Thursday, March 12.

SECOND DIVISION.

GARLAND *v.* HICKLING.

Succession—Vesting—Destination to Class—Direction on Death of Liferentrix Leaving Issue to Divide amongst Her Issue.

A testator by his trust-disposition and settlement directed his trustees to pay the interest of a certain sum equally to his daughters. The deed then proceeded—"and on the death of my said daughters respectively leaving lawful issue I hereby direct my trustees to divide equally amongst the issue of each of my said daughters" the sum liferented by their mother. One of the daughters had four children, two of whom survived both the testator and their mother, and two of whom survived the testator but predeceased their mother leaving no issue. *Held* that the two children who had predeceased the liferentrix had no vested right at the dates of their respective deaths in any part of the sum liferented by their mother.

Opinions reserved as to whether issue of predeceasing children would not have been entitled to the share which their parent would have taken if surviving.

Thomas Fair, Woodlands, Edinburgh, died in 1865 leaving a trust-disposition and settlement dated 5th September 1862, with two relative codicils dated respectively 10th February and 1st March 1865. By the fifth trust purpose of his trust-disposition and settlement the testator directed as follows:—"My trustees shall within five years from the period of my decease invest on good heritable or other eligible security the sum of thirty thousand pounds sterling, and pay the interest or annual profits thereof from the date of such investment equally to each of my daughters, Margaret Fair or Spence, Harriot Fair or Macaulay, and Mary Jane Fair or Thomas, during all the days of their lives, respectively and allenarly, . . . and on the death of my said daughters respectively leaving lawful issue, I hereby direct my trustees to divide equally amongst the issue of each of my said daughters the sum of ten thousand pounds sterling, being one-third of the sum directed to be invested as aforesaid; and should any of my said daughters die before the succession to the foresaid provisions opens up to them, without leaving lawful issue, the share of the interest or annual profits of the said sum of thirty thousand pounds sterling, directed to be invested as aforesaid, to which my daughter so dying would have been entitled had she survived, shall be divided equally, share and share alike, between my surviving daughters, or paid to the last surviving daughter during all the days of their lives or of her life allenarly; and the share of the said capital sum of thirty thousand pounds sterling which would have fallen to be divided equally amongst the issue (if any) of my daughter so dying shall be divided equally between the issue of my surviving daughters, or should there only be one surviving daughter having issue, to be paid equally to such issue: Declaring, nevertheless, that in the event of the husband of any one of my said daughters surviving his wife, the husband so surviving shall have a liferent interest allenarly in the provisions hereby made to my daughter so predeceasing to the extent of two hundred pounds sterling per annum; and I hereby in this event direct my trustees to pay to the husband so surviving the said sum of two hundred pounds sterling per annum during his lifetime accordingly."

By the codicil dated 1st March 1865 the sum of £30,000 to be dealt with in accordance with the trust purpose above quoted was increased to £36,000. The testator was survived by the three daughters above mentioned.

On 2nd July 1884 Mrs Thomas died without issue and predeceased by her husband.

A question having arisen as to who was entitled to her share of the £36,000, and the trustees being advised by counsel that it fell into residue, the residuary legatees executed a deed of renunciation and discharge dated 2nd, 3rd, and 6th April 1885, by which, upon the narrative that they were clearly of opinion that it was not the intention of the testator that the residue should be increased, and the residuary legatees benefited by the decease of any of his daughters, but that the share of any predeceasing without issue should accresce to the provisions of the other sister or sisters surviving, and their or her families, they renounced their rights in favour of the surviving daughters and their families. The material clauses were as follows:—"We do hereby renounce and discharge any right competent to us to the income or capital of the share of the foresaid provision liferented by the said deceased Mary Jane Fair or Thomas, and hereby agree and direct that the income of the said share shall be paid equally to each of the said Margaret Fair or Spence and Harriot Fair or Macaulay during all the days of their lives respectively and allenarly, at two terms in the year, Whitsunday and Martinmas, by equal portions . . . and upon the death of the said Margaret Fair or Spence and Harriot Fair or Macaulay respectively, we hereby agree and direct that the capital sum of £6000, being the half of the share of the said provision liferented by the said Mary Jane Fair or Thomas, shall be divided equally amongst the issue of each of the said Margaret Fair or Spence and Harriot Fair or Macaulay; and we hereby declare that the full effect of these presents, read in connection with our father's trust-disposition and settlement, is that the share of the foresaid provision of £36,000 belonging to each of the said Margaret Fair or Spence and Harriot Fair or Macaulay in liferent and their respective families in fee, shall be £18,000, and that said respective shares shall be held by us, the said John Fair, James Fair, and Frederick Fair, as the

surviving trustees of the said Thomas Fair, upon the conditions contained in the foresaid fifth purpose of the said trust-disposition and settlement."

Mrs Macaulay died on 16th February 1895 survived by two daughters, Mrs Harriot Fair Macaulay or Garland and Mrs Margaret Helen Fair Macaulay or Kinmont, and predeceased by a son, Thomas Fair Macaulay and a daughter Mrs Mary Annie Fair Macaulay or Hickling. Both these latter children survived the testator. Thomas Fair Macaulay died intestate, unmarried, and a minor. He predeceased Mrs Thomas. Mrs Hickling died on 13th October 1893 and left no issue. Mrs Macaulay's husband died on 22nd March 1895.

In these circumstances questions having arisen as to the distribution of the sum of £18,000 liferented by Mrs Macaulay, this special case was presented to the Court. The parties to the case were (1) the trustees of Thomas Fair; (2) the marriage-contract trustees of Mr and Mrs Garland; (3) Mrs Garland and her husband; (4) the trustees under the mutual trust-disposition and settlement of Mr and Mrs Macaulay, as representatives of Thomas Fair Macaulay; (5) the marriage-settlement trustees of Mrs Hickling; (6) the testamentary trustees of Mrs Hickling; (7) the marriage-contract trustees of Mr and Mrs Kinmont; and (8) Mrs Kinmont and her husband.

The fifth and sixth parties claimed that Mrs Hickling had a vested interest under Mr Fair's trust-disposition and settlement in the proportion originally liferented by her mother of the share of £36,000; and also that she had a vested interest in the share originally liferented by Mrs Thomas of the £36,000, and afterwards, to the extent of one-half, liferented by Mrs Macaulay under the deed of renunciation and direction by the residuary legatees. The fourth parties similarly maintained that Thomas Fair Macaulay had a vested interest under the said trust-disposition and settlement and deed of renunciation to a share of the fund liferented by his mother. On the other hand, the second, third, seventh, and eighth parties contended that no part of the estate liferented by Mrs Macaulay or Mrs Thomas vested in Mrs Hickling or in Thomas Fair Macaulay, either under the will of the said Thomas Fair or under the deed of renunciation and direction above referred to.

The opinion of the Court was requested upon the following questions of law:—"(1) Had the said Mrs Hickling at the date of her death a vested interest in any part of the sum of £18,000 liferented by her mother Mrs Macaulay? (2) If so, was her interest limited to one-fourth of the sum of £12,000 originally liferented by Mrs Macaulay? Or, (3) Did it extend to a share of the sum of £6000 set free by the death of Mrs Thomas, which was liferented by Mrs Macaulay and is dealt with by the deed of renunciation and direction? (4) Had the said Thomas Fair Macaulay at the date of his death a vested interest in any part of the said sum of £18,000? (5) If so, was his interest limited to one-fourth of the sum of £12,000 originally liferented by Mrs Macaulay?"

Argued for second, third, seventh, and eighth parties — Nothing vested till the death of the liferentrix. Until that date it could not be ascertained whether she would die leaving lawful issue or not, and except in the event of her leaving lawful issue there was no gift at all. The persons who were entitled to share were the issue still in existence on the death of the testator's daughter. Issue who predeceased were not issue left by a daughter, and such issue alone were intended to benefit. The direction was to divide amongst issue, and division could only take place among issue who were alive to take on division.

Argued for the fifth and sixth parties—There was here vesting *a morte testatoris* in the children of the liferentrix. Where there was a direction on the death of a liferenter leaving children to divide among children as a class, the benefit of the gift was not confined to the survivors, but the representatives of those predeceasing were entitled to a share—*Boulton* v. *Beard*, February 24, 1853, 3 De G., M. and G. 608; *In re Orlebar's Settlement Trusts*, July 16, 1875, L.R., 20 Eq. 771; *M'Lachlan* v. *Taitt*, November 26, 1860, 2 De G., F. and J. 449; Jarman on Wills, (5th ed.) vol. ii. 1641; Theobald on Wills, (4th ed.) 471. In gifts to children as a class the law favoured vesting at as early a date as possible—*M'Lachlan* v. *Taitt, cit.; White* v. *Hill*, July 12, 1867, L.R., 4 Eq. 265. The word "divide" only affected the date of payment and not the date of vesting — *Horne's Trustees* v. *Horne*, July 14, 1891, 18 R. 1138; see also *Hay's Trustees* v. *Hay*, June 19, 1890, 17 R. 961, *per* Lord President Inglis at p. 969, and *M'Alpine* v. *Stewart*, March 20, 1883, 10 R. 837, *per* Lord Shand at p. 850. *Alternatively*, leaving lawful issue was equivalent to "having lawful issue." This though a somewhat strained construction had been resorted to by the courts in England to give effect to the presumed intention of a testator—*White* v. *Hill, cit.; in re Brown's Trust*, May 30, 1873, L.R. 16 Eq. 239. Here the reasonable presumption was that it was not the testator's intention to make the benefit conferred by him dependent upon the accident of surviving the liferentrix. Moreover, there was here no destination-over, and it was therefore to be inferred that he intended the children of his daughter to take a fee at his death. The construction contended for by the surviving children would have required the word "such" before "issue." As regarded the £6000 dealt with in the deed of renunciation the case was even stronger in favour of the contention of these parties.

Argued for the fourth parties—In addition to the argument for the fifth and sixth parties which was adopted, it was submitted that the representatives of Thomas Fair Macaulay were entitled at least to a share of the £6000 dealt with in the deed of renunciation, which had a retrospective effect.

LORD YOUNG—The question before us is one of vesting under the fifth provision of

the will. That provision is—"On the death of my said daughters respectively, leaving lawful issue, I hereby direct my trustees to divide equally amongst the issue of each of my said daughters the sum of £10,000 sterling." There were three daughters, and to each of these he gave a liferent of £10,000, £30,000 to be equally divided, which was afterwards increased to £36,000, giving £12,000 to each. Well, one of the daughters—and it is only with her we are here concerned—Mrs Macaulay, died in the month of March 1895 leaving two daughters, and she had had a daughter who was married and died sometime before her mother—Mrs Hickling—and the question is whether she is one of the issue entitled to a share of the £10,000 or £12,000 appointed to be divided by the clause of the settlement to which I have just referred. Now, that depends, as I have stated, entirely and exclusively upon the construction of that clause.

I may say at once that I attach no importance to the view which was suggested that this meaning of the clause was affected by the fact that the word "issue," when it occurs for the second time in the clause, is not preceded by the word "such."

It was suggested to us by Mr Mackay that the benefit of the provision was not limited to the issue left in the ordinary sense of the expression by the deceasing daughter, but extended to the whole issue whether surviving her or not. I think the meaning of the clause as employed by a Scotch conveyancer is to create a provision in favour of issue surviving the deceasing daughter, and not a provision in favour of issue predeceasing a deceasing daughter. If it did apply to issue predeceasing it would apply in the case which I put to Mr Mackay, and which he accepted. Suppose a daughter should have died not survived by two children, but survived by none, but who had a son or daughter who had predeceased her by any number of years, is this a provision in favour of the creditors or in favour of the legatees or disponees of such predeceasing child? Mr Mackay accepted that as a fair test of the argument, and maintained that if the argument was good for anything it was good for that, and that the disponees or creditors would take any such provision. I am of opinion that that is not so, that that is contrary to the import of the words, and contrary to the construction which we must put upon them.

I should desire to guard myself against expressing any opinion now as to the case of a child predeceasing her mother and leaving lawful issue of her own, whether upon the *conditio si sine liberis* or upon some analogous principle of law such grandchildren of the testator would not take in the same way as children. He provides in favour of his daughters and the issue of his daughters, and it is a question whether that would not take it, not merely to the daughter or issue of the daughter, but to the issue of the issue of the daughter, and whether, it being a provision by the father to his daughter and granddaughter, it might not extend to great-granddaughters; but there is nothing of that kind here. There is no question of issue having right according to the presumed will of the testator as coming in place of a deceased parent.

My opinion therefore is that under this provision none can be entitled to share in the division of the fund which Mrs Macaulay liferented except the issue which she left to have it divided among. I do not attach any importance to the word "divide," because if she had left only one child that child would have taken the whole. My opinion therefore is that the questions before us must be answered accordingly—that there was no vesting *a morte testatoris* in the children of Mrs Macaulay, but only a vesting of the right to participate in the division of the money liferented by Mrs Macaulay in the children surviving her and upon her death, that being the date of vesting.

The LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court answered the first and fourth questions in the negative, and found it unnecessary to answer the other questions.

Counsel for the First Parties — Cullen. Agents—Horne & Lyell, W.S.

Counsel for the Second and Third Parties—Salvesen. Agents—Horne & Lyell, W.S.

Counsel for the Fifth and Sixth Parties—Mackay. Agents—J. S. & J. W. Fraser Tytler, W.S.

Counsel for the Fourth Parties—J. H. Millar. Agents — J. S. & J. W. Fraser Tytler, W.S.

Counsel for the Seventh and Eighth Parties—Balfour, Q.C. Agents—Kinmont & Maxwell, W.S.

Thursday, March 12.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

GRAHAM *v* MAGISTRATES OF PERTH.

Burgh — Petty Customs — Royal Charter —Liability to Petty Customs of Extended Area included in Burgh under Statute—Police and Improvement (Scotland Act 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 13 *— Causeway-Mail — Toll — Roads and Bridges (Scotland) Act* 1878 (41 *and* 42 *Vict. cap.* 51), *secs.* 3 *and* 33.

The magistrates of a royal burgh had right under a charter of King James VI. to levy petty customs "on things and goods carried to the streets" of the burgh "that the same might be sold there."

The area of the burgh was extended under the Police and Improvement (Scotland) Act 1862, which provides that the boundaries as extended under the provisions of the Act "shall there-