Friday, June 22.

FIRST DIVISION.

SPECIAL CASE—DUNCAN AND OTHERS.

Heritable and Moveable—Succession—Heir and Executor—Relief.

A testator conveyed to trustees his whole estate, heritable and moveable, for purposes to be after specified. By a subsequent testamentary writing he bequeathed his whole estate to his two sisters, to be divided equally between them on condition that they should secure payment after their decease of any bequests he might make. By another testamentary writing he made bequests to the amount of £4000. The trustees conveyed the heritage to the sisters on the understanding that they should grant a bond and disposition in security over the heritable estate for £4000, which was accordingly done. The terms of payment were £2000 on the death of the predeceaser, and £2000 on the death of the survivor. On the death of the predeceasing sister a question was raised as to whether payment of the £2000 due at her death should be made by her executor or by her heir-at-law. *Held* that there was nothing in the origin of the debt to prevent the application of the ordinary rule, and that the debt being heritable fell to be paid by the heir-at-law.

By trust-disposition and settlement, dated 28th November 1865, and registered in the Books of Council and Session 29th May 1872, Colonel A. H. Duncan of Foxhall conveyed to trustees his whole estate, heritable and moveable, real and personal, in trust, *inter alia*, for the purposes to be specified in any writing or writings under his hand which should be held as relative to the trust-disposition and settlement. By a testamentary writing, dated 3d April 1872, and recorded along with the trust-disposition and settlement, he gave and bequeathed to his sisters, Miss Georgina Duncan, now deceased, and Miss Margaret Ann Duncan, everything of which he might die possessed, to be equally divided between them, "on condition that they secure payment after their decease to any persons hereafter named, or to any institutions named, of the sums of money or valuables left by me to them in this or any separate pieces of paper with my usual signature attached." Of the same date he executed another testamentary writing, by which he made certain bequests of money to the persons therein named, amounting to the sum of £4050 sterling, which were therein declared to be payable, one-half on the death of each of these sisters; and he further, by other writings, bequeathed valuables to various persons. Colonel Duncan died on 16th April 1872, and after his death his trustees completed their title to the lands and estate of Foxhall, being the whole heritage belonging to him at his death, by notarial instrument, recorded in the Division of the General Register of Sasines applicable to the county of Linlithgow on 8th November 1872; and they thereafter conveyed these lands to the sisters equally, share and share alike, and to their respective heirs and assignees whomsoever, by disposition dated 17th March 1873. In the said disposition it was, *inter alia*, narrated that "the said Miss Georgina Duncan and Miss Margaret Ann Duncan have agreed, in security of the payment of the foresaid pecuniary legacies, when the same become due as aforesaid, to grant a bond and disposition in security in our favour, as trustees foresaid, over the lands and estate of Foxhall, for the sum of £4000." The trustees were confirmed in the moveable estate, which amounted to £11,142, and at the desire of the Misses Duncan five legacies of £10 each were paid off, leaving £4000 to be paid on the deaths of these sisters. In implement of the above-mentioned obligation a bond and disposition in security over Foxhall was executed by the Misses Duncan on 9th April 1873, recorded in the Register of Sasines on same date, and delivered to the trustees, who made over the moveable estate to the Misses Duncan, and received from them a discharge.

By this bond and disposition in security, on the narrative that they had taken the succession of Colonel Duncan on condition of making payment of legacies amounting to £4050, of which sum £50 had been paid, the Misses Duncan bound themselves, &c., in the usual form, to make payment to the testator's trustees of the sum of £4000 at the terms following, viz., the sum of £2000 at the first term after the death of the predeceaser, and the sum of £2000 at the first term after the death of the survivor of them, declaring that the trustees should apply these sums in payment of the legacies bequeathed by Colonel Duncan.

Miss Georgina Duncan died on 2d June 1882. She and her sister had executed a trust-disposition and settlement, dated 1st July 1872, whereby they conveyed to trustees their whole estate, for the purpose, in the first place, of payment of debts, deathbed and funeral expenses, and, in the second place, for the further uses and purposes specified and contained in any writing or writings under the hand of either of them. No such writing by the said Miss Georgina Duncan was found. The trustees were confirmed, that they might wind up the estate and account for it to the parties entitled to succeed to it.

This was a Special Case stated for the opinion and judgment of the Court by Miss Margaret Anne Duncan and others, the next-of-kin of Miss Georgina Duncan, of the first part; Colonel F. K. Duncan, the only surviving brother and heir-at-law of Miss Georgina Duncan, of the second part; Colonel Windsor Parker and another, the trustees under the trust-disposition and settlement of the deceased Colonel A. H. Duncan, of the third part; and Duncan Parker and another, the trustees under the trust-disposition of Miss Georgina Duncan, of the fourth part, upon these questions—Ought the said half of the legacies bequeathed by Colonel Duncan to be paid out of the heritable estate left by Miss Georgina Duncan? or Ought the said half of the legacies to be paid out of her moveable estate?

Argued for the first, third, and fourth parties—Miss Georgina Duncan never having executed the contemplated writing under her hand, had died intestate, and there was nothing in the circumstances of the case to prevent the application of the ordinary rule that debts heritably secured should be paid by the heir in heritage, and that personal debts should be paid by the executor. Therefore the heir-at-law should be held liable.—*Douglas' Trus-*

tees v. *Douglas*, January 17, 1868, 6 Macph. 223; *Special Case—M'Leod's Trustees*, June 28, 1871, 9 Macph. 903.

Argued for the second party—These legacies were intended to be a burden on the personal estate, and therefore, looking to the origin of the debt, the executor should pay them—*Arbuthnot* v. *Arbuthnot*, June 23, 1773, F.C.; *M'Nicol* v. *M'Nicol*, June 16, 1814, F.C.; *Meiklam's Trustees* v. *Mrs Meiklam's Trustees*, December 2, 1852, 15 D. 159.

At advising—

Lord President—This is a question of intestate succession, and if one rule is better settled than another it is this, that in cases of intestacy the heir must pay debts which are heritably secured, and the executor those which rest on personal security, with mutual relief against each other; and it is only possible to raise a question here if there is anything of such importance as to bar the application of that rule.

The origin of the debt of which the heir here seeks relief—for that is substantially the question before us—is, that Colonel Andrew Henry Duncan, the brother of Miss Georgina and Miss Margaret Anne Duncan, left a settlement by which he substantially gave to these two ladies all his property on one condition, which is thus expressed:—"On condition that they secure payment after their decease to any persons hereafter named, or to any institutions named, of the sums of money or valuables left by me to them in this or any separate pieces of paper with my usual signature attached." Then after specifying the various legacies he adds—"These legacies are payable one-half on the death of one sister, Georgina or Margaret, and the other on the death of the other." Now, Miss Georgina Duncan died intestate, and there, of course, falls to be paid one-half of the legacies left by Colonel Duncan, viz., £2000.

The obligation undertaken by these two ladies by the acceptance of the gift from the testator was to secure payment of these legacies after their decease, and they thereby became debtors to the trustees for the sum of £4000, of which £2000 was payable on the decease of the first of the sisters, and £2000 on the death of the survivor. The kind of security required is not specified in Colonel Duncan's settlement; if heritable security had been particularly required by him, that might have raised an argument on both sides, but he does not require any particular kind of security, but merely leaves the money to the two ladies, making the trustees creditors for the amount. Then these ladies, being the debtors, choose, with the concurrence of the trustees, to grant heritable security. It is not necessary to read the bond, which is in the usual form except as to the terms of payment. First, there is a personal obligation to pay the sum of £4000, and then follows the disposition in security of the lands which they had inherited.

These are the whole facts of the case, and I cannot understand what kind of specialty there is attaching to them. When there is a specialty it generally occurs in a case of testate succession, and I can quite understand that where a party has left settlements it is right to spell out from them what the intention of the testator was, in order to see whether there is anything to reverse the ordinary rule, which is that the heir is to pay the debts heritably secured, and the executor the debts which are personal. But in a case of intestate succession, I cannot find out where there can be a specialty, for the executor simply finds certain debts secured on the personal estate which he has to pay, and other debts secured on the heritage which the heir taking that heritage has to pay, and that is the whole matter.

I can imagine a case where from the constitution of the security it could be said that the intention of the testator was to burden the executor instead of the heir with the payment of a heritable debt—for instance, where a man granted a bond over his estate binding himself and his executors but excluding his heirs. That would be a strong reason for reversing the ordinary rule, but without something as pregnant as that I cannot see what kind of case can arise in intestacy so special as to raise any question on the point.

Lord Mure—I am of the same opinion. This debt was secured on the heritable estate of Miss Duncan, and the question is whether the heir in heritage or in moveables is liable to pay it? The money was so secured in order to carry out the wishes of the brother, the condition upon which the sums of money were made over to the two sisters being that they should secure payment of certain legacies after their decease to any persons or institutions named by the testator. There was no positive obligation to invest in heritable security; it was entirely in their option to do so, for the money was made over to them to do what they liked with, provided that on their death they left enough to pay these legacies. The way they did that was to secure a sufficient sum on the heritable estate and *ex facie* of the bond that appears to have been the arrangement. I am unable in that deed to see anything which throws the burden on the executor instead of on the heir in heritage.

Lord Shand—In my opinion there is very little doubt about this case, for it is simply one where the deceased has granted a security over her heritage for the sum of £4000, prestable at her death. There is no peculiarity in the bond and disposition in security from which it could be gathered that the obligation was to be satisfied by the executor and not by the heir, and therefore, since at her death the bond affected the lands, the heir taking them must take subject to the bond. But it is said that here the debt was primarily payable out of the moveable estate. I suppose, however, that is usually the case, and that it is only because the debtor does not find it convenient to pay out of the moveable estate that heritable security is given. It is not very material to look at the origin of the debt here, but if we do, I do not think that there is anything in its origin to show that this lady intended to secure the money in such a way that the executor should be liable in payment; and I think it would require to be very clear that the ordinary rule was not to apply. I do not think that the cases of *MacNicol* and *Arbuthnot* apply to the present, because it was conceded that if in these cases the security had been granted by the deceased, his heir would have had no right of relief against the executor. The argument in *MacNicol's* case was that the debt in question was heritable *quoad* the persons to whom it was due, but that it was not heritable *quoad* the succession

of MacNicol, because he was not personally liable to the creditor in the bond, and his own creditor, the seller, had no real right in his own person for that part of the price. There the security had been granted by a party other than the deceased, and the Court held that the ordinary rule did not apply; but as we have not a case of that sort here I think the ordinary rule should apply.

LORD DEAS was absent on Circuit.

The Court pronounced this interlocutor:—

"Find that the sum of £2000, being one half of the amount of the legacies due by the deceased Miss Georgina Duncan, falls to be paid out of her heritable estate."

Counsel for First, Third, and Fourth Parties—Mackintosh—Brown Douglas. Agent—J. & J. H. Balfour, W.S.

Counsel for Second Parties—Pearson—Low. Agent—John T. Mowbray, W.S.

Thursday, June 28.

FIRST DIVISION.

[Sheriff of Lanarkshire.

M'LEAN *v.* WARNOCK.

Reparation — Custody for Hire — Liabilities of Custodier.

Where a farmer had taken in a horse to graze for hire in one of his fields, which was over old mineral workings, and had failed, through not having examined the field, to discover that there was in it a subsidence of the ground, through the existence of which an accident happened to the horse, and caused its death — *held* that he was liable to the owner for the value of the horse.

Observed that in such circumstances the *onus* was on the custodier to account for the death of the horse.

This was an action raised in the Sheriff Court of Lanarkshire by Archibald M'Lean, carting contractor, Auchinbegg, against George Warnock, farmer, Lesmahagow, concluding for a payment of £50, being the value of a horse belonging to the pursuer which the defender agreed to graze during a part of the summer of 1882, and which was found dead on the 3d of September, owing, as the pursuer averred, to the defender's carelessness and neglect.

It appeared from the proof which was taken before the Sheriff that the defender had had upon several previous occasions, including the preceding year, both horses and cattle belonging to the pursuer for grazing, and that it was the custom between the parties to make a payment for the grazing at the end of the season. The same course was to have been followed upon the present occasion, and no precise sum was stipulated for in name of rent.

The soil underneath the field into which the pursuer's horse was put upon the 1st of July 1882 had been to some extent removed on account of mineral workings, and in consequence there was a sit or subsidence of the surface.

There appeared also to have been in a hollow part of the field a hole, the soil about the edge of which seemed to be quite hard, and the mouth of which could only be seen by one who was close to it. There was some difference of opinion among the witnesses as to the size of the mouth of the hole, but it could not have been less than from 18 inches to 2 feet in diameter. A wet ditch lay near to it, but the hole itself was dry. Both pursuer and defender deponed that they were ignorant of its existence, while the witnesses who spoke to its size alleged that it had been known to them for a considerable time. There was no fencing of any kind around the hole, and the defender had horses of his own going about in the same field. It was into this hole that the pursuer's horse had slipped. The horse's hind legs had apparently gone in first, and in struggling to free himself he had enlargened the hole, and caused the water from the wet ditch to flow into the hole. The result was that the horse was drowned.

As the defender denied all liability for the death of the horse, and refused to make any compensation, the pursuer raised the present action for its value, and pleaded—"(1) The defender in undertaking and agreeing to graze the gelding in question for pursuer, was bound to take all proper precautions for the protection and safety of said gelding; and having failed to do so, he is liable for the loss occasioned to the pursuer through such failure. (2) The defender having undertaken to graze the said gelding for pursuer, and having negligently permitted the same to fall into a hole or sit on his park or field, and thereby to be destroyed, is liable to the pursuer in reparation to the extent sued for, which is reasonable."

The defender pleaded that he had entered into no contract with the pursuer for the grazing of the horse, and had undertaken no responsibility in relation thereto, and further—"(3) In the event of the death of the said gelding being shewn to have resulted from a sit or sinking of the surface of the ground in consequence of the minerals thereunder having been wrought out, for which the proprietor of the said lands might be held responsible, the pursuer ought to have called the said proprietor for his interest."

After a proof the Sheriff-Substitute (BIRNIE) pronounced this interlocutor:—"Finds in fact (1) That the defender contracted with the pursuer to graze for hire a three-year-old gelding belonging to the pursuer for the portion of the season after the month of July last; (2) That said gelding was placed on the defender's farm of Auchinbegg, and grazed there until on or about the third day of September, when it was killed by falling into a hole on said farm: Finds in law that said gelding was killed through the fault of the defender: Assesses the damages at £50: Finds the defender liable to the pursuer in said sum, with interest at the rate craved from date of citation until payment: Finds the defender liable to the pursuer in expenses," &c.

"*Note.*—The defender is tenant of several adjoining farms, including High Stockbriggs and Auchinbegg, and says the pursuer was told by him to put the horse on High Stockbriggs, and is therefore not entitled to damages for the injury which happened to the horse on Auchinbegg; but to my mind that is not so, as whether