Thursday, July 17, 1902.

SECOND DIVISION.

SWORD'S TRUSTEES *v.* SWORD.

Succession—Vesting—Direction to Pay to Certain Persons Named on Death of Widow—Effect of Direction to Pay Unclaimed Shares to Other Legatees and Issue of Legatees not Claiming—Accretion — Survivorship Clause — Vesting Postponed.

A testator directed his trustees on the death or second marriage of his wife, to whom he had given a liferent of residue, after realising his estate, to divide the residue equally among certain persons named, and the lawful issue of such of them as might have predeceased leaving lawful issue *per stirpes*. He provided that in the event of any of his residuary legatees or their issue failing to claim their respective provisions within one year from the death or second marriage of his wife, or within one year from the date of his death in the event of his surviving her, his trustees should pay such unclaimed shares of residue to his other residuary legatees and their lawful issue *per stirpes*, declaring that any forfeited shares of the residuary legatees should be paid to their issue in preference to his other residuary legatees. The testator was survived by his wife, the liferentrix, and by all the residuary legatees. Two of the residuary legatees predeceased the liferentrix, of whom one left issue and the other did not. *Held* that the direction with regard to lapsed shares was in effect a survivorship clause and gave a right of accretion which otherwise would not have existed; that vesting did not take place until the death of the testator's widow; that the share destined to the residuary legatee who had predeceased the liferentrix leaving issue now fell to be divided among his issue; and that the share destined to the residuary legatee who died without issue fell to be divided among the residuary legatees who had survived the liferentrix and the issue *per stirpes* of any surviving legatees who had predeceased her.

William Sword, sometime baker in Falkirk, died on 24th February 1894, leaving a trust-disposition and settlement and codicil dated respectively 29th December 1879 and 30th March 1892. By his trust-disposition and settlement he conveyed in general his whole heritable and moveable estates and effects to the trustees therein mentioned (whom he also nominated his executors), in trust for the purposes therein specified.

The first four purposes of the trust-disposition and settlement were as follows:—First, for payment of debts, widow's mournings, and expenses; second, for payment and delivery to the testator's widow of money in his house and in bank, and of the testator's household furniture; third, for payment to the testator's widow during her widowhood of the income of the free residue of the trust-estate, with certain powers to the trustees in regard thereto; and fourth, for payment, on the death or second marriage of the testator's widow, of certain legacies, two of which were revoked by the codicil.

The fifth purpose was in the following terms:—"I hereby direct and appoint my trustees upon the death or second marriage of my said wife, whichever of these events shall first happen, after realising and converting the whole rest and residue of my estates (so far as then unrealised) into cash, to divide the same to and equally among Marion Russell, Ann Russell, Margaret Russell, and Mary Russell, daughters of my deceased niece Margaret Sword or Russell, Andrew Sword, my nephew, presently residing in Australia, Andrew Sword and Thomasina Sword, children of my deceased nephew Thomas Sword, Ann Sword or Scott my niece, wife of the said John Tudhope Scott, and Ann Hutton or Wilson, daughter of the late Thomas Hutton, sailor, Grahamston, and wife of James Wilson, number one Howards Lane, Upper Parkfields, Richmond Road, Putney, London, share and share alike, and the lawful issue of such of my said residuary legatees as may have predeceased leaving lawful issue, such issue of my residuary legatees taking only equally among them the share which would have fallen to their deceased parent if alive. And it is hereby provided and declared that in the event of any of my said residuary legatees or their issue being abroad or in this country and their addresses not being known to my trustees at the time of the succession opening to them, and not claiming their respective provisions under this deed within the period of one year from and after the death or second marriage of my said wife, whichever of these events shall first happen, or within one year from the date of my death in the event of my surviving my said wife, my trustees shall be entitled and shall pay after the lapse of said period such unclaimed shares of residue to and equally among my other residuary legatees and their lawful issue, such issue always taking *per stirpes*, and the share to which they may become entitled going equally among them, declaring that any forfeited share or shares (if any) of my residuary legatees shall be paid to his, her, or their issue, in preference to my other residuary legatees on the lapse of the period foresaid, provided such issue claim the same in same way as if their parent or parents were dead. And such of my said residuary legatees or their issue as may have forfeited their share of residue by not claiming the same within the period foresaid shall have no claim for the same against my estate or said trustees, or any of them, or any other person or persons whatever, either under this deed or at common law, but the same shall be held as regards such of my said legatees or their issue who may not claim their share of residue as aforesaid within the period before mentioned to have lapsed and fallen."

The testator was illegitimate and left no issue.

The testator was survived by his wife Mrs Mary Binnie or Sword. She died on 29th May 1901 without having entered into another marriage, and on her death the *fifth* purpose of the trust-disposition fell to be carried into effect.

All the nine residuary legatees named by the truster in the said fifth purpose survived him; only seven of them however survived his widow the liferentrix, two having predeceased her. The two residuary legatees who predeceased the truster's widow were Andrew Sword, designed in the trust-disposition and settlement as "my nephew presently residing in Australia," and Andrew Sword, therein designed as a child "of my deceased nephew Thomas Sword." Andrew Sword, the truster's nephew, left a last will and testament dated 30th October 1895, appointing certain persons as his executors. He left issue who still survived. The said Andrew Sword, son of the truster's deceased nephew Thomas Sword, died on 20th November 1899, intestate and without having been married. He was predeceased by his father and mother. He was survived by his sister Mrs Thomasina Sword or Sinclair, who was his only next-of-kin.

All the first four purposes of the trust-disposition and settlement having either been satisfied or lapsed except the provision for payment of the expenses of the trust, and questions having arisen with regard to the rights of parties in the shares of residue which were bequeathed to Andrew Sword, the testator's nephew, and Andrew Sword, son of the testator's deceased nephew Thomas Sword, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were—(1) the trustees; (2) the seven residuary legatees who survived the testator's widow, with the husbands of those of them who were married women; (3) the executors nominated and appointed and acting under the last will and testament of Andrew Sword, the testator's nephew; (4) the surviving children of Andrew Sword, the testator's nephew; (5) Mrs Thomasina Sword or Sinclair, with consent and concurrence of her husband, as next-of-kin of Andrew Sword, son of the testator's deceased nephew Thomas Sword; and (6) the Lord Advocate as representing His Majesty as *ultimus hæres*.

With reference to the share bequeathed to Andrew Sword, nephew of the truster, it was maintained by the third parties that the said share vested in him *a morte testatoris*, and fell to be paid to them as his executors under his said last will and testament. On the other hand, it was maintained by the fourth parties that the fifth purpose of the truster's settlement constituted a destination-over in favour of the issue of residuary legatees who should predecease the period of distribution, or in other words, that if there were vesting *a morte testatoris*, it was vesting subject to defeasance in the event of the residuary legatee dying before the date of division and leaving issue. The fourth parties, as the children of the said deceased Andrew Sword, therefore claimed said share.

With regard to the share bequeathed to Andrew Sword, son of the truster's deceased nephew Thomas Sword, it was maintained by the fifth party, as his sole next-of-kin, that the said share vested in the said Andrew Sword *a morte testatoris*, and now fell to be paid over to her; the second parties maintained that the bequest of the said share to the said Andrew Sword lapsed by his having predeceased the truster's widow, and was payable to them as the residuary legatees who survived the truster's widow; the sixth party maintained that the bequest of the said share lapsed, and that the share fell into intestacy and passed to the Crown.

The questions of law were as follows:—"(1) Did the share of residue bequeathed to Andrew Sword, nephew of the truster, vest in him absolutely on the death of the truster, and if so, does the said share now fall to be paid to the third parties as his executors under his last will and testament? (2) In the event of the first question being answered in the negative, does the said share fall to be divided among the fourth parties as the whole surviving children of the said Andrew Sword, the truster's nephew? (3) Did the share of residue bequeathed to Andrew Sword, son of the truster's deceased nephew Thomas Sword, vest in him on the death of the truster, and if so, does the said share fall to the fifth party as his sole next-of-kin? Or does said share fall to the second parties as residuary legatees foresaid? Or does said share fall to the sixth party as intestate succession of the truster?"

Argued for the third and fifth parties—Vesting took place *a morte*. There was no survivorship clause and no destination-over. The present case was ruled by the decision in *Matheson's Trustees* v. *Matheson's Trustees*, February 2, 1900, 2 F. 556, 37 S.L.R. 409. The case of *Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142, 18 S.L.R. 103, was distinguishable, for in that case there was a destination-over. The following authorities were also cited — *Wilson's Trustees* v. *Quick*, February 28, 1878, 5 R. 697, 15 S.L.R. 395; *Ross's Trustees* v. *Ross*, November 16, 1897, 25 R. 65, 35 S.L.R. 101; *Parlane's Trustees* v. *Parlane*, May 17, 1902, 39 S.L.R. 632; *M'Alpine*, March 20, 1883, 10 R. 837, 20 S.L.R. 551. There was no accretion here—*Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191, 23 S.L.R. 830.

Argued for the second parties—Vesting was postponed. There was accretion, for the rule in *Paxton's* case was not an absolute rule, but dependant on the facts and circumstances of each case. Andrew Sword, the truster's grandnephew, left no issue, and his share accresced to the other residuary legatees — *Menzies' Factor* v. *Menzies*, November 25, 1898, 1 F. 128, 36 S.L.R. 116.

Argued for the fourth and sixth parties—Vesting was postponed to the date of

distribution. The gift was several and not joint, and so there was no room for accretion—*Farquharson* v. *Kelly*, March 20, 1900, 2 F. 863, 37 S.L.R. 574.

At advising—

LORD TRAYNER—The truster by the fifth purpose of his settlement directed his trustees on the death of his widow to realise his estate and divide it among certain persons named, "share and share alike," and the lawful issue of such of the residuary legatees "as may have predeceased leaving lawful issue." By the same purpose of the trust he directed that, should any of the residuary legatees fail to claim their share within twelve months of the succession thereto opening to them, his trustees should pay the unclaimed shares of residue "to and equally among my other residuary legatees and their lawful issue, such issue always taking *per stirpes*." Now, while the direction to pay the residue to the residuary legatees named, "share and share alike," would not in itself have conferred a right on any of them to claim, as by way of accretion, any share of the residue which had lapsed, either by the death of one of the residuary legatees without issue or by his failure to claim the same within the time prescribed by the truster, yet the direction to pay such lapsed shares "to and equally among my other residuary legatees and their lawful issue" appears to me to confer such a right of accretion and to be in effect and substance a survivorship clause. Taking the whole of the fifth purpose together, I read it as directing payment or division of the residue among the legatees named and the survivors of them, or the issue of predeceasing legatees—that is, legatees predeceasing the period of division. If that view of the truster's settlement is taken, then the questions before us are ruled, in my opinion, by the decision in *Bryson's Trustees*, on the authority of which I hold that vesting was postponed until the death of the truster's widow, and that no right was conferred on any of the residuary legatees named until that event happened. But the issue of any predeceasing legatee are, by the express direction of the truster, substituted to the predeceasing parent, and take the share (equally among them) which the parent would have taken had he survived. I am therefore of opinion that the share destined to the truster's nephew Andrew Sword falls to be divided among his surviving children, and the share destined to Andrew, the truster's grandnephew, falls to be divided among the residuary legatees who survived the widow, and the issue *per stirpes* of any residuary legatees who predeceased her.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties to the special case, answer the first question of law therein stated in the negative, and the second question of law therein stated in the affirmative; answer the third question of law therein stated by finding that the share destined to Andrew Sword, son of the truster's deceased nephew Thomas Sword, falls to be divided among the residuary legatees who survived the truster's widow and the issue *per stirpes* of any surviving legatees who predeceased her: Find and declare accordingly and decern."

Counsel for the First, Second, and Fourth Parties—Cullen. Agent—Henry Smith, W.S.

Counsel for the Third and Fifth Parties—Orr. Agents—Coutts & Palfrey, S.S.C.

Counsel for the Sixth Party—C. N. Johnston, K.C.—Guy. Agent—W. G. L. Winchester, W.S.

Thursday, July 17.

SECOND DIVISION.

PARISH COUNCIL OF STORNOWAY *v.* PARISH COUNCIL OF EDINBURGH.

Poor—Settlement—Residential Settlement—Continuous Residence for More than Three Years and Less than Five during Period Some Years Prior to Commencement of 1898 *Act—Poor Law (Scotland) Act* 1898 (61 *and* 62 *Vict. c.* 21), *sec.* 1.

A man who was born in the parish of A, resided continuously in the parish of B for three years and two months between March 1888 and May 1891. He thereafter resided in the parish of B from June 1893 to February 1895. He received temporary relief in February 1895 and September 1896, and ultimately became permanently chargeable in 1899. *Held* that his continuous residence in the parish of B for three years and two months between March 1888 and May 1891 was not such residence "before" the commencement of the Poor Law (Scotland) Act 1898 as to give a residential settlement under the provisions of section 1 of that Act, and that the pauper was now chargeable to his birth parish.

Parish Council of Falkirk v. *Parish Councils of Govan and Stirling*, June 12, 1900, 2 F. 998, 37 S.L.R. 759, *distinguished* and *commented on per* the Lord Justice-Clerk.

This was a special case presented for the opinion and judgment of the Court upon the question whether a pauper, John Maclennan, was chargeable to the parish of Stornoway or to the parish of Edinburgh.

The facts in the case were as follows:—John Maclennan was born in the parish of Stornoway in 1853. He resided in the following parishes for the following periods—(*a*) St Cuthbert's from March 1888 to May 1891, a period of three years and two