Wednesday, January 27.

SECOND DIVISION.

HUNTER'S TRUSTEES *v.* DUNN.

Succession — Testament — Survivorship — Accretion—Intestacy.

A testator directed his trustees to "hold the whole residue of my estate for behoof of my three daughters A, B, and C, and the survivors and survivor of them equally for their liferent use allenarly and their issue in fee, and that in such proportion as their parent may have directed by any writing under her hand, and failing such instructions, equally share and share alike: Declaring that in the event of any of my said daughters predeceasing me leaving issue, such issue shall succeed to the share of my said means and estate that their parent would have been entitled to had she survived: Declaring that no right of fee shall vest in anyone taking benefit under these presents until they have reached majority."

A, B, and C survived the testator. Thereafter A died without issue.

Held that the share liferented by A did not accresce to B and C in liferent and to their issue in fee, but fell to be dealt with as intestate succession of the testator.

Robert Hunter died on 18th January 1887 leaving a trust-disposition and deed of settlement by which he conveyed his whole means and estate to trustees for the purposes therein specified. The fourth purpose was in the following terms:—"(*Fourth*), My trustees shall hold the whole residue of my estate for behoof of my three daughters Annie Hunter, Isabella Hunter, and Mary Hunter, and the survivors and survivor of them, equally for their liferent use allenarly and their issue in fee, and that in such proportions as their parent may have directed by any writing under her hand, and failing such instructions, equally share and share alike: Declaring that in the event of any of my said daughters predeceasing me leaving issue, such issue shall succeed to the share of my said means and estate that their parent would have been entitled to had she survived: Declaring that no right of fee shall vest in any one taking benefit under these presents until they have reached majority."

The testator was survived by his three daughters Mrs Annie Scouler Hunter or Blair, Mrs Isabella Roll Hunter or Dunn, and Mrs Mary Maitland Hunter or Grant, who were all of age at the date of the testator's death.

Mrs Annie Scouler Hunter or Blair died on 1st January 1900 without issue, but leaving a settlement. She was survived by her husband John Blair and by her two sisters. Mrs Isabella Rollo Hunter or Dunn had five children, the eldest of whom had attained majority. Mrs Murray Maitland Hunter or Grant had one child, who was a minor.

In terms of the directions contained in the fourth purpose of the trust-deed the income of the residue of the trust-estate was divided by the trustees from time to time among the testator's daughters Mrs Blair, Mrs Dunn, and Mrs Grant, until Mrs Blair's death. In consequence of her death questions arose as regards the share of the residue destined to her in liferent by the testator.

For the settlement of the point raised a special case was presented to the Court by (1) Mrs Hunter's trustees, (2) Mrs Dunn and Mrs Grant and their husbands and children, (4) William Grant as executor under Mrs Blair's settlement, and (5) John Blair.

The second parties maintained that the share in question fell to Mrs Dunn and Mrs Grant equally and the survivor in liferent and the issue of Mrs Dunn and Mrs Grant equally *per stirpes* in fee. The fourth and fifth parties contended that on Mrs Blair's death the share of residue in question fell into intestacy of the testator.

The questions of law were—"(1) Does the share of residue liferented by the deceased Mrs Annie Scouler Hunter or Blair now fall to be held by the trustees for her surviving sisters Mrs Isabella Rollo Hunter or Dunn and Mrs Mary Maitland Hunter or Grant equally and the survivor in liferent, and their respective issue equally *per stirpes* in fee? or (2) Does the said share of residue fall to be disposed of as intestate estate of the testator, either (*a*) now, or (*b*) on the death of the survivor of Mrs Dunn and Mrs Grant?"

Argued for the second parties—By the terms of the fourth purpose, on the death of Mrs Blair her share of the liferent accresced to the surviving liferenters Mrs Dunn and Mrs Grant, and no share of the estate passed to the fiars till the death of the last survivor of the three sisters—*Fergus* v. *Conroy*, July 13, 1872, 10 Macph. 968. The suspension of vesting of the right of fee in each grandchild till he or she attained majority strengthened the view that survivorship meant survivorship of one another and not of the testator. As to the fee, it was the duty of the trustees to hold it till the death of the last survivor of Mrs Dunn and Mrs Grant, and then divide it among their issue in terms of the said deed.

Argued for the fourth and fifth parties—The provision in the deed was inconsistent with accrescing liferent. The liferent of an equal share of the residue was given to each daughter alive at the death of the testator, and the liferent of the third share falling to Mrs Blair came to an end at her death. There was no ulterior destination of the share liferented by Mrs Blair in the event of Mrs Blair dying without issue. That share therefore fell into intestacy and fell to be divided now—*Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191, 23 S.L.R. 830; *Wilson's Trustees* v. *Wilson's Trustees*, November 16, 1894, 22 R. 62, 32 S.L.R. 54.

LORD JUSTICE-CLERK—There is no doubt that as this deed is framed there is some difficulty as to what it means. While the terms of the bequest are somewhat puzzling to follow, the impression I have formed is this, that the intention of the testator was to give each of the daughters surviving an equal liferent in the estate, and that the fee should go to the children of the daughters, and as that would not have been sufficient to provide for the grandchildren of any child who did not survive, he put in an express clause for that event, namely, "In the event of any of my said daughters predeceasing me leaving issue, such issue shall succeed to the share of my said means and estate that their parent would have been entitled to had she survived." Mrs Blair died and left no children. It is maintained on behalf of her two sisters that they are entitled to have her liferent of the share she was enjoying given to them. I am of opinion that they have no right to that. My opinion is that the share of which the liferent was given to Mrs Blair fell into intestacy at her death, it not being provided for in the deed.

LORD YOUNG—Our answer to the first question depends upon these words in the fourth purpose, where the trustees are directed with respect to the residue to hold it "for behoof of my three daughters Annie Hunter, Isabella Hunter, and Mary Hunter, and the survivors and survivor of them, equally for their liferent use allenarly and their issue in fee." Now, all the three daughters survived the testator, and were therefore entitled to have the residue of the trust held for them for their liferent use allenarly, and then for their children in fee. Now, the question first presented here for our decision was, whether if one of these three daughters, who were all survivors, died, the other two would liferent the whole, the liferent which had been held and enjoyed by the predeceasing daughter going to the two survivors, or whether the two survivors just continued to enjoy the liferent of the two-thirds to which they were entitled. I am of opinion that each of the three surviving sisters took the liferent of one-third of the residue, one-third and no more, and that if a sister died leaving issue the issue of that predeceasing sister took the fee of the share which the dead mother had liferented. Now, here Mrs Blair married, but died in January 1900 leaving no issue, and the question is where the fee which would have gone to her issue under the will is to go. Now, the will makes no provision on that subject. It does provide that the fee of the share which was liferented by Mrs Blair would at her death go to her issue, but there is no provision in the will where this is to go to if she died without issue, and therefore there is intestacy on the part of the testator with respect to that, and it will go to the testator's legal heirs *ab intestato*, namely, the whole children who were the testator's heirs at his death. I therefore propose that the first question be answered in the negative, and the second question in the affirmative as regards the first alternative, and in the negative as regards the second.

LORD MONCREIFF—This case raises one of those puzzles that are frequently presented to us in the construction of settlements, and I cannot say I have been free from doubt or difficulty in the consideration of the deed. Indeed at first I was impressed with Mr M'Lennan's argument that the liferent of the deceased daughter accresced to the surviving daughters of the truster. Mr M'Lennan with great force argued that the words "and the survivors and survivor of them" necessarily meant not survivors or survivor at the date of the truster's death, but survivors or survivor of each other, so that ultimately if there were only one survivor that survivor would take the liferent of the whole estate. But I have come to think that reading the clause as a whole the scheme of the fourth purpose was that the residue of the estate should be divided into three parts, of which one was destined to each of the three daughters in liferent allenarly, and to their issue in fee. I think the clause proceeds entirely on this idea—that each of the daughters was to liferent a share of the residue, the fee on their death going to their respective children. I think a good deal of aid is to be derived from the words which follow—"declaring that in the event of any of my said daughters predeceasing me leaving issue, such issue shall succeed to the share of my said means and estate that their parent would have been entitled to had she survived." This expression is elliptical, because the parent if she survived was not entitled to anything beyond a liferent. It must therefore necessarily mean that if one of the daughters predeceased the truster and left issue, such issue should succeed to the one-third of the estate of which their mother would have had the liferent if she had survived. Looking to the peculiar terms of the deed I think the safest course is to hold that there was intestacy as regards the fee of the share liferented by Mrs Blair, and that the liferent of that share does not accresce to her surviving sisters.

LORD TRAYNER was absent.

The Court answered the first question of law in the negative, and found in answer to the second question of law that the one-third share of the residue of the deceased Robert Hunter which was liferented by his daughter Mrs Annie Scoular Hunter or Blair fell to be divided now as intestate estate of the testator the said Robert Hunter.

Counsel for the First and Fourth Parties—M'Clure. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Second Parties—M'Lennan. Agents—Cumming & Duff, S.S.C.

Counsel for the Fifth Party—Younger. Agents—Cameron & Orr, S.S.C.