferent by other words in the same clause, and not, as in *Lindsay's Trustees* v. *Lindsay*, December 14, 1880, 8 R. 281, by words in a subsequent and distinct part of the deed. This liferent was granted to the four daughters "severally and respectively," and the mention of survivors related only to survivance of the testator. The same considerations applied to the initial clause of the *seventh* trust purpose, disposing of the liferent. The liferent of one-fourth vested in each of the four daughters at the testator's death, and on the death of one of the four there was no accretion. "Share and share alike" excluded accretion—*Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191. The fee of each fourth went to the liferentrices' children, if any, and if none, to her appointee, provided she made an appointment. But failing these contingencies, it fell into intestacy. It could not be maintained that the liferent clause had a different meaning where a deceasing daughter left children from what it had where she left none; and whatever its meaning was it must apply where children were left, because the bequest to children was "subject to said liferent as hereinbefore expressed." Clearly therefore there was no accretion either of liferent or fee. Therefore (3) the heirs *in mobilibus ab intestato* of the testator were entitled to succeed. No doubt the law was unfavourable to intestacy, but where it clearly appeared that a testamentary provision had failed, and that the fund was not otherwise disposed of, intestacy was inevitable—*Fulton's Trustees* v. *Fulton*, February 6, 1880, 7 R. 566. Here it was natural that a testator who preferred strangers appointed by the liferentrices to the fiars under the deed should similarly prefer his own next-of-kin *ab intestato*.

Argued for fifth parties—There was no vesting of their shares in the nieces who died—*Byron's Trustees* v. *Clark*, November 26, 1880, 8 R. 142. There was no accretion—*Paxton's Trustees*, July 16, 1886, 13 R. 1191, and *Stobie's Trustees*, 15 R. 340. Intestacy was to be avoided—*Aberdeen's Trustees*, March 19, 1870, 8 Macph. 750. The residuary legatee was entitled to every thing that in the event turned out not to be well disposed of by the testator—Jarman (4th ed.) i. 761.

Argued for sixth parties—Miss Jane Strachan's next-of-kin were entitled to a fourth of the special fund. To that extent she had a right of fee, or, at any rate, a general power of disposal which she had not exercised—*Alves* v. *Alves*, March 8, 1861, 23 D. 712.

At advising—

Lord Justice-Clerk—The late Mr Patrick Strachan by his last will and testament set apart in the hands of the executors a sum of £60,000, as a special fund for the sole use and behoof of four nieces and of "the survivors and survivor of them, share and share alike," and as regards the nieces themselves, the testator's executors were directed to hold the money "in trust for the alimentary use and behoof of the said four daughters, the survivors or survivor of them severally and respectively in liferent." He directed that the annual proceeds were to be divided and annually paid over to the neices, "the survivors or survivor of them, share and share alike, for their personal maintenance and support allenarly during their respective lives." Subject to this liferent provision he directed the fund to be held for the children of the nieces "to the extent of their respective mothers' share in fee," and this fee on the death of the mother is declared not to be burdened with a liferent to the surviving nieces. Failing children each niece is entitled to test on her share either with or without the burden of a liferent to the surviving sisters as she might express by any document under her hand. These are all the important parts of this deed which it is necessary to refer to in deciding this case. The testator was survived by four nieces. One of these, Jane, died in 1881, leaving no issue, and another, Georgina, died in 1887, leaving two children. The two other nieces are still alive, and have no issue.

Now, the two questions which it seems to me require to be answered here, are—(1) How is Jane's share to be disposed of as at her death, and (2) how is the share of Georgina as at her death to be disposed of? I am of opinion that the true interpretation of the deed is, first, that on the death of Jane without issue the fund fell to be divided by three instead of by four, so that the three other sisters as surviving Jane became each entitled to the liferent of one-third of the fund. And second, that on the death of Georgina her two children became entitled to the one-third of the fund of which their mother had enjoyed the liferent between the time of the death of Jane and her own death. This being my view, the answers I would suggest your Lordships should give to the questions will be as follows—To the first question, that the second parties are entitled to a conveyance of one-third of the special fund; in the second question the answer will be, No—that they are entitled only to a liferent of one-third each of the whole fund; and the three other questions will be answered in the negative.

Lord Young—One of the nieces died in 1881, eleven years after the truster, and she left neither children nor nominee to take the fee of what she liferented. The disposal of the share she had previously liferented depends upon the expression "survivors or survivor." Did the testator mean to limit that expression to the survivors or survivor of himself taking the period to be surviving his own

life. That is the meaning which such words may bear, and most commonly do bear, it being manifest upon the face of the deed that that is the intention. But they may also mean, and frequently do mean, survivorship *inter se*, and if that shall appear to be according to the intention of the testator, that meaning must be attached to the words. Now, if we put that latter meaning upon the words here the result will be that the £15,000 which Jane liferented till her death will go to the three surviving nieces. Admittedly that would have been the case if Jane had died before himself. I think it quite clear that this accords with the intention of the testator, for he only intends these four nieces, and their children or nominees, to participate in this trust fund, as to which they are the only beneficiaries named.

The next deceaser was liferentrix of £20,000. She left children, and I think, according to the language of the deed, the fee of that £20,000 which she liferented on her death must go to her children.

If, in the future, one of the surviving daughters die without children or nominees, the survivor will liferent £40,000, and the fee of whatever she liferents will go to her children or nominees. But if the last should leave no children or nominees, then there will be a fund liberated, and no recipients according to the trust. That will be a case of resulting trust, and there will be a question whether the trustees then hold for the residuary legatee or for the next-of-kin.

In the meantime my opinion is with your Lordship that Jane's death after the testator, without children or nominees, put matters in exactly the same position as if she had predeceased the testator, and that the surviving three thus took the whole fund.

Lord Rutherfurd Clark concurred.

Lord Lee—My only doubt has been whether the terms of the deed are not such as to confer the fee of an equal share upon the nieces who survived the testator. On the whole, however, after considering the case with the benefit of your Lordship's views, I am satisfied that there are no grounds for that view, and I therefore concur.

The Court pronounced the following interlocutor:—

"Answer the first of the questions therein stated to the effect that the parties of the second part are entitled to a conveyance of one-third of the special fund of £60,000: Find it unnecessary to answer the second question: Answer the third, fourth, and fifth questions in the negative."

Counsel for the First and Second Parties—Graham Murray—W. C. Smith. Agents—Auld & Macdonald, W.S.

Counsel for the Third and Sixth Parties—Gloag—Lyell. Agents—Horne & Lyell, W.S.

Counsel for the Fourth Parties — Low—M'Lennan. Agents—Auld & Macdonald, W.S.

Counsel for the Fifth Party—Dickson—G. W. Burnet. Agent—James F. Mackay, W.S.

*Tuesday, June 4.*

## SECOND DIVISION.

[Lord Trayner, Ordinary.

### TAIT & CRICHTON *v.* MITCHELL.

*Contract—Implement—Sale of Shares—Principal and Agent.*

An offer to sell a specified number of shares of a company was accepted, the acceptor adding, "You will require to execute two transfers."

In an action for implement, *held* that this was not a condition of the contract added by the acceptor, which required the offerer's consent, and decree of implement *granted*.

This was an action by Messrs Tait & Crichton, W.S., Edinburgh, against Miss Mary Sawers Mitchell, residing in Edinburgh, for implement of a contract of sale by delivery to the pursuers of sixty-eight shares of the Caledonian Fire and Life Insurance Company.

The following correspondence had passed:—Upon 15th July 1888 the pursuers wrote to the defender that they wanted fifty shares of this company for a client, and asked what price she expected. Upon 21st July the defender wrote—"I have a balance of sixty-eight shares of the Caledonian Insurance Company to dispose of, and I understand that the price is regulated by the market value. I had made up my mind to sell them as a whole at 29¼, so I hope your client may find it convenient to take them all at this figure." Upon 23rd July the pursuers wrote—"We have received your letter of the 21st offering to sell us sixty-eight shares of the Caledonian Insurance Company at 29¼ per share. We accept your offer. As our client only wishes fifty shares, you will require to execute two transfers." Upon 25th July Miss Sawers wrote—"I have received your letter of the 23rd inst. I fear that you have not apprehended the meaning of my former letter, which was simply that if your client would take the sixty-eight shares in a lot, the price was to be 29¼. With this your letter does not comply, and I am not inclined to agree to your proposal."

The pursuers pleaded that a valid contract of sale had been constituted by the missives, and the defender had refused to fulfil her part of the agreement.

The defender pleaded—"(2) No title to sue. (5) There having been no valid contract constituted between the pursuers and the defender, the defender should be assoilzied."

Upon 21st December 1888 the Lord Ordinary (Trayner) pronounced this interlocutor:—"Ordains the defender to implement and fulfil the contract of sale set forth in the conclusions of the summons, and that by forthwith executing and delivering to the pursuers a formal and valid transfer in their favour of sixty-eight shares of the Caledonian Fire and Life Insurance Company, the pursuers always, on delivery being made as aforesaid, making payment to the defender of the sum of £1989 sterling.

"*Opinion.*—I think there was a concluded contract between the parties, which both are bound to fulfil, and which either may enforce.