*Friday, June* 16.

## SECOND DIVISION.

## BAILLIE'S EXECUTOR *v.* BAILLIE.

*Succession — Conditional Institution or Substitution -- Mutual Settlement by Spouses—Gift by Wife to Husband Conditioned on Survivance.*

In a mutual settlement the wife gave everything belonging to her at the time of her death to her husband "in case he shall survive me, and to his heirs, executors, and assignees whomsoever." The husband in like manner gave all that he should die possessed of to his wife in case she should survive him, and to her heirs. The husband predeceased the wife, who died without having executed any testamentary deed other than the mutual settlement. The husband left no heritable estate. *Held* that the gift to the husband and his heirs was conditional upon his survivance, and that as he had predeceased, the whole estate which belonged to the wife at the date of her death passed to her executor for behoof of her heirs *in mobilibus ab intestata.*

*Findlay* v. *Mackenzie,* July 9, 1875, 2 R. 909, *followed.*

*Halliburton* v. *Halliburton,* June 26, 1884, 11 R. 979, *distinguished.*

The late James Baillie, shipmaster, Castletown, was married to the late Mrs Mary Annie Campbell or Baillie on 25th January 1879. There was no contract of marriage between them, and at the date of the marriage James Baillie was not possessed of much means. Mrs Baillie did not then or at any time during the subsistence of the marriage possess any separate estate. Subsequent to the marriage, James Baillie acquired considerable means from his occupation as a shipmaster and otherwise.

On 16th April 1883 James Baillie and Mrs Baillie executed a mutual disposition and settlement, the terms of which so far as of importance to the present case were as follows:—"We, James Baillie, shipmaster, residing at Castletown, in the parish of Olrig and county of Caithness, and Mrs Mary Annie Campbell or Baillie, wife of and residing with the said James Baillie, for the love, favour, and affection which we have and bear to each other, and for certain good causes and considerations, have agreed to grant these presents in manner underwritten: That is to say, I, the said James Baillie, do hereby, with and under the burdens and reservations after specified, give, grant, assign, and dispone to and in favour of my wife, the said Mrs Mary Annie Campbell or Baillie, in case she shall survive me, and to her heirs, executors, and assignees whomsoever, All and sundry my whole heritable and moveable, real and personal property, means, and estate of whatever nature or denomination the same may be, or wherever situated, at present belonging and addebted, or which shall belong and be addebted to me at the time of my decease . . . But declaring always that the said Mrs Mary Annie Campbell or Baillie, and her aforesaid, shall be bound and obliged, as by acceptation hereof they bind and oblige themselves, to make payment, out of the first and readiest of the estate hereby conveyed, of all my just and lawful debts, death-bed and funeral expenses, and of any gifts and legacies I may think proper to leave; and in like manner, I, the said Mrs Mary Annie Campbell or Baillie, do hereby give, grant, assign, and dispone, to and in favour of my husband, the said James Baillie, in case he shall survive me, and to his heirs, executors, and assignees whomsoever, all and sundry," and so forth, as in the gift to Mrs Baillie quoted above, there being however no qualifying declaration — "And for rendering this deed the more effectual, we do hereby nominate and appoint the survivor of us to be sole executor and universal legatory of such one of us as shall predecease, with full power to the survivor to intromit with the whole estate hereby conveyed, to give up inventories thereof, and to confirm the same: Reserving always to us, and each of us, our respective liferents of the estates and effects above conveyed, with full power to us, and each of us, at any time during our joint lives, to alter, innovate, or revoke these presents, in whole or in part, as we may see proper: But declaring always that the same, in so far as they shall not be altered, innovated, or revoked as aforesaid, shall be effectual, though found lying by either of us at the time of his or her predecease, or in the custody of any other person for our behoof, with the delivery whereof we hereby dispense for ever: Providing always that in the event of either of us exercising the said reserved power of alteration, innovation, or revocation, these presents shall thenceforth become and be null and void to all intents and purposes whatsoever."

James Baillie died at Castletown on 8th July 1898, without issue, but survived by Mrs Baillie. He left the following means and estate:—(1) Ten shares in the Commercial Bank of Scotland, Limited, taken in name of "Captain James Baillie and Mrs Mary Annie Campbell or Baillie, spouses, Castletown, Caithness, and the survivor," conform to share certificate dated 18th March 1898. (2) Dividend of £16 thereon vouched by dividend warrant, dated 1st July 1898, payable to "James Baillie and Mrs Mary Annie Baillie." (3) Sum of £1425 in deposit-receipt dated 31st May 1898, granted by the Commercial Bank of Scotland, Limited, Castletown, in name of "Captain James Baillie and wife, Mary Annie, Castletown, to be repaid to either or survivor;" and (4) Articles of household furniture and plenishings of no great value. He left no heritable estate. Except in so far as the destination contained in the share certificate may be found to have involved any innovation upon the terms of the mutual disposition and settlement, that disposition and settlement had not been

altered or revoked during the lifetime of the spouses.

Mrs Baillie survived her husband only a few days, and died at Castletown on 17th July 1898, without obtaining confirmation to her husband's estate. Apart from the mutual-disposition and settlement, Mrs Baillie had not executed any deed regulating the succession to her estate.

Mrs Baillie's brother was duly decerned and confirmed as her executor-dative, the confirmation in his favour including the estate left by James Baillie.

Questions having arisen as to the effect of the mutual-disposition and settlement, the present special case was presented for the opinion and judgment of the Court.

The parties to the case were (1) Mrs Baillie's executor-dative; (2) Mrs Baillie's brother as an individual, and also as executor-dative *qua* next-of-kin of another brother who had survived Mrs Baillie, and had been originally a party to this case, but died while it was in dependence, these two having been her sole surviving next-of-kin and heirs *in mobilibus ab intestato;* (3) James Baillie's four brothers, being his sole next-of-kin and heirs *in mobilibus ab intestato.*

The first and second parties contended that the peculiar terms of the destination by each spouse in favour of the other in case he or she should survive instructed that the bequest was intended solely as a provision for the surviving spouse; that the reference to heirs, executors, and assignees in the destination did not imply a conditional institution of these persons, but merely a substitution of them in the event of the spouse called as institute obtaining a vested right by survivance, and dying without altering the destination; and that the destination created by the surviving spouse entirely lapsed and became inoperative upon the predeceaser's death. They accordingly claimed that the whole estate of the deceased James Baillie passed to Mrs Baillie by virtue of said mutual-disposition and settlement, that she died intestate, and that upon her death the right to uplift the estate passed to the first party as executor-dative of Mrs Baillie for behoof of the second parties, her next-of-kin.

The third parties on the other hand submitted that by virtue of the destination created by James Baillie his whole means and estate passed to Mrs Baillie as surviving spouse, and that as she did not alter or revoke the destination created by her in the mutual deed, she died testate, and that her estate, including the estate bequeathed to her by her husband, passed by virtue of the destination created by her in that deed to the third parties as conditional institutes in the destination *qua* heirs and executors of James Baillie.

The questions of law for the opinion and judgment of the Court were as follows—1. Did the said Mrs Mary Annie Campbell or Baillie die intestate, with the result that the second parties as her next-of-kin are now entitled to her whole moveable estate, including the estate bequeathed to her by her husband, the said James Baillie, under the said mutual-disposition and settlement? or 2. Did the bequest by Mrs Baillie contained in the said mutual-disposition and settlement remain operative, notwithstanding the predecease of her husband, with the result that the third parties—the next-of-kin of the husband—are now entitled to the said moveable estate as conditional institutes in the bequest?

Argued for the first and second parties—Nothing was given by the wife to the husband and his heirs except in the event of his being the survivor. This was obviously the intention of the makers of the settlement. The gift was specially made contingent upon survivance, and the survivor was appointed executor. The words "though found lying by either of us at the time of his or her predecease" showed the time at which the settlement was to come into effect. There was no rule of law which prevented the deed receiving the construction now contended for. No doubt the general rule was that a legacy to A and his heirs was effectual to A's heirs if A predeceased the testator, but there was an exception when it was shown that the gift was conditional upon survivance—*Findlay* v. *Mackenzie*, July 9, 1875, 2 R. 909. That case ruled the present. Indeed, this case was *a fortiori*, because there the limitation "in the event of her surviving me" occurred only in the narrative of the deed, whereas here the corresponding words were in the dispositive clause. The distinction between the case of *Findlay* and the case of *Halliburton* v. *Halliburton*, June 26, 1884, 11 R. 979, was that in the former case there were words specially limiting the gift to the event of the beneficiary's survivance, whereas in the latter there were no such words, and the general rule received effect. Doubtless all legacies were contingent upon survivance, but where words specially limiting the gift to that event were used by the testator in a legacy to A and his heirs they had been held not to be superfluous, but to show an intention on the part of the testator not to give the legacy to A's heirs as conditional institutes. The same result might follow where even without such words as were found here, that was shown to be the testator's intention — *Russell's Trustees*, June 30, 1887, 14 R. 849.

Argued for the third parties—This case was ruled by *Halliburton* v. *Halliburton*, *cit.* In *Findlay* v. *Mackenzie*, *cit.*, the Court were dealing with a provision by a husband for his wife. A provision could only receive effect in the event of survivance. This was not a case of a provision. A wife was under no obligation to provide for her husband. The plain meaning of the words used was that the husband was to take if he survived, but if he did not, that his heirs were to take. This interpretation gave effect to all the words used, whereas the opposite contention gave no effect to the words "and to his heirs, executors, and assignees whomsoever." The general rule was in favour of the contention of these parties — *Findlay*, *cit.*, *Halliburton*, *cit.*, *Cleland* v. *Allan*, January 13, 1891, 18 R.

377, where there was a gift of heritage, and the wife was made executrix and universal legatrix—*Boston* v. *Horseburgh*, February 13, 1781, M. 8099. There was nothing in this deed to prevent the application of the general rule. Indeed, a consideration of the particular words used was favourable to its application. The settlement was pactional, as was shown by the use of the word "agreed." The power to revoke was confined to the period of the spouses' joint lives. The wife was not entitled to revoke after her husband's death. That provision could only be intended to prevent her defeating the rights of the husband's heirs.

LORD TRAYNER—I cannot say that I have found this case altogether unattended with difficulty. The general rule is that where a testator bequeaths estate to a person named "and his heirs, executors, and successors" the legacy does not lapse by the predecease of the legatee, but is taken by his heirs. That rule is however not without exception, as was instanced in the case of *Findlay* v. *Mackenzie*. I think that case is more applicable to the present than the case of *Halliburton*, and accordingly I think the views adopted in *Findlay* v. *Mackenzie* should be followed here, and the first question answered in the affirmative.

LORD YOUNG concurred.

LORD MONCREIFF—Having regard to the scheme of the mutual disposition and settlement executed by Mr and Mrs Baillie, and the terms in which it is expressed, I am of opinion that on Mrs Baillie surviving her husband she became absolute proprietor of the property settled upon her by her husband as well as of her own means and estate; and that the settlement made by her in the deed on her husband, "his heirs, executors, and assignees whomsoever," was evacuated to all intents and purposes.

It is true that in the absence of contrary intention, when a legacy is destined to a legatee, and "his heirs, executors, and assignees," these words import a conditional institution of the heirs, executors, and assignees in the event of the predecease of the legatee. But in the present case I am satisfied the whole gift was intended to be contingent on the husband's survivance.

The case of *Findlay* v. *Mackenzie*, July 9, 1875, 2 R. 909, is an authority directly in point. The case cited for the third parties on the other hand—*Halliburton* June 26, 1884, 11 R. 979—is distinguishable, because in that case the bequest was not "made conditional upon the survivance of the institute."

I therefore think that the first question should be answered in the affirmative, and the second in the negative.

The LORD JUSTICE-CLERK concurred.

The Court answered the first question in the affirmative.

Counsel for the First and Second Parties—C. K. Mackenzie—M'Lennan. Agents—Mackenzie & Black, W.S.

Counsel for the Third Parties—Campbell, Q.C.—Chree. Agents—Macpherson & Mackay, S.S.C.

*Friday, June* 16.

## FIRST DIVISION.

[Lord Pearson, Ordinary.

## MILN *v.* ARIZONA COPPER COMPANY, LIMITED.

*Company—Preference Shares—Cumulative Dividend—Payment out of Profits of Each Year.*

The articles of association of a company contained this clause—"The holders of preferred shares shall be entitled to receive out of the profits of each year a cumulative preferential dividend for such year at the rate of 10 per cent. per annum on the amount for the time being paid upon the preferred shares held by them respectively, and the surplus profits in each year shall belong, one-half to the holders of the preferred shares, and the other half to the holders of the deferred shares."

*Held* that the preference shareholders were entitled to a cumulative dividend of 10 per cent., so as to have the deficiency in one year paid out of the profits of a subsequent year.

The Arizona Copper Company, Limited, was originally incorporated on 11th August 1882 for the purpose of acquiring and working certain copper mines in Arizona, U.S.A.

In 1884 a new company was incorporated which took over the property and undertaking of the old company, with all its rights and liabilities.

By article 7 of the articles of association of the new company (which was in the same terms as the corresponding article in the old company) it was provided—"Subject to the provisions of the said agreement the holders of preferred shares shall be entitled to receive out of the profits of each year a cumulative preferential dividend for such year at the rate of 10 per centum per annum on the amount for the time being paid up on the preferred shares held by them respectively, and the surplus profits in each year shall belong, one-half to the holders of the preferred shares, and the other half to the holders of the deferred shares."

An action was raised by Alexander Miln, Baltic Street, Dundee, and Mr John Gill, S.S.C., Edinburgh, against the Arizona Copper Company, concluding, *inter alia*, for declarator—"*Seventh*, that under and in terms of the articles of association and constitution of the said company, the holders of the preferred shares thereof are not entitled to receive out of the profits of the current year or any future year a cumulative preferential dividend for any former year, but are entitled to receive out of the profits of each year a preferential dividend at the rate of 10 per centum per annum on the amount for the time being paid up on the preferred shares held by them respectively, and that one-half of the surplus profits in each year beyond the said preferential dividend on the preferred shares belong to the holders of the preferred