Thursday, March 15.

FIRST DIVISION.

COLQUHOUNS, PETITIONERS.

Trust—Nobile Officium—Advances out of Income of Fund Directed to be Accumulated.

A testator directed his trustees to retain a sum of £1000 annually out of the income of the residue of his estate which was directed to be paid to A. M. C., the widow of the testator's nephew, for the benefit of V and H, her two daughters, and to invest the same along with the interest accruing thereon in the trustees' own names for behoof of the said V and H, "equally between them, or in the event of one dying without leaving lawful issue, then the whole to the survivor." In the event of A. M. C.'s death the trustees were to continue setting aside £1000 annually until a sum of £10,000 should be accumulated, and it was declared that the said sums should be paid to V and H on their mother's death provided that they had attained the age of twenty-one or were married. Some years after the testator's death it was decided by the Court that although £10,000 had been accumulated the accumulation was to be continued during the life of A. M. C.

Thereafter V and H, being seventeen and sixteen years of age respectively, petitioned the Court, with the consent of their curators, to grant authority to the testator's trustees to make advances for their maintenance and education out of the income of the money accumulated for their behoof. The petitioners stated that their father had left no estate out of which they could be alimented, and that they were entirely dependent on their mother, whose income consisted of from £1000 to £1100 per annum. The petition was unopposed.

The Court, holding that the main purpose of the testator in directing the accumulation had been effected by the accumulation of the sum of £10,000, *granted* authority to the trustees to advance £200 per annum for each of the petitioners.

William Colquhoun died on the 22nd day of March 1884 leaving a trust-disposition and settlement whereby he conveyed to trustees his whole estates, heritable and moveable. By the fourth purpose thereof he directed his trustees to invest the whole residue of his means and estate, heritable and moveable, in their own names, and to hold the same for a period of twenty years from and after his decease, and also to invest the rents, interests, dividends, and other income thereof from time to time as the same might accumulate; and by the fifth purpose he directed them at the expiry of said period of twenty years to apply the said accumulated fund, both principal and interest (so far as not then already invested in land), to the purchase of land in Dumbartonshire or wherever else they might judge most expedient, and to entail the estate or estates purchased (1) on the representative of the family of Colquhoun of Luss, who should then be heir of entail in possession of the estate of Luss, and his heirs of entail.

By codicil of 25th November 1882 the testator provided:—"In the event of my being survived by Mrs Anna Maria Colquhoun, wife of my nephew Colonel James Colquhoun, and in case he shall die without having succeeded to the estate of Luss and shall leave her a widow, then and in these events I direct my said trustees (instead of allowing the rents, interest, dividends, and other income of the residue of my means and estate to accumulate as provided by the fourth purpose of my said trust-disposition and settlement) to pay and make over the said rents, interest, dividends, and other income to the said Mrs Anna Maria Colquhoun during all the days of her life."

By codicil of 6th December 1883 the testator directed his trustees:—"In the event of the said Mrs Anna Maria Colquhoun surviving the period of twenty years contemplated 'in the fourth place' in my foregoing trust-disposition and settlement, to continue to hold my said means and estate during her continued survivance, and to pay her the liferent thereof, and at her death to wind up the estate in terms of the provision 'in the fifth place' of my said trust-disposition and settlement, as if the said twenty years had only then come to an end."

By codicil of 12th February 1884 the testator provided as follows:—"I, William Colquhoun before designed, hereby direct my said trustees and executors, out of the rents, interests, dividends and other income directed by the foregoing codicil to be paid to the said Mrs Anna Maria Colquhoun, to retain and reserve £1000 annually for the benefit of Violet Colquhoun and Helen Colquhoun, her two daughters, and to invest the same along with the annual interest or income accruing thereon in my said trustees' and executors' own names for behoof of the said Violet and Helen Colquhoun, equally between them, share and share alike, or in the event of one dying without leaving lawful issue, then the whole to the survivor, and in the event of the said Mrs Anna Maria Colquhoun dying or marrying again (in which latter event I hereby revoke and recall the provision of the rents, interests, dividends and other income left to her by the foregoing codicil), then I direct my trustees and executors nevertheless to continue to set aside annually £1000, until with interest on said sums there be accumulated a sum of £10,000 for behoof of the said Violet and Helen Colquhoun, equally between them, or the whole to the survivor in the event of the predeceaser not leaving lawful issue as aforesaid: Declaring that said sums shall be payable to the said Violet and Helen Colquhoun on their mother's death; provided they have attained the age of twenty-

one or have been married: and further, declaring that said sums shall be alimentary, and shall not be affectable by the acts and deeds of the said Violet and Helen Colquhoun nor assignable by them, nor attachable for their debts or the debts of any husband to whom they may be married."

The testator, William Colquhoun, was predeceased by his nephew Colonel James Colquhoun, who did not succeed to the estate of Luss, and was survived by Mrs Anna Maria Colquhoun and her daughters Violet and Helen.

Various questions having arisen as to the administration of William Colquhoun's trust, a special case was presented to the Court on 28th February 1893 in which the Court decided that the accumulation of the fund for behoof of Violet and Helen Colquhoun, provided by the codicil of 12th February 1884, did not cease on the sum of £10,000 being accumulated.

On 9th January 1894 Miss Violet and Miss Helen Colquhoun presented a petition, with consent of their mother and Alan John Colquhoun, the curators appointed to them by their father's settlement, craving the Court to authorise the trustees of William Colquhoun to advance them such sum as the Court might deem "sufficient for the petitioners' proper maintenance and education, having regard to their position and prospects in life, out of the free annual income and produce of the moneys directed to be accumulated for the petitioners' behoof by the trust-disposition and settlement of the said William Colquhoun.

They stated that they were now seventeen and sixteen years of age respectively, that William Colquhoun's trustees had accumulated a sum of about £11,000 for their behoof, and that the said Colonel James Colquhoun did not leave any estate from which the petitioners could be alimented. "They are therefore entirely dependent on their mother, whose income consists of a sum of about £200 per annum from her marriage-contract trust, and of a further sum of from £800 to £900 per annum from Mr William Colquhoun's trust. Mrs Colquhoun is unable out of her own funds to afford the expense of a proper education for her daughters, which is at present not less than £300 per annum, and at the same time to maintain for them the home to which they are entitled."

At the date of the petition Sir James Colquhoun was then heir of entail in possession of the estate of Luss, and was the person who would have become institute under the entail to be executed by William Colquhoun's trustees in event of Mrs Colquhoun's death. Colonel Alan John Colquhoun was the heir-presumptive. It was stated in the petition that they consented to the application.

The petition was unopposed. A remit was made to a reporter, who reported that it was expedient that the application should be granted, and suggested that a sum of £200 per annum was a reasonable amount to be allowed for each of the petitioners.

Argued for the petitioners—The accumulation directed to be made by the codicil of 12th February 1884 was entirely for the petitioners' behoof. There was no ulterior destination, and the clause providing that in the event of one dying the whole should go to the survivor, merely substituted one for the other, and did not postpone vesting. The accumulated fund vested in the petitioners as a class subject to defeasance in the event of one predeceasing the other before the term of payment—*Duncan's Trustees & Others*, July 17, 1877, 4 R. 1093, *per* Lord Gifford, p. 1100; *Maitland's Trustees* v. *M'Dermaid*, March 15, 1861, 23 D. 732. It was not essential that there should be vesting, even where there was a direction to accumulate—*Latta*, June 5, 1880, 7 R. 881; *Webster* v. *Miller's Trustees*, February 26, 1887, 14 R. 501; *Muir* v. *Muir's Trustees*, December 10, 1887, 15 R. 170. A sufficient case of expediency had been made out to justify an advance sufficient to meet the expense of the petitioners' education.

At advising—

LORD ADAM—This is an application made by the two daughters of Mrs Colquhoun, aged sixteen and seventeen respectively, for an advance to be made to them out of a certain fund left by a granduncle. The application is made with the consent of their mother, and also of the persons interested to claim the funds in question if these, and assuming that these, were to fall into residue.

Now, with regard to the residue of his estate we find that Mr William Colquhoun, the granduncle, at first directed the whole income arising therefrom to be paid to the mother of the petitioners, but by a subsequent codicil he directed it to the extent of £1000 a-year to be retained by his trustees for the benefit of her two daughters, and invested along with the annual interest or income arising thereon until there should be accumulated a sum of £10,000 for behoof of the daughters equally, and then each of the daughters is substituted to the other. The accumulated fund is to be paid over to the daughters on the death of their mother, provided they have then attained twenty-one years of age or have been married. The form of the destination therefore is, that the trustees are to hold the fund for behoof of the girls with a direction to pay it over to them on a particular event, and we are now asked in the circumstances explained to us to award payments out of the income of the accumulated funds for the maintenance and education of these girls having regard to their position and prospects in life. We are informed that their mother Mrs Colquhoun has an income arising out of funds of her own of about £200 a-year, and of about £900 derived from the trust-fund of Mr William Colquhoun. We are also told—and I think this is a very material point—that the accumulated funds have reached the sum of £10,000. I say that is very material, for I think that the main object of the truster was that by the

date of their mother's death her daughters should have accumulated for them a small fortune of £5000 to each or £10,000 to the survivor. That, his main object and immediate purpose, has been effected, and so we are left free, without in a way defeating that purpose, to deal with the application of the income of the fund in the meantime as a source for providing for the maintenance and education of the daughters. Now, looking to the authorities that have been quoted, I think that in the circumstances it is desirable and appropriate that the income of this fund should be so far paid over for their benefit, and accordingly that the prayer of the petition should be granted.

LORD KINNEAR—I am of the same opinion. This cannot be represented as a case of pressing necessity, but there is no doubt that the mother of the petitioners will be able to provide for their suitable maintenance and education much more conveniently and advantageously for them and for herself if the payment is allowed, and that is a ground which the Court will always take into consideration in dealing with applications of this kind. I doubt whether we could give effect to the petition but for the consideration to which Lord Adam has adverted, for, if there were no such provision in Mr Colquhoun's settlement as that which shows that the truster thought the sum to be accumulated should be £10,000, I should have some difficulty in saying that he had not himself contemplated the question we are now considering and decided it against the petitioners, for, of course, he knew what provision he was making for their mother, and he directs that the rest of the income should be accumulated. I think, however, that the special point which Lord Adam has mentioned is extremely important, and taking the same view of it as his Lordship does, I agree in thinking that the petition should be granted.

LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court authorised the trustees under the trust-disposition and settlement and codicils of William Colquhoun to advance and pay to the petitioners' curators the sum of £200 per annum for the maintenance and education of each of the petitioners out of the free annual income of the moneys held by the trustees for the petitioners' behoof.

Counsel for the Petitioners—H. Johnston—N. J. Kennedy. Agents—Macrae, Flett, & Rennie, W.S.

Friday, March 16.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ELMSLIE *v.* YOUNG'S TRUSTEES.

Landlord and Tenant—Lease—Damages—Claim of Damages by Tenant for Breach of Conditions of Lease—Mora—Personal Bar—Tenant Barred by Payment of Rent without Deduction or Reservation.

After a tenant had been in occupation of a farm for seven years under a lease, the estate, comprising the farm, was sold. The tenant continued in occupation for three years longer, and then brought an action of damages against his former landlord for alleged loss which he had sustained during the first seven years of his tenancy by the landlord failing to keep the fences in repair and to burn a tenth of the heather on the farm each year as required by the lease. He averred that on each occasion when he paid his rent, and at various other times, he had protested orally and in writing against the landlord's failure to implement the conditions of the lease.

Held that these averments were irrelevant, and that the tenant was barred from insisting in his claim of damages, in respect that he had paid his rent during each of the seven years without deduction or reservation of his claim.

Broadwood v. *Hunter*, February 2, 1853, 17 D. 340, *followed.*

Robert Elmslie entered into possession of the farm of Wester Durris Hills, Durris, Kincardineshire, as tenant, at Martinmas 1883, under an agreement for a lease concluded by him with the proprietors, the trustees of the deceased James Young of Durris.

By the said minute of agreement it was provided, *inter alia*—"The trustees are bound to burn the heather, weather permitting, in regular strips, as near as possible to the tenth shift rotation. . . . The trustees to put the fence into repair, and supply larch posts during the lease for repairing same; also to overhaul the fencing in the spring of each year."

At Martinmas 1890 James Young's trustees sold the lands to Henry Robert Baird. Elmslie still continued in occupation of the farm of Wester Durris.

On 29th May 1893 Elmslie raised an action, in which he sought decree for payment of £250 against Young's trustees, and decree for a like amount against Baird.

He averred that the defenders had each year failed to burn the stipulated amount of heather, and had also failed to keep the fences in repair as required by the lease; that he had consequently suffered loss to the amount for which decree was sought against Young's trustees during the seven years he was their tenant, and had likewise suffered loss to the amount sued in