Wednesday, July 16.

FIRST DIVISION.

SORLEY *v.* MARTIN (MACLEAN'S CURATOR BONIS) AND OTHERS.

Succession—Vesting—Clause of Accretion—Codicil—Last Survivor—Heritable and Moveable.

A testator by his settlement conveyed his whole heritable and moveable estate—a large part being heritable—to trustees for the purposes therein mentioned. He directed the trustees to divide the whole residue, after payment of debts, into eight equal portions, and apportion the same among his four sons J., C., A., and F., and his four daughters, who were each to be entitled to one-eighth. He further declared that the shares of A. and F. should be paid to them as soon after his death as his trustees should think proper, but that the shares of the rest should be retained by his trustees till they judged it proper to invest the same in the purchase of annuities for them. In the event of either of his sons J. and C., or of any of his daughters, dying before an annuity had been purchased for him or her, or in the event of the death of either of his sons A. and F. before the amount of his provisions were paid, the share of his said sons or daughters so deceasing was to be paid and divided amongst the lawful issue of such deceaser, and failing such issue was to be divided and applied amongst his said sons and daughters and their lawful issue in the same manner as directed with regard to their own shares. It was also declared that the trustees should have power to sell the whole or any part of the trust estate in order to carry out these provisions, and they were further empowered, if they deemed it expedient, to make over the whole or part of the subjects conveyed to the person entitled to succeed to them as general disponee and residuary legatee under the foresaid destination, but always under burden of the debts and provisions, or such part of them as were left unliquidated.

The testator by a codicil restricted C.'s share to £100. He was also predeceased by A. After the testator's death the greater part of the heritage was sold, but the direction to purchase annuities was not carried out, nor was F.'s share paid over to him, the trust estate being retained in the hands of the trustees, and the income divided among the surviving beneficiaries.

Held (1) that the whole trust estate vested in J., the last survivor of the beneficiaries, on the death of the next longest liver, with the exception of the original share (in terms of the codicil one-seventh of the residue) destined to F., and the proportions of the accrescing shares which fell to him; and (2) that the said original and accrescing shares vested in F., and were payable to his heirs in moveables.

By trust-disposition and settlement, dated 18th August 1842, the late Mr Donald Maclean, W.S., conveyed certain heritable estate therein mentioned, and all other heritable estate which should belong to him at the time of his death, and his whole moveable estate, to certain trustees for the ends, uses, and purposes therein mentioned. He directed his trustees (1) to pay all his just and lawful debts; (2) to divide the whole of the residue of his means and estate into eight equal parts or shares, and apportion the same amongst his sons John, Charles, Archibald, and Fitzroy, and his daughters Mary, Lilias, Anne, and Margaret, each of his said sons and daughters being entitled to one of the said eighth parts or shares, but declaring that the respective shares of his said sons Charles, Archibald, and Fitzroy should suffer a deduction of £200 each, the sum of £600 so deducted to be applied as follows:—£200 each for his son John and his daughters Mary and Margaret, in addition to the one-eighth share bequeathed to each of his said three children. And further declaring "that the shares of my said estate to which my sons Archibald and Fitzroy are respectively entitled shall be payable to them as soon after my death as my said trustees shall deem proper, but the shares of the rest of my said children shall be retained by my said trustees until they judge it proper to invest and secure the same in the purchase of an annuity for the behalf of each of my said other children, it being my express wish and intention that my said trustees shall exercise their own discretion as to the propriety of purchasing an annuity for any of my said sons John and Charles, and for any of my said daughters, the annual produce of each of my said children's shares respectively being in the meantime applied for the maintenance and support of such child: And also declaring that in the event of the death of either of my said sons John and Charles, or in the event of the death of any of my said daughters Mary, Lilias, Anne, and Margaret, before an annuity has been purchased for behoof of him or her, or in the event of the death of either of my said sons Archibald and Fitzroy before the amount of ther provision is paid, the share of my said sons or daughters so deceasing shall be paid and divided amongst the lawful issue of such deceaser, and failing such issue the said share shall be divided and applied amongst my said sons and my said daughters and their lawful issue (such issue being entitled always to succeed to their parent's share) in the same manner as directed above in regard to their own respective shares, and that share and share alike, excepting always the portions of said deceaser's share which shall effeir to my said sons Archibald and Fitzroy, which portions shall suffer an abatement of twenty per cent. each, to be paid over to the other survivors of my said sons and daughters, share and share alike. But declaring in regard to the share of my said son Charles, that in the event of his

dying before the same shall have been invested in an annuity for his behoof, and without leaving lawful issue in life, the annual produce of his share in my means and estate shall be paid over to his present spouse in the event of her survivance, and that during her lifetime."

The truster then stated that he had purposely omitted to mention his son Andrew or his daughters Mrs Maclaine (Christian) and Mrs Crawford (Sibella), as they were established in life, and his son Andrew also had received during his lifetime as large an allowance as his means would admit of, for which considerations he had directed the distribution of his estate as above: "Declaring always that my said trustees shall have full power, in virtue of the powers hereinafter expressed, to sell the whole or any part of my said estates hereby conveyed, or to borrow money on the security thereof, and out of the produce to satisfy and pay the whole or such part of the debts, annuity, and provisions before expressed, as my trustees may deem necessary or expedient, or if my said trustees shall deem it expedient, they are hereby empowered to dispone, convey, and make over the whole or part of the subjects themselves hereby specially conveyed to the person entitled to succeed to them as general disponee and residuary legatee under the foresaid destination, but that always under the real burden of the said debts, annuity, and provisions, or such part thereof as they may think fit to have unliquidated, to be secured over the said subjects, and to be specially engrossed in the rights and infeftments thereof in favour of such general disponee or residuary legatee."

By a codicil dated 12th February 1853 Donald Maclean, in consideration that he had made at various times large advances to his son Charles, amounting to more than the equivalent of a share of his estate, supposing the same were equally divided among his children, declared that Charles' participation in his estate after his death should be and was thereby restricted to the sum of £100, payable at the first term of Whitsunday or Martinmas after his death, and he thereby recalled all other provisions theretofore made in favour of Charles.

Donald Maclean died on 16th March 1853, predeceased by his son Archibald, who died in 1844, but survived by the following children, who stood in the following order of seniority:—Christian (Mrs Maclaine), Mary, Lilias, Anne, Margaret, Sibella (Mrs Crawford), John, Charles, Andrew, and Fitzroy.

Of the beneficiaries named in the will, Mary died in 1853, Fitzroy in 1858, Margaret in 1871, Charles in 1872, Lilias in 1876, and Anne in 1881. Of these none were married or testate except Charles, who left a widow and children.

Of the truster's other children, Mrs Maclaine died in 1873, leaving children, and Mrs Crawford in 1878, also survived by children.

The truster's heritable property at the date of his death consisted of—(1) The estate of Kinloch, in Mull, subject to a bond for £3000; (2) the house No. 21 Albany Street, Edinburgh, occupied by the family then and ever since, with coach-house and stable adjoining; (3) workshop in York Lane, Edinburgh, recently sold; (4) half-flat in No. 5 Earl Grey Street, Edinburgh; (5) feu-duties in Nicolson Square, Edinburgh, of small value. The personal estate of the truster, including furniture, &c., amounted to £1742, 6s. 10d.

The estate of Kinloch, which was burdened with a debt of £3000, was sold in 1860 at the price of £10,200, thus yielding a surplus of £7200. Till this sale was effected, the income remained insufficient for the expenditure, but thereafter the then acting trustee was able annually to lay aside a surplus, from which the whole encroachments previously made in maintaining the beneficiaries were replaced.

The trustees never carried out the direction to purchase annuities for any of the beneficiaries, and Fitzroy's share was never paid over to him, but the whole trust-estate was retained in the hands of the trustees, and the income divided among the surviving beneficiaries.

On 15th February 1887 Mr Sorley, C.A., Edinburgh, was appointed judicial factor on the estate. In September 1889, F. W. Martin, C.A., was appointed *curator bonis* to John Maclean.

The present case was presented for the purpose of obtaining the opinion of the Court, *inter alia*, on the following questions—"(1) Did the whole trust-estate vest in Mr John Maclean on the death of Miss Anne Maclean? (2) Did the share of the trust-estate which was originally bequeathed to the truster's son Archibald, and which is still retained as part of the general trust-estate, accresce to the surviving residuary legatees, or did it, in consequence of his predeceasing his father, fall into intestacy? (3) Did the share of the trust-estate which was originally bequeathed to the truster's son Charles, and which is also still retained as part of the general trust-estate, accresce to the surviving residuary legatees, or did it fall into intestacy in consequence of the codicil above quoted? (4) In the event of its being held that the said two shares originally bequeathed to Archibald and Charles or either of them fell into intestacy, do the said two shares or either of them or any part thereof fall to Mr John Maclean as heir-at-law of the truster, or do they fall entirely to the truster's heirs in moveables? (5) In the event of its being held that the said two shares fell to the heirs in moveables of the truster, did *pro indiviso* shares of so much thereof as consisted of heritage and remained unconverted at the death of Mary, Lilias, Anne, Margaret, and Fitzroy pass to Mr John Maclean as their heir in heritage, or are the proportions of these shares which fell to them to be regarded as entirely moveable *quoad* succession?"

The parties to the case were—(1) Mr Sorley, the judicial factor on the trust-estate; (2) Mr Martin, *curator bonis* to John Maclean; and (3) the truster's son Andrew, and the representatives of his three deceased children, Charles, Christian, and Sibella.

The party of the second part maintained that the whole trust-estate vested in his ward as the last survivor on the death of Miss Anne Maclean, and now belonged to him, and that he was entitled, if he should see fit, to require the judicial factor to divest in his favour. If, however, it were held that the shares originally destined to his ward's brothers Charles and Archibald had fallen into intestacy, then he maintained that these shares, in so far as they at his ward's father's death consisted of heritage, fell to his ward as his father's heir-at-law; and should it be further held that these shares were wholly to be regarded as moveable *quoad* the succession of his father, then he maintained that so much thereof as remained heritage unconverted and formed part of the portions of the said shares which fell to his sisters Mary, Lilias, Anne, and Margaret, passed on their respective deaths to his ward as their heir-at-law; and in the like event the said Andrew Maclean, a party of the third part, maintained that the share of his brother Fitzroy fell to him as his heir-at-law.

The parties of the third part maintained (1) that by the predecease of the testator's son Archibald, one-eighth of the trust-estate, minus £200, fell into intestacy, (2) that by the recall of the bequest to the testator's son Charles another one-eighth of the estate, minus £200, fell into intestacy and that these two shares, with interest thereon from the date of the testator's death, fell to be distributed in equal shares amongst (1) John Maclean, (2) Andrew Maclean, (3) the executors and other representatives of Mrs Maclaine, (4) the representatives of Charles, and (5) the children of Mrs Crawford, as the heirs or as representing the heirs *in mobilibus* of the truster and of his now deceased children Mary, Lilias, Anne, Margaret, and Fitzroy.

Argued for the second party—The scheme of the trust-deed was clearly to the effect, that the residue was to be apportioned among eight of the trustee's children, and the last survivor of them was to get the whole. The trustees were directed to keep the estate in hand solely in the interest of survivors. In consequence of Archibald's death his share fell to be divided among the surviving beneficiaries—*Muir's Trustees* v. *Muir*, July 12, 1889, 16 R. 954. The effect of the codicil was to restrict Charles' equal share to £100, the balance having been paid to him during the testator's life. If the shares of Archibald and Charles fell into intestacy, there could be no constructive conversion *quoad* these shares, as *ex hypothesi* the deed did not apply to them, and the character of the succession would fall to be decided according to the character of the estate at the testator's death. The bulk of these two shares accordingly vested in John Maclean as the heir-at-law of the truster. Assuming it to be held that the deed applied to these two shares, they still must be considered as consisting largely of heritable estate, as the trustees were not directed to sell the heritable estate, but only received a discretionary power to do so. The propriety of purchasing annuities was also left to the trustees to judge of—*Cowan* v. *Cowan*, March 16, 1887, 14 R. 670; *Muir's Trustees* v. *Muir*, July 12, 1889, 16 R. 954.

Argued for the third parties—The direction to divide the residue into eight portions was equivalent to a division into separate estates, and the trust-estate was no longer a *universitas*—*Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191. Archibald having predeceased the truster, and Charles having been cut out of the will, their shares fell into intestacy, and the clause of accretion did not apply to them. Fitzroy's share had vested in him and fell to be divided among his heirs *in mobilibus*. Further, John had no right to have the capital of his own share made over to him—*White's Trustees* v. *White*, June 1, 1877, 4 R. 768; *Smith and Campbell*, May 30, 1873, 11 Macph. 639. The clause empowering the trustees to make over the whole or part of the trust-estate to the person entitled to succeed to them as residuary legatee under burden of the annuity and provisions was at variance with the terms of the rest of the deed, and must have been left in the deed by an oversight, having followed on some provision not now in deed. *On the question of conversion*—The whole estate was intended by the truster to be administered under the trust, and he intended to impress on the whole the character of moveable estate, as was clear from the directions with regard to the purchase of annuities and the power of sale given to the trustees. His intention was not to be frustrated in this respect because he died partially intestate. *Cowan's* case did not apply, as there the bulk of the estate had never been converted; here the power of sale had been exercised—*Sheppard's Trustees* v. *Sheppard*, July 2, 1885, 12 R. 1193, *per* Lord President 1197.

At advising—

LORD SHAND—The testator Donald Maclean, W.S., by his settlement dated 18th August 1842, made provisions for eight of his children, all then in life—being four sons and four daughters. As to his remaining three children, he explained in his settlement that he made no provision for them because they were already possessed of means. He died on 16th March 1853 predeceased by his son Archibald, one of the four sons provided for in his settlement. Of the seven children, beneficiaries under his deed who survived him, his son John is now and has been since 12th May 1881 the sole survivor. All of the others have died of the dates mentioned in the case without issue and intestate, excepting Charles, who died in 1872 survived by a widow and children. But his interest in the trust-estate was, on account of advances made in his father's lifetime, reduced to £100, and that sum was paid to him by the trustees in 1863.

The first two questions to be considered relate to the two original one-eighth shares bequeathed in the settlement to the testator's sons Archibald and Charles respectively.

The settlement contains a conveyance to trustees, now represented by Mr Sorley as judicial factor on the trust-estate, of the whole real and personal estate of the testator, and after payment of his debts the testator directed the residue of his estate to be dealt with as follows:—"Secondly, my said trustees shall divide the whole of the residue of my said means and estate into eight equal parts or shares, and apportion the same amongst my sons John, Charles, Archibald, and Fitzroy, and my daughters Mary, Lilias, Anne, and Margaret, each of my said sons and daughters being entitled to one of the said eighth parts or shares; but declaring always that the respective shares of my said sons Charles, Archibald, and Fitzroy shall suffer a deduction of £200 sterling each,"—after which the deed contains special directions as to the application of the sum of £600 to be so deducted from the shares of these three sons.

The deed in its immediately succeeding clause declares that the shares of Archibald and Fitzroy "shall be payable to them as soon after my death as my said trustees shall deem proper," but with regard to the shares of the other children there is this very special provision—"the shares of the rest of my said children shall be retained by my said trustees until they judge it proper to invest and secure the same in the purchase of an annuity for the behalf of each of my said other children, it being my express wish and intention that my said trustees shall exercise their own discretion as to the propriety of purchasing an annuity for any of my said sons John and Charles, and for any of my said daughters, the annual produce of each of my said children's shares respectively being in the meantime applied for the maintenance and support of such child."

The only other clause which it is necessary to have in view for the solution of the questions to be answered is one of survivorship or destination-over, and that is in the following terms, viz.—"And also declaring that in the event of the death of either of my sons John and Charles, or in the event of the death of any of my said daughters Mary, Lilias, Anne, and Margaret, before an annuity has been purchased for behoof of him or her, or in the event of the death of either of my said sons Archibald and Fitzroy before the amount of their provision is paid, the share of any of my said sons or daughters so deceasing shall be paid and divided amongst the lawful issue of such deceaser, and failing such issue the said share shall be divided and applied amongst my said sons and my said daughters and their lawful issue (such issue being entitled always to succeed to their parents' share) in the same manner as directed above in regard to their own respective shares, and that share and share alike, excepting always the portions of said deceaser's share which shall effeir to my said sons Archibald and Fitzroy, which portions shall suffer an abatement of twenty per cent. each, to be paid over to the other survivors of my said sons and daughters, share and share alike."

It will be observed that the deed directs the estate to be divided into eight equal shares, and provides that each eighth share shall go to a separate child of the testator, or be held for his or her behoof, and it has been contended that the shares of Archibald, who predeceased his father, and of Charles, whose share was paid on a different footing, fell into intestacy and belong therefore to the heirs in moveables of the testator, who are parties to the case.

I am of opinion that this contention fails in regard to both of these shares, and that the whole estate, including these shares, is dealt with by the settlement, and must be regulated by its provisions. First, as regards the share of Archibald, it appears to me to be clearly provided for by the clause of destination-over. The deed expressly provides that in the event of the death of Archibald before the amount of his provision is paid, his share—the words are "the share of any of my said sons or daughters so deceasing—shall be paid and divided amongst their lawful issue, and failing such issue," amongst the other sons and daughters and their issue. It is true the terms of this clause rather refer in the first instance, or in their primary sense, to the case of sons or daughters who survive the testator, and who thereafter die before payment to them of their shares (which in the case of daughters, and in the case of John and Charles, must mean before annuities have been purchased for them, for that was the only form in which they were to receive payment), but the language used is quite apt and sufficient to cover also the case of any of the beneficiaries, sons or daughters predeceasing the testator. Any son or daughter who predeceased his father certainly died without and before receiving his share. In this way, in my opinion, by force of the provision of the deed, intestacy is excluded in the case of Archibald's share, for the destination-over took effect, and his share fell to be divided amongst the other surviving children in terms of that destination in the same way as if he had survived his father but now predeceased the other beneficiaries, his brothers and sisters, before receiving payment of his share. Indeed, in his case the clause of survivorship could not really take effect if he had survived his father, for in that case he would have been entitled to immediate payment of his share, and the mere non-payment would not have suspended absolute vesting, so that the true reading of the survivorship clause so far as his share is concerned is to hold it applicable to the very event which occurred, viz., his predecease of his father.

Again, in the case of Charles it appears from the narration of the codicil of 1853 that after the date of the settlement he had obtained advances from his father of an amount which was more than equal to his share, and it was accordingly provided by the codicil that his further participation in his father's means and estate "shall be and is hereby restricted to the sum of £100 sterling, payable at the first term of Whitsunday or Martinmas after my death, recalling as I hereby recall all other provi-

sions in his favour." It appears to me that the effect of this provision is that Charles having received his eighth, and at his father's death the £100 which was paid to him, the remainder of the estate less his £100 was directly destined to the other beneficiaries.

The testator's daughter Mary died unmarried and without issue five months after her father, and in regard to her share as well as the share of her predeceasing brother Archibald I think a different effect must be held to have taken place as regards the right of Fitzroy Maclean from the rights of his brother John and those of all of his sisters. Fitzroy was to be entitled to his own share "as soon after my death as my trustees shall deem proper," which really describes an absolute vesting *a morte testatoris*. But the accruing shares under the destinations-over were appointed, failing issue of the child deceasing, to be divided and applied amongst sons and daughters and their issue, "in the same manner as directed above in regard to their own respective shares." It results therefore that Fitzroy was entitled to payment of his part of accruing shares, that is, an equal part of such shares with his brother and sisters, less 20 per cent., while the shares of his brother and sisters of such accruing shares were to be held by the trustees subject to the power of purchasing an annuity if in their discretion they thought fit to do so in the case of any or all of the beneficiaries, but failing this power being exercised, then subject to the clause of survivorship or destination-over. The deed does not give any of these children a fee indefeasible. The trustees are to exercise their own discretion as to the propriety of purchasing an annuity for any of these children, and till they do so each child's share is held subject to the survivorship clause. It follows that as no annuity was purchased for any of the beneficiaries, the effect of the survivorship clause is that the judicial factor now holds the trust-estate for behoof of the claimant John Maclean, now represented by Mr Martin, C.A., his *curator bonis*. Fitzroy Maclean having died next after his sister Mary, could take no part of the shares of the others, who all survived him.

As to the rights of John Maclean, it is to be observed that the survivorship clause can have no further effect, for he is himself the last survivor. The judicial factor holds therefore for him, having no ulterior interests to protect. Again, the trustees, if they had survived, or the judicial factor now representing them, if he had the authority of the Court, might purchase an annuity with the residue of the estate, in his favour. This, however, would be most inexpedient, and clearly a wrong exercise of any discretion, and even if an annuity were purchased it would be subject to the debts and deeds of Mr John Maclean, who would be absolute fiar, for the settlement contains no authority for putting the annuities under trust for the annuitants, and beyond their deeds or the diligence of their creditors. In these circumstances I am of opinion that to all intents and purposes John Maclean is now the fiar of the residue, subject only to the rights of Fitzroy Maclean's representatives to their share of the estate original and accruing as before stated. If an annuity were purchased Mr John Maclean would be entitled to sell it, and he has an interest therefore to say it shall not be bought, and as there is no ulterior interest under the deed to be now protected, I think he is entitled to have the estate conveyed to him.

LORD ADAM, LORD M'LAREN, and the LORD PRESIDENT concurred.

The Court pronounced the following interlocutor:—

> "Find that the whole trust-estate vested in Mr John Maclean upon the death of Anne Maclean, with the exception of the original share (being in terms of the codicil one-seventh of the residue of the trust-estate under deduction as directed by the trust-deed) which was destined to Fitzroy Maclean, and the proportions of the shares destined to Archibald and Mary which fell to Fitzroy in consequence of their predecease: Find that the said original and accrescing shares vested in Fitzroy Maclean, and are payable to the heirs in moveables of the said Fitzroy Maclean: In respect of the above findings, find it unnecessary to answer the questions in detail."

Counsel for the First and Third Parties—Low—Patten. Agent—F. J. Martin, W.S.

Counsel for the Second Party—Jameson—Fraser. Agent—J. H. Sang, W.S.

Friday, July 11.

FIRST DIVISION.

[Lord Trayner, Ordinary.

TRAILL'S TRUSTEES *v.* GRIEVE AND OTHERS.

Crofters—Crofters Commission—Enlargement of Holdings—Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. cap.* 29).

Held that the Crofters Commissioners have power under the Crofters Holdings (Scotland) Act 1886 to assign land under leases dated subsequent to the passing of the Act for the enlargement of Crofters Holdings.

On 9th August 1888 John Grieve, a crofter on the estate of Hobbister and Elsness, Isle of Sanday, Orkney, and eight others, crofters on the same estate, applied to the Crofters Commission, acting under the Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. cap. 29), to enlarge their holdings by making an order on the proprietor to let to the applicants a portion of the farm of Elsness occupied by James Swanson at a rent of £210. The application was