Friday, July 12.

TAYLOR *v.* GRAHAM.

(Before the Lord Chancellor, Lord Hatherley, Lord Blackburn, and Lord Gordon.)

[*Ante*, p. 32, November 3, 1877, 5 Rettie 49.]

Succession—Vesting—Condition Personal to Legatee. The residue of an estate was destined in equal shares to A, B, and C in liferent, and to their children in fee equally among them *per stirpes*. Failing issue of A or B the survivor was to liferent the predeceaser's share, and failing issue of both, their two-third shares were to go to C and her children *per stirpes* as provided with respect to her own share of the estate. C predeceased A and B, who both died without issue. *Held* [*rev.* judgment of Court of Session] that part of these shares had vested in a child of C who had died without issue before the date of the expiry of the liferent interest enjoyed by A and B.

This was an appeal from a decision by the Second Division in a Special Case raising the question of the construction of a testamentary deed. The nature of the case and the terms of the deed sufficiently appear from the report of the case in the Court of Session [November 3, 1877, *ante*, p. 32, 5 R. 49] and from the opinion delivered by Lord Gordon *infra*.

Mrs Taylor, one of the parties excluded from participation by the Court of Session, appealed to the House of Lords.

At delivering judgment—

Lord Gordon—My Lords, I think there is no difference between the law of England and that of Scotland in the principle ruling the decision of this case. The ruling principle in the construction of all testamentary deeds is the intention of the testator, and that is to be gathered from the words used; and, as Lord Westbury said in the case of *Young* v. *Robertson* (4 Macqueen 312), "it is satisfactory when in the legal construction of ordinary words in the English language there is no difference in the view which is taken in the one country and in the other."

The testator here directed his trustees to hold and apply the whole residue of his estate "for behoof of my several nieces after named and their children in the following proportions, viz., one-third part or share thereof for behoof of Jane Gilbert in liferent, and of the lawful child or children to be procreated of her body equally among them if more than one in fee; one-third part or share thereof for behoof of Cecilia Buchanan Gilbert . . . in liferent, and of the lawful child or children to be procreated of her body equally among them if more than one in fee;" and the remaining one-third the testator left for behoof of his nieces, the four children of Colin M'Cainsh, equally among them in liferent, "and of the lawful child or children procreated or to be procreated of their bodies equally among them *per stirpes* in fee; or one-fourth share of the said third part to the child or children respectively of each of my said nieces, equally among them if more than one in fee." The testator then declares that the said provisions made in favour of his said nieces respectively shall be for their liferent alimentary use allenarly, "and the fee thereof for the use of their children," and as such the same shall be exclusive of *jus mariti*, and shall not be affectable by creditors. And he provided and appointed that in case either of his nieces Jane and Cecilia Gilbert should die unmarried or without leaving lawful children, or in the event of such children existing but afterwards deceasing before attaining the years of majority or being married, then, and in either of these events, the deceaser's share of the residue should fall and accrue to the survivor of them and her lawful child or children in liferent and fee, and upon the same terms as provided to the predeceaser and her issue. And then there follows the provision under which the question arises which your Lordships are called on to determine. The words used are as follows:—"And in case both of my said nieces Jane and Cecilia Buchanan Gilbert shall die unmarried or without leaving lawful children, or in the event of such children existing but afterwards deceasing before attaining the years of majority, or being married, then, and in either of these events, their said shares of the residue of my estate shall fall and accrue to my other nieces, the said Christian, Margaret, Grace, and Helen M'Cainsh, and their children respectively in liferent and fee, and equally among them *per stirpes*, as provided with respect to their own shares of my estate." I think these latter words are very important with reference to what has been before provided with regard to the shares given to the M'Cainsh family, and to the clause which immediately follows, and which is in these words—"And further, I hereby provide and appoint that in case any or either of my said nieces, Christian, Margaret, Grace, and Helen M'Cainsh, shall die unmarried or without leaving lawful children, or in the event of such children existing but afterwards deceasing before attaining the years of majority or being married, then, and in either of these events, the deceaser's share of the residue of my said estate shall fall and accrue to the survivors or survivor of them and their children respectively in liferent and fee equally among them *per stirpes* as aforesaid."

I think these are all the provisions in the deed which it is necessary to advert to, and I shall now shortly refer to the history of the families concerned.

Cecilia Gilbert, the liferentrix of one-third share, died on the 9th July 1870, leaving no children, her only child having died in infancy many years before her. On the death of Cecilia her third share fell in terms of the settlement to be liferented by Jane Gilbert, who thus became entitled to the liferent of two-third shares. Jane Gilbert died on 22d March 1877, also without leaving issue, and the question now arises as to the proportion in which the fee of the two shares which were liferented by Jane Gilbert are now divisible among the representatives of the M'Cainsh family.

Christian, Margaret, Grace, and Helen M'Cainsh, the liferentrices of the remaining third share of the estate, are all dead. Helen (Mrs Stewart) died childless on 28th March 1850. Christian (Mrs M'Culloch) predeceased the testator, leaving several children. Margaret (Mrs Maclaren) died on 25th November 1869, also leaving several children. Grace (Mrs Taylor) was

survived by two children, James and Colin Taylor. Colin died in pupillarity in 1845. James Taylor, as to whose share the present question arises, died intestate on 9th June 1859, twenty-five years of age and married, but without issue. His widow, Mrs Jessie Watling or Taylor, succeeded to one-half of his estate *jure relictæ*, and the testamentary trustees of his father succeeded to the other half as his next-of-kin. The children of Mrs M'Culloch and Mrs Maclaren claim respectively one-half of the fee of the two-thirds of the estate which were liferented by Jane Gilbert, while the representatives of James Taylor claim that the said two-thirds should be divided into three portions, and that they should be found entitled to one of those portions, the other two falling to the families respectively of Mrs M'Culloch and Mrs Maclaren.

The question which has arisen must of course be decided according to the intention of the testator. Now, there can be no doubt that the testator intended, in the event, which has happened, of the two liferentrices Cecilia and Jane Gilbert dying without children, that the fee of their shares should go to the children of the M'Cainshes, and should fall and accrue to them equally among them *per stirpes*, as provided with respect to their own shares of his estate. I think it is of importance to observe that the shares were to be divided among the children *per stirpes*. The testator takes care to use these words every time he has occasion to refer to the division of the fee among the children of the M'Cainsh nieces, and when he is providing for the fee of the third share which was liferented by these four nieces he not only uses the words *per stirpes*, but apparently, lest there should be any mistake as to his meaning, he adds "or one-fourth share of the said third part to the child or children respectively of each of my said nieces equally among them if more than one in fee." I think this leaves no room for doubt that the testator intended that the children of each niece should take a share of the fee of his estate. No doubt there were personal conditions attached to the children, namely, that they were not to take unless they attained the years of majority or were married. But as soon as these conditions were fulfilled I think the children each became possessed of a vested right in the fee. There was no condition that the children should survive the liferentrices, either their own mothers (the M'Cainshes) or the Gilberts. Of course the payment of the fee was postponed till the death of the liferentrices, but this did not affect the vesting, which I think took effect on the children attaining majority or being married. It is admitted in the Special Case—and there can be no doubt on the point—that so far as concerns the third share of the residue which was liferented by the four M'Cainsh nieces the fee vested in the children who attained majority, and this being admitted *quoad* that share, I am at a loss to understand how it should be disputed *quoad* the shares which were liferented by Cecilia and Jane Gilbert, it having been expressly declared by the testator that the fee of these shares should fall and accrue to the children respectively of the M'Cainshes "equally among them *per stirpes*, as provided with respect to their own shares of my estate." If the fee of their mother's share vested in the children on their attaining majority or being married, I think that the shares which were liferented by the Gilberts vested equally on the same event. No doubt there was a contingency in regard to these latter shares—that the Gilberts might have left children, and so have defeated the right of fee given to the children of the M'Cainshes. But this, I think with the Lord Justice-Clerk, was a mere contingency, and was not a condition suspensive of the vesting. As his Lordship says—"It is in no respect a condition of the legacy. It is only an event, before the arrival of which it cannot be known whether the devolving clause has or has not taken effect in favour of the conditional institute. But when that is once ascertained, James Taylor simply takes from the date of his majority or marriage—that is to say, it vests, and whether he predeceases or survives the liferentrix is a matter of no moment."

I think the Court below had not had its attention directed to what I regard as the important words—that the division of the fee was to be equally among the children of the M'Cainshes "*per stirpes*, as provided with respect to their own share of the estate"—at least none of their Lordships make any remarks on these words in the judgments which they delivered. But I think these words solve any difficulty in the case, and that it is not necessary to consider how the case should have been disposed of if these words had not been used, and I would rather not give any opinion on that point.

I think the representatives of James Taylor are entitled to participate in the division of the fee of the two-third shares which were liferented by Jane and Cecilia Gilbert, along with the children of Mrs M'Culloch and Mrs Maclaren, and that the Court below should have so found, and I therefore think that the judgment appealed against should be reversed.

The Lord Chancellor, Lord Hatherley, and Lord Blackburn concurred.

Interlocutor of Court of Session reversed, and parties excluded by the judgment appealed from held entitled to participate in the residue, and costs ordered to be paid out of the trust-estate.

Counsel for Appellant—Fox Bristowe, Q.C.—A. Young. Agent—William Robertson, solicitor.

Counsel for Respondents — Lord Advocate [Watson]—Kay, Q.C. Agents — Grahames & Wardlaw, solicitors.

Tuesday, June 4.

[Before the Lord Chancellor, Lord Hatherley, Lord Blackburn, and Lord Gordon.]

THARSIS SULPHUR AND COPPER COMPANY *v.* M'ELROY & SONS.

[*Ante*, p. 115, Nov. 17, 1877, 5 Rettie 161.]

Obligation—Construction of Written Contract—Parole Proof—Acquiescence.

A building contract contained the following clause:—"*Twelfth*, The Company reserve power during the progress of the work to make any alterations, additions, or deductions, or to vary from or alter the plans or materials