

all, and have already indicated the advantages which the trustees got. I agree with your Lordship that the assignation must receive effect according to its terms.

LORD M'LAREN and LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary, and found that in virtue of the assignation to the trustees of the said James Hadden the claimant Mrs Bryden was entitled to be ranked and preferred in terms of the second head of her claim.

Counsel for Claimant Mrs Bryden—Ure, Q.C.—Aitken. Agents—J. & J. Milligan, W.S.

Counsel for Claimant Mrs Hadden—Campbell, Q.C.—Cook. Agents—Wallace & Pennell, W.S.

Thursday, March 9.

SECOND DIVISION.

[Sheriff of Chancery.

JOHNSTON, PETITIONER.

Succession—Destination—Accretion.

The purchaser of certain heritable subjects took the destination thereto in favour of herself in liferent, and after her death to her daughters A, B, and C, *nominatim*, "in conjunct fee and liferent, and to the heirs of their bodies, and to their assignees whomsoever," . . . whom failing to her sons D and E, *nominatim*, "jointly, and their heirs whomsoever," but reserving power to herself at any time of her life, without consent of A, B, C, D, and E, "or any of them or their foresaids, to sell, burden, wadset, or affect with debt, or even gratuitously dispoise the subjects, and generally to do every other thing thereanent as if she were absolute fiar."

The purchaser died survived by her daughters A and B, and predeceased by her daughter C, who died unmarried.

Held that under the destination A and B took each a third share in the subjects, but had no right by accretion to the third share, which would have been taken by C if she had survived, and that this share, in terms of the destination, passed to D and E as conditional institutes.

In 1824 Mrs Clara Elizabeth Dickson or Sibbald, widow of William Sibbald, merchant in Leith, purchased a flat in Royal Circus, Edinburgh, from John Paton, builder in Edinburgh. The destination in the disposition of these subjects was taken in the following terms:—"To and in favour of the said Mrs Clara Elizabeth Dickson or Sibbald in liferent during all the days of her life, and after her death to Clara Elizabeth Sibbald, Jane Sibbald, and Mary Frances Sibbald, daughters procreated of the marriage between the said Mrs Clara Elizabeth Dickson or Sibbald and the said

deceased William Sibbald, in conjunct fee and liferent, and to the heirs of their bodies, and to their assignees whomsoever, heritably and irredeemably, excluding the *jus mariti* of any husband whom they may hereafter marry: Declaring that in the event of the marriage of any of the said Clara Elizabeth Sibbald, Jane Sibbald, and Mary Frances Sibbald, the liferent right and interest in the said subjects belonging to such of them as may be married shall cease and determine, and shall accresce and belong to such of them as remain unmarried; and in the event of the whole of them being married, then and in that case their respective liferent interests shall revive and revert and belong to all of them in terms of the above destination; whom failing to and in favour of Alexander Sibbald and Charles Robert Sibbald, sons procreated of the marriage between the said Mrs Clara Elizabeth Dickson or Sibbald and the said deceased William Sibbald, jointly, and their heirs and assignees whomsoever; but with and under the reservation and power after written in favour of the said Mrs Clara Elizabeth Dickson or Sibbald, All and whole . . . But reserving always full power, faculty, and liberty to the said Mrs Clara Elizabeth Dickson or Sibbald at any time of her life, and without consent of the said Clara Elizabeth Sibbald, Jane Sibbald, Mary Frances Sibbald, Alexander Sibbald, and Charles Robert Sibbald, or any of them or their foresaids, to sell, burden, wadset, or affect with debt, or even gratuitously dispoise, the subjects above dispoised, and generally to do every other thing thereanent as if she were absolute fiar of the same."

Sasine was taken upon the precept of sasine contained in this disposition conform to instrument of sasine dated 25th and recorded 30th November 1824.

Mrs Clara Elizabeth Dickson or Sibbald died on 24th February 1865, survived by two of her daughters, viz., Mrs Jane Sibbald or Johnston and Mary Frances Sibbald, and predeceased by her daughter Clara Elizabeth Sibbald, who died unmarried in the year 1835. Mrs Jane Sibbald or Johnston died on 15th April 1888.

In September 1898 David Henry Johnston, Mehama, Marion County, Oregon, United States of America, presented a petition to the Sheriff of Chancery, in which he set forth that the late Jane Sibbald or Johnston died last vest and seised in All and whole the one *pro indiviso* half of all and whole the subjects above mentioned, and that the petitioner was her eldest son and nearest lawful heir of provision in special in these subjects under and by virtue of the disposition before mentioned, and craved the Sheriff of Chancery to serve him as such heir of provision in special.

Proof having been led to establish the facts narrated *supra*, the Sheriff of Chancery (CHISHOLM) on 1st November 1898 issued the following interlocutor:—"The Sheriff having considered the petition, proof, and productions, and heard counsel on behalf of the petitioner, Finds it proved that the late Jane Sibbald or Johnston

died last vest and seised in one-third *pro indiviso* of the subjects and others described in the petition, and not in one-half *pro indiviso* thereof as therein averred: *Quoad ultra* finds the facts stated in the petition proved, and serves and decerns the petitioner nearest and lawful heir of provision in special of the said Jane Sibbald or Johnston in the one-third *pro indiviso* of the subjects and others described in the petition, but always with and under the whole burdens, conditions, provisions, stipulations, privileges, and obligations, and declarations referred to in the petition, and decerns."

Note.—"In this case one of the three daughters predeceased her mother, and the claim of the petitioner rests on the assumption that the share which would have vested in this daughter had she survived, vested in her two surviving sisters; in other words, that the whole subjects vested in them to the extent of one-half *pro indiviso* in each. There are no words of survivorship. I am, however, asked to hold that these are implied by the gift to the three daughters *in conjunct fee and liferent*, and to their heirs and assignees. I do not think that the authorities warrant such a conclusion; the one-third to which the predeceasing daughter would have succeeded would have fallen into intestacy but for the destination-over. As it is, the share in my view vested in the two brothers or their heirs."

The petitioner appealed, and argued—(1) The powers reserved to Mrs Sibbald were not limited to deeds *inter vivos*, and the effect was that she remained fiar until her death—*Miller's Trustees v. Findlay*, Nov. 6, 1896, 24 R. 114; *M'Laren on Wills*, vol. ii. 1088. If this were so, the petitioner's mother took a half share on her mother's death. (2) The effect of the words "in conjunct fee and liferent" was that the petitioner's mother took a half share although there was no clause of survivorship.

At advising—

LORD TRAYNER—I think the judgment of the Sheriff now appealed against is right.

The destination in the disposition before us is in favour of Mrs Sibbald in liferent, and her three daughters in conjunct fee and liferent, and their heirs. Under such a destination each of the daughters takes a fee of one-third, but no accruing right to the fee falling to a predeceaser. There is no provision for such third going to the survivors. Failing the daughters, or any of them, their or her share goes, by virtue of another part in the destination, to Mrs Sibbald's sons.

LORD MONCREIFF—I am of opinion that the Sheriff's judgment is right, and should be affirmed. The petitioner asks to be served as heir of Mrs Jane Sibbald or Johnston, in one *pro indiviso* half of the subjects described in the petition. The Sheriff has served him as heir in one-third *pro indiviso* only. Under the destination in the disposition granted by John Paton

in favour of Mrs Clara Dickson or Sibbald and others, the subjects were destined after her death to her daughters Clara, Jane, and Mary, "in conjunct fee and liferent, and to the heirs of their bodies, and to their assignees whomsoever, heritably and irredeemably," and then passing over in the meantime directions as to the liferent, "whom failing to and in favour of Alexander Sibbald and Charles Robert Sibbald."

Clara Sibbald predeceased her mother unmarried, and therefore nothing vested in her. The only question which remains is, whether the right to one-third *pro indiviso*, which she would have taken had she survived her mother, accresced to her surviving sisters Jane (to whom the petitioner asks to be served heir) and Mary, or passed to the conditional institutes Alexander and Charles Robert Sibbald.

I am of opinion with the Sheriff that under a destination in the terms quoted, there is no accretion, there being no words implying a right of survivorship in the fee. This is the construction which has been settled by a long course of decisions. The survivors are by the deed expressly given a right to a lapsed share of the liferent by accretion so long as they remain unmarried, and if the deed had not made special provision in that matter, the law would have implied a right of survivorship as regards the liferent. But under such a destination, after the termination of the liferent, the whole of the fee does not go to the survivors' heirs, but falls to be divided (in this case) into three, two thirds of which go to the heirs of the two sisters who survived their mother, and the one-third which would have fallen to the one who predeceased her to the conditional institutes in terms of the ulterior destination—*Ersk.* iii. 8, 35.

The result is that Jane died vested only in her own one-third of the fee, and the petitioner, her heir, is entitled to no more. Clara, the predeceaser's, share passed to Alexander and Charles Sibbald or their heirs as conditional institutes.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court dismissed the appeal, and affirmed the interlocutor appealed against, and remitted to the Sheriff of Chancery to proceed.

Counsel for the Petitioner and Appellant—T. B. Morrison. Agents—Watt, Rankin, & Williamson, S.S.C.

Thursday, March 9.

SECOND DIVISION.

DUNLOP'S TRUSTEES v. SPROT'S EXECUTOR.

Succession—Fee and Liferent—Whether Gift one of Liferent or Fee—Restriction to Liferent in event of Having Issue.

A testator by his trust-disposition and settlement directed his trustees "to hold and set apart the principal sum of £10,000, which I hereby leave and bequeath to the children of my deceased sister M who shall attain the age of twenty-one years or be married and have issue, and their issue, equally among them *per stirpes*, as follows, *videlicet*— one equal part or share thereof to each of her three daughters in liferent and their issue respectively equally among them in fee," the share of any nephew or niece dying before twenty-one without issue to be held for behoof of the survivors and the issue of predeceasers equally *per stirpes*. He also directed his trustees to "lay out and invest the shares of the said sum provided to" his "nieces and their issue on heritable security or otherwise for behoof of them in liferent and their children respectively in fee, taking the bonds, securities, and writings in favour of" his trustees in trust for his nieces and their issue for their respective rights of liferent and fee. One of M's daughters, A, died at the age of 16, another of them, B, married and died leaving issue, and a third, C, was married, but died at the age of 78, intestate and predeceased by her husband, without ever having had any issue. *Held* that the settlement gave C a right of fee subject only to the condition that if she married and had issue her right should be restricted to a liferent, and that as she had never had any children, upon her death the fee of her share passed to her executor-dative.

William Dunlop died on 31st May 1838, leaving a trust-disposition and settlement dated 7th March 1836, whereby he disposed his whole means and estate, heritable and moveable, to the trustees and for the trust purposes therein mentioned. The first four trust purposes were payment (1) of debts, (2) of expenses of management, (3) of two annuities which had ceased to be payable, and (4) of legacies and bequests left and bequeathed by any writing under the testator's hand. The fifth and last purposes were as follows— "*Fifthly*, To hold and set apart the principal sum of ten thousand pounds, which I hereby leave and bequeath to the children of my deceased sister Margaret Dunlop, wife of Robert Buchanan, merchant in Glasgow, who shall attain the age of twenty-one years complete, or be married and leave issue, and their issue equally among them *per stirpes*, as follows, *videlicet*—one equal part or share thereof to

her son, the said Robert Buchanan junior, in fee, whom failing to his issue, equally among them; and one equal part or share thereof to each of her three daughters in liferent, and their issue respectively, equally among them in fee; and in the event of the decease of any of my said nephew and nieces, whether before or after me, before attaining the age of twenty-one years, and without lawful issue, or in the event of the failure of the issue of the deceiver or deceasers before attaining majority, and without lawful issue, to hold the share or shares of such deceiver or deceasers, and their issue, for behoof of the survivors of my said nephew or nieces, and the issue of any of them who may have predeceased, equally among them *per stirpes*, that is, the issue acquiring equally among them the share to which their parent would have been entitled if in life: declaring, however, that the shares lapsing to my said nieces, or either of them, shall be held for their liferent use only, and for behoof of their issue respectively, equally among them in fee, as provided in regard to their own original shares; and I hereby direct and appoint my said trustees or trustee to pay to my said nephew, Robert Buchanan junior, his share of the said sum at and upon his attaining the age of twenty-one years complete, and to lay out and invest the shares of the said sum provided to my nieces and their issue, on heritable security, or otherwise, for behoof of them, my said nieces respectively, in liferent, and their children respectively in fee, taking the bonds, securities, and writings in favour of my said trustees and their foresaids in trust for my said nieces and their issue, for their respective rights of liferent and fee; and I direct and appoint my said trustees to pay and apply the interest arising on the said respective shares towards the maintenance and education of my said nephew and nieces respectively during their minority: And, *Lastly*, To pay, dispoise, convey, and make over to my said brother, James Dunlop, Esquire, of Annanhill, and failing him by death, to the child or children of his body equally, or share and share alike, whom all failing, to my own heirs whomsoever, the whole remainder, residue, and reversion of my subjects, property, estate, debts, and effects, heritable and moveable, real and personal, hereby conveyed, after setting aside such sum or sums as my said trustees may consider necessary for securing payment of the foresaid annuity and legacies and bequests, and for carrying into execution the purposes of the trust."

After the testator's death his trustees, in fulfilment of the fifth purpose of his trust-disposition and settlement, set apart the principal sum of £10,000 above mentioned, and in fulfilment of the last purpose they paid and made over to the testator's brother James Dunlop, who survived the testator, the whole residue of the testator's estate and effects, heritable and moveable, real and personal. James Dunlop died on 24th June 1851, leaving a trust-disposition and settlement, dated 28th July 1846, and relative codicil dated 2nd August 1850.