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 disponed 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 deceaser or deceasers before attaining majority, and without lawful issue, to hold the share or shares of such deceaser 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, dispone, 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.

Four children of the testator's deceased sister Margaret Dunlop or Buchanan survived the testator, viz., (1) Robert Buchanan junior, now known as Robert Dunlop Buchanan, (2) Margaret Buchanan, (3) Helen Graham Buchanan or Haines, who was married and had issue who survived her, (4) Henrietta Dunlop Buchanan or Sprot, who was married but never had any children.

Margaret Buchanan died in 1842, aged 16 years or thereby, and in accordance with the terms of the fifth purpose the trustees thereafter held the £10,000 for the remaining three children and their issue.

On Robert Buchanan attaining his majority, his share and interest, being accordingly one-third, in the said sum of £10,000, were duly paid and accounted for to him by the trustees.

Helen Graham Buchanan or Haines enjoyed the annual income and revenue of the share, viz., one-third, falling to her in liferent and her children in fee up to the time of her death, which happened on the 26th day of March in the year 1873, and her children received payment of the whole of their share, viz., one-third of the said sum of £10,000.

The annual income and revenue of the remaining one-third of that sum were regularly paid and accounted for to Mrs Henrietta Dunlop Buchanan or Sprot by the trustees up to the time of her death, which took place on 15th March 1898. At the date of her death she was 78 years of age. She died intestate, and she was predeceased by her husband. Robert Dunlop Buchanan was appointed her executor, conform to decree in his favour by the Sheriff of Ayr dated 24th May 1898.

Questions having arisen as to the persons entitled to the fee of the share of the sum of £10,000, the income whereof had been paid to Mrs Sprot during her life, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were:—First, William Dunlop's testamentary trustees; second, Mrs Sprot's executor; third (*a*) Robert Dunlop Buchanan as an individual, and (*b*) Mrs Haines' children; and fourth, James Dunlop's sole surviving testamentary trustee.

The second party maintained that upon a sound construction of the settlement there was a fee and not merely a liferent in the person of Henrietta Dunlop Buchanan or Sprot in one-third of the £10,000, or at least in the one-fourth of that sum originally provided to her and her issue; and that there being not merely a liferent, but really a fee in the person of Mrs Sprot, the fee of the said one-third or said one-fourth fell to the second party, to be distributed by him among her next-of-kin. The third parties ultimately adopted the contention of the second party. The fourth party maintained that the said one-third, or at least the said one-fourth, was merely a liferent in the person of Mrs Sprot; and that the contingency which had happened, namely, Mrs Sprot's having attained majority, and having died without leaving children, was not provided for in the fifth purpose of the settlement, and that the fee of the said one-third or one-fourth fell into residue and ought to be paid over to the fourth party, as sole surviving trustee under the trust-disposition and deed of settlement of the testator's brother James Dunlop.

The questions of law for the opinion and judgment of the Court were, *inter alia*, as follows:—"(1) Does the fee of the one-third of the £10,000, the income and revenue of which were paid to Mrs Sprot during her life, or the fee of the one-fourth originally provided to her and her issue, now belong to the second party? (3) Does the fee of the said one-third, or the fee of the said one-fourth, now belong to the fourth party?"

There were other questions and relative contentions, which do not require to be noticed here, as the Court did not find it necessary to consider them.

It was stated from the bar at the discussion that the parties were now agreed that the whole of the one-third, the income of which was ultimately enjoyed by Mrs Sprot, was to be regarded as being in the same position as the one-fourth share originally provided to her and her issue.

Argued for the second party—In virtue of the provisions contained in the fifth purpose of the settlement, Mrs Sprot took a fee. There was here an absolute gift of a fee, and the restriction to a liferent did not take effect except in the event of her having children—*Lindsay's Trustees* v. *Lindsay*, December 14, 1880, 8 R. 281; *Dalglish's, Trustees* v. *Bannerman's Executors*, March 6, 1889, 16 R. 559; *Stewart's Trustees* v. *Stewart*, January 22, 1896, 23 R. 416; *Mackay's Trustees* v. *Mackay's Trustees*, June 8, 1897, 24 R. 904. Here, as in *Lindsay's Trustees*, the words of gift were "leave and bequeath," and the subsequent clause of restriction was not so strong in its terms as the corresponding clause in *Stewart's Trustees*. In the case of *Muir's Trustees* v. *Muir's Trustees*, March 19, 1895, 22 R. 553, the words of gift were not sufficiently absolute in their terms to confer a fee in spite of the subsequent words of restriction. 2. If Mrs Sprot had only a liferent, then the fee now fell to the third parties and not into residue. The sum of £10,000 was finally set aside by the testator for the benefit of his sisters' descendants. It could not fall under the residue clause owing to the wording of that clause itself. The trustees were directed to pay the residue to the residuary legatee only after setting aside, *inter alia*, the sum of £10,000 given to Margaret's children. If it did not pass to the third parties, it fell into intestacy. Owing to the terms of the residuary clause here, the case of *Storie's Trustees* v. *Gray*, May 29, 1874, 1 R. 953, was not in point.

Argued for the fourth party—1. Mrs Sprot took a liferent only—*Muir's Trustees* v. *Muir's Trustees*, *cit.* There was not here, as in *Stewart's Trustees*, an unambiguous, unqualified gift of fee. The ground of decision in *Muir's Trustees* was not that the original words of gift were insufficient, but that the original

words were qualified by the words which followed. A direction to trustees to hold for behoof of anyone as in *Muir's Trustees*, was equivalent, apart from qualification, to direct words of gift in that person's favour —*Greenlees' Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136. 2. The fee of the share liferented by Mrs Sprot fell into residue. As she died after attaining the age of twenty-one, the accrescing clause did not apply. The presumption was against intestacy. Everything which was not required to satisfy special bequests fell to the residuary legatee, who indeed took the whole estate under burden of the special bequests—*Storie's Trustees* v. *Gray*, May 29, 1874, 1 R. 953; *Wallace's Executors* v. *Wallace*, November 21, 1895, 23 R. 142.

Counsel for the third parties adopted the argument for the second party upon the question of fee and liferent, and the question with the representative of the residuary legatee.

LORD JUSTICE-CLERK—The testator here bequeathed to the children of his sister Margaret a sum of money on their attaining majority or being married and leaving issue, and the question is, whether certain words coming after the words "as follows," which succeed the words of gift, prevent the daughters having a fee, and restrict them to a liferent. I think that the provision as to the daughters having merely a liferent only applied in the event of their being married and leaving issue, and as this never occurred in this case, the provision has no application.

LORD YOUNG concurred.

LORD TRAYNER—I think this clause may fairly be read as conferring a fee on Mrs Sprot. There are words of direct gift to her as one of Mrs Buchanan's children. It is, however, conditional that if any of Mrs Buchanan's daughters should marry and leave issue, the daughter's right should be one of liferent only, and the issue take the fee. In the case of Mrs Sprot, this condition did not take effect; she had no issue. Mrs Sprot's right therefore was that of fee.

LORD MONCREIFF — I am of the same opinion.

The Court pronounced this interlocutor:—

"Answer the first question therein stated by declaring that the fee of the one-third of the £10,000, the income and revenue of which was paid to Mrs Sprot during her life, now belongs to the second party: Find it unnecessary to answer the other questions therein stated: Find and declare accordingly, and decern."

Counsel for the First Parties — Clyde. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Second Party—Dundas, Q.C.—Clyde. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Third Parties — R. S. Horne. Agents—Cowan & Dalmahoy, W.S.

Counsel for the Fourth Party—Craigie—D. Anderson. Agents—Campbell & Smith, S.S.C.

Thursday, March 9.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

A *v.* B.

Reparation—Slander—Innuendo—Justification—"Lay Behind the Hedge and Shot his Poisonous Darts"—Issue — Counter-Issue.

In an action of damages for slander, the pursuer complained of a certain article in a newspaper owned and published by the defender. The article in question stated, with regard to a certain other newspaper—"It said some things in such offensive terms about so many people in the town that it is well to bear it in mind. . . . We knew all the while the particular gentleman in whose interest the paper was run, and who wrote its most offensive articles, although that gentleman took every opportunity to deny all knowledge and connection with" it. "Little wonder that he did; the articles written by the editor and financier of the concern were such that any man holding a respectable, not to say responsible position might well be ashamed of. We are in possession of the whole story from start to finish, and may publish it all some day, revealing the name of the gentleman who lay behind the hedge and shot his poisonous darts at well-known public men in this town." The defender admitted that this article in part referred to the pursuer, and averred that the newspaper alluded to was under the pursuer's control, and was financed by him; that certain articles specified by date and title which appeared in it were of an offensive character and were written by the pursuer, and that on various specified occasions the pursuer had denied all connection with it. The Court (1) *allowed* an issue whether the article complained of represented that the pursuer was editor and financier of the newspaper in question; that he wrote for that paper offensive articles of such a disreputable character that any respectable man would be ashamed of having written them; that he used the said paper as a means of anonymously defaming public men, and that notwithstanding he took opportunity falsely to deny all knowledge of and connection on his part with the said paper; and (2) *allowed* a counter-issue whether the pursuer wrote the articles specified by the defender, and specifically referred to (but not set forth *ad longum*) in the schedule to the counter issue; whether they or some of them were offensive to well known men in the town where they were published, and of such a character that a man in the pursuer's position ought to have been ashamed of having written them; and whether on several occasions he