

stified in the bud by an explicit admission of the pursuer's statement which had previously been denied. If the admission meant that she would have been a proper object of parochial relief if placed in certain circumstances, then it was trifling with the Court to make it. Such an admission might have been made in regard to any child, even a child of the richest man in the country. I think, therefore, it must have been meant to apply to the particular circumstances of this case. Accordingly the Lord Ordinary finds "that the pauper Elizabeth Clark was at the date of the action and during the whole period embraced in the account sued for and still is, in respect of the state of her health, a proper object of parochial relief." That being the case, the question is what was her parish of settlement in 1856, when she began to be a proper object of relief. That, I think, can't admit of any doubt. She had then a settlement in the City Parish—derived no doubt through the residence of her father—but as complete a personal settlement as if she had been an adult. I have no doubt of that, for it has been held both here and in the House of Lords that a child acquires such a settlement for itself and in its own right. That liability of the City Parish has never ceased, unless, indeed, we take the peculiar view urged upon us which seems to assume two shapes. First, it is said that this being a derivative settlement, and the girl being a pauper, she may have had a good settlement when the pauperism began, but as her father continued to go about without becoming a pauper, and lost his settlement, the daughter has also lost hers. This is a very strange view—that because the settlement is derivative, it must fluctuate with the father's movements. I think that is absurd. But that is not the view of the Lord Ordinary. He says—"It appears to him that the question of settlement must be taken to arise as at the date of the notice." That is his view. Is it the statutory rule? I can find nothing in the statute to that effect. When a person becomes a pauper, his settlement *then* must fix the liability. All that the statute says is, that notice must be given before you can recover. The want of notice does not alter the settlement; when a person becomes a pauper the liability is fixed, although it is only from the date of notice that disbursements can be recovered.

The Court pronounced the following interlocutor:—

"*Edinburgh, 23d November 1866.*—The Lords, having heard counsel on the reclaiming note for the Inspector of Barony Parish against Lord Barclay's interlocutor of 9th February 1866, recal the said interlocutor; of new advocate the cause; recal the interlocutors of the Sheriff and Sheriff-Substitute complained of: Find that the pauper, Elizabeth Clark, being then eleven years of age, became, in respect of the state of her health, a proper object of parochial relief in her own right in November 1856, and has continued to be so ever since: Find that, at the time when the pauper became a proper object of parochial relief, as aforesaid, her settlement was in the City Parish of Glasgow, by reason of her father then having an industrial settlement in the said parish: Find that since the pauper became a proper object of parochial relief she has been maintained at the expense of the Barony Parish: Find that the said parish gave notice to the City Parish on 12th June 1860 that the pauper had become chargeable in terms of the 71st section of the statute 8 and 9 Victoria, cap. 83: Find that the pursuer is entitled to re-

cover from the defender the expense of maintaining the pauper from and after the date of the said notice: Decern against the defender for payment of £28, 2s. 4d. with interest on said sum as libelled: Further, decern and ordain the defender to take charge of the said pauper, and to free and relieve the pursuer of the burden of maintaining her in all time coming: *Quoad ultra* sustain the defences; assoilzie the defender and decern: Find the pursuer entitled to expenses subject to modification, and remit to the auditor to tax the expenses and to report, and modify the expenses to two-thirds of the taxed amount thereof.

"JOHN INGLIS, I.P.D."

Agent for Barony Parish—John Thomson, S.S.C.
Agent for City Parish—William Burness, S.S.C.

BUCHANAN'S TRUSTEES v. M'NAUGHTON.

Trust—Vesting—Construction—Liferent—Fee—Heirs and Assignees. A trust-deed directed that the trustees were to hold the estate for behoof of three daughters for their liferent use alienarily, and after them for their heirs and assignees. One daughter having died, held under the deed that one-half of her share became fee in the person of a surviving sister, which she was entitled to transmit to her husband; but that the husband had no right to the third share liferented by his wife, the fee of which passed to the last surviving sister.

The question in this case arose on a multiple-pounding brought for the distribution of the estate of the late Mr Buchanan of Auldbar, who died in 1832, possessed of considerable property. The trust-deed which he left was framed by himself, and as he appears not to have been a professional person, his use of technical terms without knowing what they meant made the writing one of the most perplexing documents with which the Court has for a long time had to deal. There were three daughters—Mrs Kirk, Mrs Gibson, and Mrs M'Naughton. The trustees were directed to hold the estate for behoof of his said daughters in liferent, for their liferent use alienarily, and after their decease for behoof of their heirs or assignees in fee. There was no clause of survivorship, but the deed proceeded—"hereby declaring notwithstanding, that my said daughters shall have it in their power to destine and dispone of to the extent of one-half of the fee of such property as they may respectively succeed to." The truster went on to say that the liferents were not to be assignable unless *mortis causa*, and that none of the sisters should have the power of disposing of their shares to the prejudice of surviving sisters, nor the heirs of the bodies of sisters, but such of them as were married might leave their husbands an annuity of one-half of their share. Mrs Gibson died first, without issue; then Mrs M'Naughton, and her surviving husband, the Rev. John M'Naughton, of Belfast, claimed the whole of his wife's one-third as assignee of his wife; and also one-half of Mrs Gibson's share, which vested in his wife by survivorship. Mrs Kirk opposed the claim, on the ground that as she was the survivor of the three sisters, she and her family took the whole, Mr M'Naughton being only entitled to an annuity of one-half of his wife's share.

The Lord Ordinary (Ormidale) pronounced the following interlocutor:—

"*Edinburgh, 31st January 1866.*—The Lord Ordinary, having heard counsel for the parties, and considered the argument and proceedings, Finds that the fund *in medio* consists of the residue of

the trust-estate of the deceased James Buchanan : Finds that, according to the sound construction of the trust disposition and settlement of said James Buchanan, his daughter, the now deceased Mrs Janet Buchanan or M'Naughton, had not the power of disposing of the fee of said residue, or any part thereof, in terms of the deed of assignation, of date 7th December 1858, founded on by the claimant, the Reverend John M'Naughton : Finds, therefore, that the said assignation is inept and ineffectual, and that the claim of the said Reverend John M'Naughton can only be sustained, and that he is entitled to be ranked and preferred only to the effect and extent stated in the second alternative branch of his claim—viz., to the extent of an annuity during his life equal to one-half of the interest or annual proceeds of the portion of the trust-funds to which his deceased wife, the said Mrs Janet Buchanan or M'Naughton, succeeded in her own right, or as representing her deceased sister : Finds that the claimants, Mrs Agnes Buchanan or Kirk, and others claiming along with her, are entitled to be ranked and preferred, in terms of the first alternative branch of their claim—viz., to the effect that the whole trust-funds and property forming the fund *in medio* should be held by the nominal raisers in trust for behoof of, or that they should settle and secure the same to, the claimant, Mrs Kirk, for her life-rent use alienarily, and her children, the other claimants, along with her, among them equally in fee, and subject to the powers and provisions set forth in the said trust-disposition and settlement, and also subject to the annuity provided to the claimant, the Reverend John M'Naughton, during his life by his deceased spouse, not exceeding the interest or annual proceeds of one-fourth of the fund *in medio* : Ranks and prefers the claimants respectively, in accordance with said findings, and decerns : Finds no expenses due to or by either party. Six words deleted before subscription."

Mr M'Naughton reclaimed.

YOUNG and GUTHRIE SMITH, for him, argued—1. On a sound construction of the trust-deed in question, the testator's three daughters respectively had the power of assigning the fee of the shares life-rented by them respectively ; and the assignation founded on by the claimant was a valid exercise of this power by Janet, his deceased wife. 2. The late Mrs Gibson, having died without exercising the said power, the share pertaining to her vested in her two surviving sisters ; and the claimant, as assignee and as husband of his deceased wife, is now entitled to the one-half thereof. 3. Or, otherwise, the claimant is entitled to the life-rent of one-half of the share of the trust-funds which fell to his deceased wife, both in her own right and as representing her deceased sister.

CLARK and ASHER, for Mrs Kirk and others, answered—1. The claimant, Mrs Kirk, being the only surviving child of the truster, and her two sisters having predeceased her without issue, she and her children, under the terms of the trust-deed, are entitled to the whole residue and remainder of the trust-estate, and to be ranked and preferred to the whole fund *in medio*, in terms of the first alternative branch of their claim. 2. On a sound construction of the said trust-deed Mrs M'Naughton was not entitled to assign or dispose of any part of the fee of the trust-funds to her husband ; and the claim of Mr M'Naughton, as her assignee, ought therefore to be repelled. 3. Under the trust-deed condescended on, the

claimants are entitled to be ranked and preferred in terms of their claim.

At advising,

LORD NEAVES—This case is one which it is impossible to decide with any feeling of satisfaction. It regards the construction of a will written and apparently framed by the testator himself, and which shows on the face of it that he uses many words and phrases with an utter ignorance of their meaning, and seems quite unable to find the proper words by which his true meaning can be expressed. We must endeavour, however, to give the deed some effect, and although we may not reconcile all its contradictions, we may do what seems to be enjoined by clear and unequivocal words, and deal with the obscurer parts of the deed upon the general principles applicable to such questions.

1. The leading provision in this deed is clear enough. The estate is to be held by the trustees for the truster's three daughters, equally in life-rent, for their life-rent use *alienarily*. These words restrict the daughters to a mere life-rent of their own shares respectively, and it would be impossible to give any of them a higher right in that share without doing violence to the express words of the will, both in their natural and in their technical meaning.

2. As to the fee of these shares—i. e., the beneficial fee—it is given after the decease of the daughters respectively to their heirs or assignees. Leaving out of view assignees at present, it is a question whether heirs here means "heirs of the body" or "heirs generally." If each of the daughters left children, they would take the fee in either sense of the term ; but if one or more of them died without children, the question would practically arise. In that case, it would follow that if heirs meant heirs of the body, there would be no collateral succession by one sister or her child to another, and thus the fee would be undisposed of. To avoid that result, it seems more natural to read heirs here as meaning heirs generally, though other parts of the deed may put a partial restriction on its operation.

3. The use of the term assignees is very perplexing. Strictly speaking, life-renters can have no assignees as to the fee ; and although this is also true as to heirs, yet "heirs" is a good description of parties standing in a certain personal relation to others ; while assignees cannot exist if there is nothing to assign. Assignees, therefore, must mean here either the assignees of the heirs (as the first fiars) or the assignees of the life-renters, in so far as a faculty to assign or dispose is conferred by the deed. The adoption of the first of these alternative views would give more power to the right of fee, as transmitted from one sister to the other, and would imply a right in the fiars to assign unless expressly restrained from doing so.

4. In this case Fanny, the eldest daughter, was the first decessor, and left no child. She made no attempt to dispose of her share otherwise than to leave her husband a jointure annuity, which is plainly sanctioned by a clause in the deed, and which took effect. But what then became of the fee of that share ? According to the construction of the word "heirs" above adopted, it vested in equal parts in her two sisters, and if so, they thereby acquired a higher right to their shares of her share than they had to their own. Their right in this sixth part of the estate became a right of fee. There are other clauses which may restrict the enjoyment of it to alimentary uses, and prevent alienation *inter vivos* ; but supposing these effectual,

the positive creation of a fee in the surviving sisters is unaffected.

5. The second daughter dies leaving no issue. What becomes of the shares of the estate in which she is interested? Her liferented third goes to the only surviving daughter in fee according to the construction of the destination we have adopted. Her fee of the sixth, derived from her elder sister, will transmit by law to some one. But as to this there is no special destination in the trust-deed. When once the fee of a liferented share has vested in the liferenter's heirs, it is not destined *quoad ultra* to any one. This I hold to be very clear, and to be of considerable importance in the case. At common law, however, the fee must transmit, and if there is no positive disposition of it, it will go to the third sister. But is there any prohibition or incapacity in the second sister to dispose *mortis causa* of this fee? I see no exclusion of this—certainly no clear exclusion; and I think it ought to be remembered that an *entail* or a protected substitution in moveables is not to be presumed.

Some expressions may be founded on as indicating an intention adverse to these views. But I do not think them conclusive. If the creation of a fee implies the power of disposal, then the conferring of a partial power is not conclusive against the existence of the full power that is involved in the very nature of the thing. If we could hold that a fee is not created in favour of the heirs of the predeceasing daughters, that would be another matter. But we are driven to hold such a fee to exist, otherwise there would be no collateral succession at all, which would defeat the whole deed. And if there is such a fee, we cannot, at the same time, annihilate it because some superfluous powers are given. Some of the clauses, as I already suggested, are nonsensical in their literal terms. Thus, the declaration (above quoted) has no apparent propriety, because it seems to speak of an assignment of a liferent *mortis causa*. But if that liferent includes something that is truly a right of fee, the clause becomes intelligible, and seems to afford a warrant for an assignment of that fee *mortis causa*.

It is impossible also to overlook the vacillation and consequent uncertainty that attends some of the language used. In the passage at the end of the deed, one part of the clause speaks of the decease both of the testator and of other sisters, but the introductory part speaks only of what they have power over as succeeding to it through *my* decease, which seems to exclude what is succeeded to as sisters.

If in this case Mrs M'Naughton had left a child, what would have been the result? The child (in the absence of any will or disposition) would have succeeded to the third as conditional institute, but to the sixth not as institute but as next of kin at common law and under the deed. If so, they must have represented the deceased and been liable for her debts and deeds *ad valorem*. But I also think she could have left this sixth to them as she pleased, or cut them out of it altogether. I see no words in the deed to exclude that. But if she could have cut out her own child as being the fiar of this sixth, surely it is not to be presumed that she cannot cut out her more remote next of kin—her surviving sister. It is not to be presumed that a right of succession not provided by the deed but at common law is thus protected.

The Lord Ordinary holds Mrs Kirk to have only a liferent in the four-sixths that have come to her. But this seems erroneous in any view. What she has got as a fiar or next of kin is held in fee.

The conclusion I come to is that Mr M'Naughton has right to one-sixth of the estate, as that of which his wife possessed the fee, and which she was not legally debarred from alienating to him *mortis causa*; but that he has no right to the third which his wife liferented, of which the fee passes to her sister, and over which she had no power or faculty beyond the survivorship annuity which she was entitled to create in her husband's favour to the extent of one-half of her liferent, and which is not disputed. Mr M'Naughton, therefore, will get this annuity. He will also get, as his wife's assignee, the sixth of the estate which had vested in her from her elder sister's liferented share.

The deeds exercised by Mrs M'Naughton go beyond her legal powers; but that is no good reason why these should not be sustained so far as they are within her powers.

Lord BENHOLME dissented on the ground that it was the intention of the testator to create as many liferents as there were families.

The LORD JUSTICE-CLERK and Lord COWAN concurred with Lord Neaves.

Agents for Mr M'Naughton—Patrick, M'Ewen, & Carment, W.S.

Agent for Mrs Kirk—R. B. Maconochie, W.S.

PETITION—WILLIAMS.

Bankruptcy—Section 164 of Act—Judicial Factor.

A petition for a judicial factor under section 164 of the Bankruptcy Act containing no information as to who were entitled to take up the deceased's succession, *refused*.

This was a petition for the appointment of a judicial factor on the estate of a deceased party who left both heritage and moveables. The petition was brought under sec. 104 of the Bankrupt Act by a heritable creditor. Nothing was known as to the indebtedness of the estate, and there was no information as to what parties were entitled to take up the deceased's succession.

Lord MURE reported the point to the Second Division, and to-day the Court, in exercise of their discretion, refused the application.

ADAM supported the application.

Agents—A. & A. Campbell, W.S.

Saturday, Nov. 24.

APPEAL—W. D. HALL AND OTHERS.

Bankruptcy—Personal Protection of Bankrupt—

Appeal—Competency—Section 169 of Statute.

Circumstances in which held (diss. Lord Benholme) that although it was competent under section 169 of the Bankruptcy Act to appeal against a resolution of creditors refusing a personal protection, the prayer of an appeal, and also of a reclaiming note, was informal, in respect it did not conclude with an express petition.

At a meeting of the creditors of Hugh Donaghy, merchant and manufacturing chemist in Glasgow, held on the 28th April 1866, it was moved that Mr Donaghy's personal protection be renewed for six months from that date. A counter motion was made that protection should not be renewed. The vote having been taken, the chairman of the meeting declared the counter motion carried. The creditors who supported the first motion then presented an appeal to the Sheriff simply asking him to recal the resolution declared at the meeting, on the ground that it had been carried by means to a