Friday, June 14.

SECOND DIVISION.

FORSYTH *v.* FORSYTH.

Fee—Conditions Imposed on Gift of Fee—Repugnancy — Disposition — Clause of Transmission in Certain Event.

A, the owner of certain heritable subjects, by gratuitous disposition, *inter vivos*, disponed them to B, his daughter, in liferent for her liferent use allenarly, and to C, his granddaughter, in fee, but under the express condition and declaration, *inter alia*, that in the event of C predeceasing A before attaining the age of 25, without leaving issue, the subjects should revert to A; and in the event of A predeceasing C before she attained that age, that the subjects should transmit to B, and failing her, to A's own heirs.

The disposition was recorded on behalf of B in liferent for her liferent use allenarly, and C in fee; and B, the liferentrix, entered into possession of the subjects. Thereafter, A the granter died before C the fiar had attained the age of 25.

Held that the clause of transmission to B, in the event of A dying before C had attained the age of 25, being repugnant, could not receive effect, and that the fee of the property in question belonged to C.

By disposition, *inter vivos*, dated 21st June 1898, Robert Cruikshank, ironfounder, Denny, "for the favour and affection which he had and bore to his daughter and granddaughter after mentioned," assigned and disponed to his daughter "Margaret Cruikshank or Forsyth, wife of James Forsyth, baker, Kirkintilloch, in liferent for her liferent use allenarly, and to" his "granddaughter, Agnes Forsyth, daughter of the said Mrs Margaret Forsyth, in fee, and to the heirs of her body, heritably and irredeemably, all and whole," certain heritable subjects in Kirkintilloch belonging to him.

The disposition was granted subject to the following condition and declaration, which immediately followed the description of the subjects—"But these presents are granted under the express condition and declaration that these presents shall be exclusive of the *jus mariti* and right of administration of the present husband, or of any husband whom my said assignee and disponees may marry, that the liferent to my said daughter is purely alimentary, and shall not be assignable by her nor arrestable for her debts, nor attachable by the diligence of her creditors, and also that the said Agnes Forsyth shall not be entitled to borrow on the security of the subjects disponed, or to grant obligations burdening the same, or to sell or dispone the same during the lifetime of me and my wife without my consent or the consent of my wife, should she survive me; and in the event of the said Agnes Forsyth dying before attaining the age of twenty-five (without leaving issue) survived by me, the said subjects shall revert to me, and these presents shall, *ipso facto*, become void and null, and in that event I shall be entitled to deal with the subjects as my own, and to sell or burden the same as freely as if these presents had never been granted; and in the event of my predeceasing my granddaughter before she attains said age, the subjects shall transmit to my said daughter, and failing her, to my own heirs whomsoever."

The disposition was duly recorded in the Register of Sasines by the authority of the granter on 25th January 1899 on a warrant of registration on behalf of the said Mrs Forsyth in liferent for her liferent use allenarly, and the said Agnes Forsyth in fee. The liferentrix thereafter entered into possession of the subjects.

Robert Cruikshank died on 27th July 1900, survived by his widow and by a son and two daughters, one of whom was the said Mrs Margaret Forsyth. He was also survived by the said Agnes Forsyth. At the date of his death Agnes Forsyth had not attained the age of 25 years.

He left a trust-disposition and settlement whereby he disponed his whole means and estate, heritable and moveable, to trustees, and directed them, *inter alia*, to divide the residue of his estate among his children, subject to the liferent use thereof by his widow.

His widow died on 5th November 1900.

Questions having arisen as to the effect of the disposition of 21st June 1898, a special case was presented for the opinion and judgment of the Court.

The parties to the special case were—(1) Miss Agnes Forsyth, (2) Mrs Margaret Forsyth, and (3) Robert Cruikshank's testamentary trustees.

The first party maintained that by virtue of the recorded destination she was fiar of the property absolutely, subject to the liferent of Mrs Forsyth, her mother. With reference to the clause of transmission to her mother, she submitted that it was a mere substitution defeasible at her pleasure; or otherwise, that it was repugnant to the gift in the destination itself, and could not receive effect; or otherwise, that it only applied in the contingency of her dying before she reached the age of twenty-five. The second party contended that the granter having predeceased Agnes Forsyth (the first party) before she attained the age of twenty-five, the fee of said property belonged to the second party, or in any event, that her liferent over said property still subsisted. The third parties maintained that the gift to Agnes Forsyth being conditional upon her attaining the age of twenty-five years before the death of the granter, and this condition not having been fulfilled, the said gift was not effectual. They further maintained that the clause of transmission to Mrs Forsyth was repugnant to the gift of the liferent in the said destination; or otherwise, that the destination itself and the clause of transmission were ambiguous, and could not receive effect. They therefore claimed the said property for the general purposes of the trust.

The question of law for the opinion and judgment of the Court was as follows—"(1) Does the fee of the property conveyed by Mr Cruikshank in his disposition of 21st June 1898—(*a*) Belong to the first party, Agnes Forsyth? or (*b*) Does it belong to the second party, Mrs Forsyth? or (*c*) Does it fall to be administered by the third parties, Mr Cruikshank's trustees, as part of the general trust estate?"

Argued for the first party—The disposition conveyed the fee of the subjects in question to the first party subject to her mother's liferent. That was clearly the granter's intention, and the clause of transmission in favour of the second party should be read as if it contained the words "and of her (*i.e.*, the first party) dying without issue." To read it literally, in the event which had happened, would deprive the first party of all right whatever. The clause of transmission might be read as a substitution defeasible at the pleasure of the first party—*Mackay* v. *Campbell's Trustees*, January 13, 1835, 13 S. 246, *per* Lord Medwyn at p. 250. (2) Alternatively, the clause was repugnant to the gift of fee already given by the dispositive clause, and it was well-settled that the latter must rule—*Young's Trustees* v. *Young*, July 19, 1867, 5 Macph. 1101, *per* Lord Ormidale (Ordinary) at p. 1107.

Argued for the second party—The gift in favour of the first party was qualified by the condition that in the event of the granter's predecease before the first party attained the age of twenty-five the subjects should revert to the second party. That event had happened. The intention was that until the first party reached twenty-five she should not be absolute fiar. That view was supported by the clause forbidding her to borrow on the security of the subjects. The clause of transmission to the second party was not a substitution but a clause of return, which must be read as a condition of the grant. The fact that it was conceived in favour, not of the grantee, but of a third party made no difference—*Lawson* v. *Imrie*, June 10, 1841, 3 D. 1001, *per* Lord Mackenzie; Ersk. Inst. iii. 8, 45. The grant here was gratuitous, and the first party was not entitled to defeat it even onerously. (2) There was no repugnancy.

The third parties formally maintained the contentions stated by them in the case.

At advising—

LORD JUSTICE-CLERK—The deed in this case contains a gift of the fee of certain estate belonging to the granter to the first party, the liferent being reserved to her mother, the second party. The question is, whether under a special clause occurring in the latter part of this deed the fee is, in the circumstances which have occurred, taken away from the first party so that she is divested and the fee goes to the second party. The granter desired to provide against certain cases which might occur. He provides that if the first party should predecease him before reaching twenty-five years of age without leaving issue the property is to revert to him. He then adds the clause which raises the question, which is—"And in the event of my predeceasing my granddaughter (the first party) before she attains the said age the subjects shall transmit to my said daughter (the second party), and failing her to my own heirs whomsoever." Now, if this clause were to be taken as an expression of intention in the sense of its words, it would, if the event contemplated occurred, completely upset what upon the rest of the deed was his plain intention, viz., that his granddaughter and her family should benefit by having the fee of his estate after the expiry of a gift of liferent to her mother. Under such a reading as the second party maintains, if the first party married and had children, but the granter died a day before she attained twenty-five years, both she and her children would be deprived of the benefits which he had by the rest of the deed expressly conferred upon her and her issue, even were she to attain twenty-five years and live for many years afterwards. This result would be absolutely repugnant to the whole of the rest of the deed. It cannot be doubted that the clause has been badly drawn up, and I think it would not be difficult to guess what it was really intended to effect. But I think it must be held that it is ineffective to deprive the first party of the right of fee conferred upon her, and that the first branch of the question in the case should be answered in the affirmative, and the other branches in the negative.

LORD YOUNG—I agree. In my opinion the only operative clause in the deed regarding this heritable property is the clause whereby the granter assigns and dispones the same to his daughter in liferent for her liferent use allenarly, and to his granddaughter in fee. The liferent is distinctly given to his daughter and the fee to his granddaughter. The deed was duly recorded, and there is therefore a completed right in these two parties. With respect to the clause to which your Lordship has referred, I think it is inoperative to affect the clause which I have read. The questions should therefore be answered as your Lordship proposes.

LORD TRAYNER — Lord Moncreiff has kindly communicated to me the import of his opinion, and I concur with his Lordship.

LORD MONCREIFF—In this case the first party, Miss Agnes Forsyth, and the second party, her mother Mrs Forsyth, are infeft in fee and liferent respectively in certain subjects which were disponed to them *inter vivos* by Robert Cruikshank, the father of the second party, and the grandfather of the first party.

The deed contains a clause of devolution or return in the following terms:—"And in the event of my predeceasing my granddaughter" (that is, the first party) "before she attains said age" (twenty-five years) "the subjects shall transmit to my said daughter" (the second party), "and failing her to my own heirs whomsoever."

When Robert Cruikshank died on 27th July 1900 Agnes Forsyth had not attained the age of twenty-five years, and it is contended on behalf of the second party that right to the fee of the property has now devolved on her.

The clause of devolution occurs in a fee-simple disposition, and is not fenced with irritant and resolutive clauses. But such clauses of devolution or return, although not frequently met with in a fee-simple destination, are not necessarily to be refused effect. They are or may be a condition of the grant.

But if a clause of the kind is to receive effect, and the person who is infeft in fee in a heritable property is to be divested in respect of it, it must be expressed in clear and unambiguous language.

The difficulty in this case is that although we may surmise that some words (probably "and of her dying without leaving issue") have been omitted, the clause as it stands, taken literally and apart from its context, is grammatical and can be given an intelligible meaning, viz., that if the disponer predeceases Agnes before she reaches the age of twenty-five, the property is to devolve on her mother or revert to the disponer's heirs. So far there is no ambiguity, and improbable as it is that this clause as it stands expresses the disponer's intention, I have some hesitation in refusing to give effect to its apparent meaning.

But when it is contrasted with a clause of return, which occurs in an earlier part of the deed, I think we have sufficient grounds for holding that it may be rejected on the ground of repugnancy. The earlier clause runs thus—"And in the event of the said Agnes Forsyth dying before attaining the age of twenty-five (without leaving issue) survived by me, the said subjects shall revert to me, and these presents shall, *ipso facto*, become void and null, and in that event I shall be entitled to deal with the subjects as my own, and to sell or burden the same as freely as if these presents had never been granted."

Under this clause it will be observed (1) that if Agnes predeceases the disponer before attaining the age of twenty-five, the subjects do not transmit to her mother, but at once revert to the disponer absolutely, with the result apparently that even the second party's liferent vanishes.

But (2), if Agnes leaves issue, the subjects do not revert to the disponer, even although she predeceases him before reaching the age of twenty-five.

Turning now to the concluding clause of devolution, it provides that even if Agnes survives the disponer, and whether she has issue or not, the subjects are to transmit to the second party (who under the former clause would have got nothing at all if Agnes had predeceased the truster before reaching twenty-five without leaving issue, and who would not have got the fee of the estate if Agnes had left issue) and failing her to the disponer's heirs.

Suppose that the second party predeceased the disponer and Agnes, we should then have to deal with two clauses of return. Under the first one, if Agnes predeceased the disponer before reaching the age of twenty-five leaving issue, the property would not return to the disponer. But under the second clause, if the disponer predeceased her before she reached that age, she would, although she had issue, be immediately divested, and the subjects would revert to the disponer's heirs, which seems absurd.

Although with some difficulty, I think that the second clause is repugnant, and that we are entitled to refuse to give effect to it.

I therefore answer question 1 (*a*) in the affirmative, and 1 (*b*) and 1 (*c*) in the negative.

The Court answered the first branch of the question of law in the affirmative, and the second and third branches of the question in the negative.

Counsel for the First Party—Constable. Agent—James Skinner, S.S.C.

Counsel for the Second Party—Graham Stewart. Agent—Charles Munro, S.S.C.

Counsel for the Third Parties—J. C. Watt. Agent—J. W. Deas, S.S.C.

Saturday, June 15.

FIRST DIVISION.

[Lord Stormonth-Darling, Ordinary.

WHYTE *v.* WHYTE.

Parent and Child—Aliment—Son Engaged in Learning a Profession.

A young man engaged in learning a profession is entitled to reasonable aliment from his parents.

Circumstances in which *held* that a stockbroker's clerk, who was preparing to enter that profession, and was earning a salary of £40, with no other means of support, was entitled to aliment from his mother at the rate of £12 a-year.

David Whyte, stockbroker's apprentice, Edinburgh, brought an action against his mother, Mrs Sarah Jane Wildsmith or Whyte, widow of the late David Whyte, live-stock agent, Cupar-Fife. The conclusions of the summons were that the defender should be ordained "to make payment to the pursuer of the sum of £100 sterling yearly in name of aliment and expenses of learning his profession of stockbroker, or of such other sum, more or less, as our said Lords shall think just and reasonable in the situation of the parties . . . aye and until his mother shall receive him back into her house, or until he is set out in his profession and is able to support himself without the assistance of his mother."

In his condescendence Whyte averred that he was twenty years of age, had been well educated, and was now, with his mother's approval, a clerk in a stock-