

and that Margaret Robson's children take the share originally destined to her mother by virtue of the condition.

The LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court answered the second question in the affirmative.

Counsel for the First and Second Parties—C. S. Dickson—Younger. Agents—Campbell & Smith, S.S.C.

Counsel for the Third Parties—Jameson—Burnett. Agents—Clark & Macdonald, S.S.C.

Friday, July 13.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

BURNETT v. BURNETT'S TRUSTEES.

Succession — Settlement — Codicil — Construction.

By trust-disposition and settlement dated in 1883 a testatrix appointed her trustees to pay over the yearly interest of the residue of her estate to C. J. B., G. B., and S. M. B., equally among them, and to the survivors and survivor of them, and at the death of the survivor to divide the residue among persons named. By codicil dated in 1890 the testatrix, on the narrative that G. B. had died since the date of her trust-disposition and settlement, recalled the bequest made by her therein to him of a share of the residue of her estate "being one-third thereof," and ordained her trustees to pay over the said share which would have fallen to G. B. to his widow.

The testatrix died in 1890 and S. M. B. in 1893.

Held that the right of G. B.'s widow was not restricted to one-third of the income of the residue, but that upon S. M. B.'s death she was entitled to share the income equally with C. J. B.

By trust-disposition and settlement dated 3rd August 1883, Miss Mary Erskine Burnett, after providing for payment of debts and expenses, certain legacies, and an annuity, in the last place appointed her trustees "to pay over the yearly interest or profits arising on the whole remainder and residue of my estate . . . to my brothers Charles John Burnett, George Burnett, and Stuart Mowbray Burnett, equally among them . . . and to the survivors and survivor of them . . . but for their liferent use allanarly." At the death of the survivor of the liferenters the trustees were to divide the residue among three nieces of the testatrix who were named.

By codicil dated 12th March 1890 Miss Burnett, after recalling the direction contained in her settlement as to the payment of an annuity, and giving other directions

with regard thereto, provided as follows—"And considering that since the date of my said trust-settlement my said brother George has died, I do hereby recall the bequest made by me therein to him of a share of the residue of my estate, being one-third thereof, and ordain my trustees to pay over the said share which would have fallen to the said George Burnett, had he not so predeceased me, to Mrs Alice Stuart or Burnett, his widow, and with these alterations thereon I hereby confirm my said trust-disposition and settlement in every other respect."

Miss Burnett died in April 1890, and after her death a third of the free yearly interest of the residue of her estate was paid to each of Charles John Burnett, Stuart Mowbray Burnett, and Mrs Alice Burnett, until the death of Stuart Mowbray Burnett in January 1893.

After the death of Stuart Mowbray Burnett Mrs Alice Burnett claimed payment of one-half of the yearly interest of the residue of Miss Burnett's estate, and this claim not being admitted by Miss Burnett's trustees Mrs Alice Burnett raised an action against the said trustees, of whom Charles John Burnett was one, concluding for declarator that, in virtue of the provisions of Miss Burnett's settlement and relative codicil, she was entitled, from and after the death of Stuart Mowbray Burnett, to the yearly interest arising on the residue of Miss Burnett's estate, along with the said Charles John Burnett, equally between them, during the joint lives of herself and Charles John Burnett, and for decree ordaining the defenders to make payment to her of the said yearly interest equally and share and share alike with the said Charles John Burnett during their joint lives.

The action was resisted by Miss Burnett's trustees, who pleaded—" (3) On a sound construction of said trust-disposition and settlement and relative codicil, the pursuer is only entitled to one-third of said yearly interest.

On 14th March 1894 the Lord Ordinary (KYLACHY) found, decerned, and ordained in terms of the conclusions of the summons.

Opinion.— . . . I think the question is not without difficulty; but it is after all simply a question as to the trustor's intention, and I have come to the conclusion that according to the just construction of the codicil of 12th March 1890, the pursuer Mrs Burnett is entitled to be put exactly in the same position as her husband would have held if he had survived. That is to say, she takes up not only the original share but also the accruing share to which under the settlement her husband would have succeeded.

I do not think that much help is to be derived from the analogy of the law applicable to conditional institution of children, either expressed or implied. The cases on that subject no doubt establish a rule of construction which, whether artificial or not, is well settled. But it is not a rule which I should desire to extend, and in the present case it is, I think, enough to say that

the codicil under construction does not operate a conditional institution at all. The position just is that the original legatee having died before the testator, his widow, the pursuer, is by the codicil in question instituted in his place.

Again, I am not disposed to lay the stress which the defenders do upon the language in which the codicil recalls the bequest to Mr George Burnett. No doubt the bequest recalled is described as 'the bequest made by me therein to him of the share of the residue of my estate being one-third thereof.' But it is, I suppose, certain that the recal applied to the whole interest bequeathed to the deceased. Had Mr George Burnett been alive, and had it been desired to substitute his wife in his place, the language of the codicil would or might have been just the same, and yet I think it would in that case have been difficult to contend that Mrs Burnett should get the original share, while Mr Burnett should remain entitled to the share which accrued on his brother's death. I think, therefore, it is not doubtful that the words of recal cover the whole bequest, and that being so it appears to me that the words which follow, and by which the pursuer is instituted, must be read in the same sense." . . .

The defenders reclaimed, and argued—It was not to be assumed that the testatrix intended her brother's widow to have the whole of the benefit which he would have taken had he survived, and the words of the codicil were inconsistent with such a view. The words of recal were quite unnecessary, because George Burnett was dead and the provision in his favour had lapsed. Their use was therefore to make it clear that the pursuer was only to take what was given her by the codicil. Now, what the codicil gave her was one-third of the interest of the residue, and that was therefore all she was entitled to. This conclusion was supported by the cases relative to the conditional institution of children, for it had been held in such cases that where either by express provision or by the operation of the *conditio si sine liberis*, children of a predeceasing legatee took their parent's share, that share was merely the original share provided to the parent, and did not cover accreting shares in which the parent had he survived would have been entitled to participate — *Henderson v. Hendersons*, January 9, 1890, 17 R. 293. The language of the codicil in this case might be usefully contrasted with that used in *M'Culloch's Trustees*, May 14, 1892, 19 R. 777, where the substituted legatees were held entitled to participate in an accreting share just as the original legatee would have been.

Argued for the pursuer—The intention of the testatrix was to recal the provision in favour of her brother George, and to substitute his widow in his place. The words "being one-third thereof," applied to the bequest which the testatrix was clearing out of the way. The bequest to George's widow was contained in the subsequent words, and the meaning of the

testatrix clearly was that the pursuer should take the same benefit as her husband would have taken had he survived. This construction was supported by the fact that the will contemplated only one period of distribution. The words "being one-third thereof" accurately described the amount of the share which George Burnett would have taken at the date of the codicil, and also at the date of the death of the testatrix, and the only inaccuracy in the description lay in the fact that the third was capable of expanding into more. The codicil contained other inaccuracies, e.g., the bequest was described as a "share of the residue," whereas it was only a share of the interest of the residue, and exact definition was not to be looked for in a loosely drawn deed of that kind. The inaccuracy of describing the pursuer's share as a third did not amount to a *falsa demonstratio*, but even if it did, the Court would give effect to what was the evident meaning of the testatrix — *Macfarlan's Trustees v. Henderson &c.*, December 3, 1878, 6 R. 288; *Forbes' Trustees v. Forbes*, January 13, 1893, 20 R. 248; *Whitfield v. Clement*, 1816, 1 Merivale, 402. Where there were inconsistencies in the description of a bequest, effect would be given to the leading words of description — *Theobald on Wills*, p. 94.

At advising—

LORD PRESIDENT — I think the Lord Ordinary is right. The words of recal, which are somewhat superfluously introduced, must be read as relating to what follows, but the words of bequest are contained in the words "I ordain my trustees to pay over the said share which would have fallen to the said George Burnett had he not predeceased me, to Mrs Alice Stuart or Burnett, his widow." In the first place, I think Mr Mackay is right in saying that the words which purport to be a recal of the prior bequest import a total recal—that is to say, the theory on which this lady finds it necessary to recal the provision made in the settlement is that she wants to clear the ground of the bequest to her brother George Burnett. Then it is to be observed that the thing recalled is somewhat loosely described as "a share of the residue" instead of "a share of the income of the residue," and that prepares one for the rest of the codicil not being expressed with complete accuracy of definition. Then we find that the testatrix, dealing with the bequest to her brother George of a share of the residue, puts in the words "being one-third thereof." I think the argument of Mr Mackay is sound, that these words are merely descriptive of the right which the testatrix was clearing out of the way, and it is to be noted that at the time when she was writing, and at the date of her decease, the amount quite accurately described the amount of George's share, because the decease of the other brother had not then taken place, and George's share was therefore one-third.

When, then, we go over the various points in the description of this bequest, it

appears to me that the sound view is that the testatrix, having in mind and dealing with the bequest made to her brother George, which at the time was a bequest of one-third of the yearly interest of the residue, gives that to his widow. I do not think it necessary to say that the words are inaccurate—they are rather inexhaustive, but it appears to me sufficiently clear that the gift to George Burnett's widow is made to square with the lapsed gift to her deceased husband.

LORD ADAM—The language of this codicil is inaccurate and requires construction. In the first place, the testatrix says that she recalls the bequest made to her brother George, and that is an inaccurate way of speaking, because the bequest to her brother had lapsed, and a lapsed bequest requires no recal. Then she describes the bequest to George as a share of the residue, and that is, strictly speaking, inaccurate, because it is not a share of the residue with which she is really dealing, but a share of the revenue of the residue. All this shews that the words of bequest must receive construction, and I do not entertain any doubt that the intention of the testatrix was just to substitute the wife for the husband. When she says that in consideration of her brother George's death she recalls the bequest made to him, I have no doubt that she intends to deal with the lapsed bequest and nothing else, and having so dealt with it she ordains her trustees—leaving out the words “being one-third thereof”—to pay over the said share to her brother's widow. I agree that the words “being one-third thereof” are not incorrect, because the share was in fact a third of the yearly interest of the residue with its incidents—that is to say, its capacity for becoming more. At the date of the codicil and the death of the testatrix it was a third.

LORD M'LAREN—I agree substantially in the views expressed by your Lordships, but although it is immaterial I wish to say that I am not sure that I concur with the observation made by Lord Adam that the testatrix is inaccurate in saying that she recalls the bequest which she had previously made. If there was any inaccuracy it was only in using the equivalent word “recal” in place of the word “revoke,” because I think that when in consequence of the death of one of the original objects of a testator's bounty it is desired to put some other person in his place, it is quite correct conveyancing, and conduces to clearness, to begin by saying, “I revoke the bequest.” It has this advantage, that however expressed, it always corrects the testamentary bequest by stating what part of it has been displaced in order to make room for the bequest which the testator is about to bring in.

I agree in other respects that this codicil is not strictly accurate in its language. “A share of the residue” is not what is given, and this cannot be said to be merely an abbreviated mode of dealing with a

share given to the mother in liferent and the family in fee, because that is not the scheme of the provision. So we begin with a codicil which is not expressed in strictly accurate terms. But if it had provided simply that the liferent share intended for the brother of the testatrix should go to his widow, or had bequeathed to the widow “the liferent of a third of the residue given to my brother George,” I would have held without difficulty that no right of accretion was carried by a bequest in these terms. My first impression of this case differed from the view taken by the Lord Ordinary, but my difficulty has been entirely removed by considering, first, what was pointed out by Lord Kinnear during the discussion, that the reference to the share given to George as a third was descriptive of the interest which he would have taken as at the date of the codicil; and second, that the bequest does not stop there, but goes on—“I ordain my trustees to pay over the said share which my brother George Burnett would have taken had he survived, to his widow.” These are very comprehensive words, and although it is true, as is pointed out by the Lord Ordinary, that in some cases a bequest to children of the share which their parent would have taken has been held not to cover accreting shares in which the parent would have participated, that has been because the general scheme of disposition otherwise showed that that was not the intention of the testator. In the present case the words are adequate to include the whole right and interest which George Burnett would have taken had he survived.

LORD KINNEAR—I also agree with the Lord Ordinary for the reasons his Lordship has given, and for the further reasons your Lordships have added.

The Court adhered.

Counsel for the Pursuer—Mackay—Sym. Agents—Scott Moncrieff & Traill, W.S.

Counsel for the Defenders—H. Johnston—Craigie. Agents—Dalgleish, Gray, & Dobbie, W.S.

Saturday, July 14.

FIRST DIVISION.

ROSS'S TRUSTEES AND OTHERS, PETITIONERS.

Trust—Advances out of Trust Funds for Behoof of Minor Beneficiaries—Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), sec. 7.

A testator after providing that his widow should have a liferent of the residue of his estate, directed his trustees to hold the residue for behoof of his children, and after the death of the longest liver of himself and his wife, to