Saturday, March 2.

SPECIAL CASE—SIR THOMAS GIBSON CARMICHAEL'S TRUSTEES AND OTHERS.

Succession—Testament.

A testator died in 1855, leaving a trust-disposition and settlement, and a subsequent holograph testament. By the former he conveyed his whole estate, heritable and moveable, to trustees, directing them, after payment of debts and legacies, to pay £8000 of the residue to his widow, and divide the remainder among his brothers and sisters. The latter was in the following terms:—"I hereby will and bequeath and dispose of my personal property as follows:—All monies belonging to me or due to me from any source (over and above the sum of Eight thousand pounds stg. already settled on my wife), I wish to be equally divided between my wife and my mother." At the time of his death the testator was possessed of moveable property to the amount of £5500, and of heritable bonds to the amount of £8500.

Held that the subsequent testament dealt with a surplus of moveable property above £8000, which turned out not to exist; that the whole moveable estate was to be exhausted in payment *pro tanto* of the widow's provision, and that the remainder of that provision fell to be paid out of the heritable estate, leaving the balance of the heritable estate to the residuary legatees under the trust-deed.

On the 12th December 1850 the late Sir Thomas Gibson Carmichael executed a trust-disposition and settlement, by which he conveyed to trustees his whole estate, heritable and moveable, except the entailed estates possessed by him. The purposes of the trust were—*First*, payment of debts; *second*, payment of any legacies he might leave by any separate writing or memorandum by him, however informal; *third*, in the event of his dying without issue, he directed his trustees to pay out of the residue of his means and estate £8000 to his widow, the remainder to be divided equally among his brothers and sisters, Charles, William Henry, Maria, and Sophia, excluding either of his brothers who should succeed to the entailed estates, and declaring that if any of his brothers and sisters predeceased him their issue should take the share which would have fallen to their parents. The provision of £8000 to his widow, together with an annuity which he had provided to her, was declared to be in full of her legal rights.

In December 1852 the truster's brother Charles died without issue, and in May 1853 his sister Maria, then the wife of Mr John Philip Lacaita (afterwards Sir J. P. Lacaita) died, leaving one child, Charles Carmichael Lacaita.

Sir Thomas, who had been in bad health for some time, and travelled abroad on that account, died in Italy on 30th December 1855, survived by his widow Frances Lady Carmichael, his mother Anne Lady Carmichael, his brother William (now Sir W. H. G. Carmichael), his sister Sophia, (now Mrs Nevile Reid), and his nephew Charles Carmichael Lacaita.

In the portmanteau of the deceased was found a document in his handwriting, purporting to be his last will and testament, dated 12th November 1853, in the following terms:—

"*Castle Craig, November* 12, 1853.—I hereby will and bequeath and dispose of my personal property as follows:—All monies belonging to me or due to me from any source (over and above the sum of Eight thousand pounds sterling already settled on my wife), I wish to be equally divided between my wife Frances Marianne Gibson Carmichael, and my mother, the Honourable Anne Gibson Carmichael; all my plate, furniture, books, horses, carriages, and farm stock, &c., I leave to my brother William Henry Gibson Carmichael, or in case of his predeceasing me, to my sister Sophia Caroline Gibson Carmichael. This is my last will and testament, to which I hereby sign my name.

THOS. G. CARMICHAEL."

(Written on back) "My will, Novr. 12th 1853.

THOS. G. CARMICHAEL."

Independently of the entailed estates, Sir T. G. Carmichael was in possession, at his death, of property which, after payment of his debts and the special bequest of plate, furniture, &c., to his brother Sir William, amounted to £8500 in two heritable bonds, dated in 1847 and 1848 respectively, and about £5500 in moveable property. His income was about £4500 a-year.

Lady Anne Gibson Carmichael, mother of the testator, died in December 1861, leaving a trust-settlement.

A Special Case was presented to the Court by—(1) The trustees of the late Sir Thomas Gibson Carmichael, Mrs Nevile Reid and husband, and Charles G. Lacaita, with concurrence of his father as his administrator-in-law. (2) Dame Frances Gibson Carmichael, widow of the late Sir Thomas Gibson Carmichael, and the trustees of the late Lady Anne Gibson Carmichael.

Both parties agreed that the trust-deed of 1850 and the holograph will of 1853 were to be read together as the testator's settlement.

The parties of the *first part* maintained that the true construction of the holograph will was to make the provision of £8000 to Lady Frances G. Carmichael a primary burden on the moveable estate, and to throw it on the heritable estate only in so far as it exceeded the moveable estate. According to this construction, the moveable estate would be exhausted in paying Lady Frances' provision, and Lady Anne's representatives would take nothing. After providing the balance of £2500 of Lady Frances' provision out of the heritable estate, there would remain £6000 to be divided between Mrs Reid and Charles Carmichael Lacaita, the residuary legatees under the trust-deed of 1850.

Alternatively, they maintained that the provision of £8000 was to be paid out of the moveable and heritable estates in proportion to their respective amounts.

The parties of the *second part* maintained that the effect of the will was to give Lady Frances G. Carmichael one-half of the moveable estate in addition to the £8000 which fell to be paid out of the heritable estate. According to this view, the £5500 of moveable estate would be divided equally between Lady Frances and Lady Anne's representatives. Lady Frances would take £8000 out of the heritable estate, leaving only £500 to the residuary legatees.

Alternatively, they acquiesced in the second proposal of the parties of the *first part*.

The questions submitted to the Court were stated in the case, as amended—

"1. Whether, according to a sound construction of the foresaid deeds of 12th December 1850 and 12th November 1853, as constituting together the testator's settlement, the testator's personal estate, with the exception of articles specifically disposed of, falls in the first place to be applied, so far as it will go, towards payment of the £8000 to his wife; and whether the remainder of that sum falls to be paid out of the foresaid heritable securities, and the balance, if any, arising from said securities to be disposed of as provided by the said first mentioned deed? or—

"2. Whether the testator's personal estate, excepting as aforesaid, falls to be equally divided between his wife and the representatives of his mother, and the said £8000 to be paid out of the proceeds of the said heritable securities, and the balance of said proceeds to be disposed of as provided by the said first mentioned deed? or—

"3. Whether the said £8000 falls to be paid rateably out of the whole residue, both heritable and moveable?"

SHAND and MACKINTOSH, for the first parties, argued that the deed of 1853 deals with a surplus of personal property which turned out not to exist. Except as regards the special bequest of plate, furniture, &c., it could only come into operation if the personal estate left by the testator exceeded £8000.

SOLICITOR-GENERAL and RUTHERFURD, for the second parties—The expression "over and above" in the deed of 1853 is not equivalent to "after," as the other side contend. The sound construction of the deed is that it gives to the widow, *over and above* the £8000 already secured to her, one-half of his personal property. Sir Thomas must have been acquainted with the state of his investments. He must have known that his moveable property was much less than £8000.

At advising—

LORD DEAS—Sir Thomas Gibson Carmichael was possessed of an income, chiefly derived from entailed estates, of about £4500 a-year. He does not appear to have had any great estate otherwise, beyond what he could save from the rents. He left a widow, a mother, a brother, and sister, and the child of a deceased sister.

In December 1850 he executed a trust-disposition and settlement disposing of his whole means. Substantially he gave £8000 of capital to his widow, in addition to an annuity, the amount of which is not stated, but which I suppose was that which he was entitled to provide to her out of the entailed estates. She appears to be sufficiently provided for, and indeed the trust-deed bears that the annuity and the sum of £8000 are to be accepted by her as in full satisfaction of "all terce of lands, legal, or share of moveables, and every other thing that she, *jure relictæ*, or otherwise, or her next of kin, could ask, claim, or demand by and through my decease."

Sir Thomas appears to have been always in indifferent health, and went abroad on that account. Before he went abroad for the last time he executed a holograph will, which has given rise to the present question. He died in Italy on 30th December 1855, and this will was found in his portmanteau.

Two leading constructions have been contended for of that will, both of which in the state of funds are somewhat undesirable. By the original trust-deed he had given the residue of his whole means, after providing the £8000 to his widow, to his brothers and sisters and their descendants. The holograph will bears—(*reads*). Now at his death his personal estate amounted to £5500 and the sums contained in heritable bonds to £8500. One construction of the holograph will is that it carries his whole personal estate to his widow and mother. According to this, nothing would remain but the £8500 contained in heritable bonds, which, after providing for £8000 to the widow, would only give a balance of £500 to the brothers and sisters. The contention on the other side is that the £8000 falls to be set, in the first instance, against the moveable estate. Consequently, under the holograph will, his mother gets nothing, and his widow nothing added to her £8000. There is a third view which has been suggested by both parties—that the £8000 shall be allocated rateably on the heritable and moveable estate in proportion to their respective amounts, but I think we are all agreed that there is no room for such an arrangement, however desirable it might be.

We are therefore driven to choose between the two views first stated. I am of opinion that the grounds of judgment preponderate in favour of the view that the £8000 is to be provided by first taking the moveable estate, and only the excess out of the heritable estate. It is a moveable provision, and naturally comes out of the moveable estate. There is no suggestion that the testator intended to cut his brothers and sisters and their issue out of the provisions which he had made for them by the original deed; and it is difficult to find any other ground to support the opposite view. For the view which I adopt there is a reasonable ground, viz. that he had supposed himself richer than he was—a very common thing—or that he had expected to save a little more money. There was every prospect of his doing so, for he had no expenses beyond his travelling expenses. If he had accumulated more, the surplus over £8000 would have been divided between his widow and mother. I propose that we should answer the first question in the affirmative, and the other two in the negative.

LORD ARDMILLAN concurred.

LORD KINLOCH—The present case lies within a narrow compass.

There cannot be any doubt as to the import of the original trust-disposition. The whole estate, heritable and moveable, was massed; and after paying debts and legacies, the residue was divided into a first and preferable payment of £8000 to Lady Carmichael, the testator's wife, and a balance divisible amongst his brothers and sisters named.

There then comes the holograph codicil, whose construction is now in issue. Its meaning must, I think, be determined by a sound consideration of its words. The amount of the testator's fortune, at one period or another, cannot be taken as conclusive in the question of interpretation, although it may be a circumstance to aid the construction of the writing.

I think it clear that this codicil regulates the distribution of the testator's whole moveable estate. It says in express terms—"I hereby will, and bequeath, and dispose of my personal property as follows." The effect of this declaration is to take

the personal property out of the original trust-disposition, leaving the heritage still comprised in it.

What then is the import of the declaration "all monies belonging to me, or due to me from any source (over and above the sum of £8000 sterling already settled on my wife), I wish to be equally divided between my wife Frances Marianne Gibson Carmichael, and my mother the Hon. Anne Gibson Carmichael?" I cannot interpret the clause to mean that his wife and mother had the whole personal estate bestowed on them, leaving the £8000 to be paid out of the heritage, and the residuary disponees to get any balance over of the proceeds of this heritage. Such conclusion I think to be at variance at once with the words and the fairly presumable intention of the testator. What I think he meant was, that so far as the monies included in the personal estate went beyond the sum necessary to pay the provision of £8000 to his wife, the surplus should be divided between his wife and mother. I can put no other rational construction on this clause of the codicil. This of course implies that if the personal estate did not amount to £8000 no benefit resulted under this bequest. It equally implies that the personal estate should be primarily applicable in payment of this £8000. If the bequest fails, in consequence of the personal estate not amounting to £8000, there will be no practical occasion to draw any distinction between heritable and moveable, for both will be indiscriminately applicable in the primary payment of this sum, as under the original deed.

I am of opinion that the first question in the Amended Case should be answered affirmatively, the others in the negative.

LORD PRESIDENT gave no opinion, having been absent during the debate.

The following interlocutor was pronounced:—

"2*d March* 1871.—In answer to the first question, find that the two deeds, dated respectively 12th December 1850 and 12th November 1853, constitute together the testator's settlement; and that, according to a sound construction thereof, his personal estate, with the exception of articles specifically disposed of, falls in the first place to be applied, so far as it will go, towards payment of the £8000 provided to his wife, and the remainder of that provision falls to be paid out of the proceeds of the two heritable securities held by him at his death, leaving the balance, if any, arising from the said heritable securities to be disposed of in terms of the clause in the deed of 12th December 1850, which provides that, after payment of the said £8000, the remainder of the residue shall go to the testator's brothers and sisters or their issue, subject to the contingencies and conditions therein expressed. And, as regards the remaining two questions, answer each of them in the negative; and decern."

Agents for First Parties—Mackenzie & Black, W.S.

Agents for Second Parties—Gibson Craig, Dalziel & Brodies, W.S

Saturday, March 2.

DUKE OF HAMILTON, PETITIONER. JOHN GRAHAM BARNES GRAHAM, RESPONDENT.

(*Vide ante*, vol. vi., 658, and in the House of Lords, 9 Macph., p. 98.)

Process—Appeal—Expenses.

Where a judgment of the House of Lords reversed that of the Court of Session, and remitted back to that Court to assoilzie the defender in the action, and to find him entitled to the expenses incurred by him in the said Court,—*Held* that the defender was entitled to the expenses of the petition to apply this judgment of the House of Lords.

In this case the judgment of the House of Lords, of date 28th July 1871, was in the following terms:—"It is ordered and adjudged by the Lords spiritual and temporal, in Parliament assembled, that the said interlocutor of the Lords of Session in Scotland of the First Division, of the 5th of July 1869, complained of in the said appeal, be, and the same is hereby, reversed, and that the cause be, and is hereby, remitted back to the Court of Session in Scotland, with instructions to that Court to assoilzie the appellant (defender in the action in the said Court) from the whole conclusions of the libel, reserving right to the respondent (pursuer in the said action) to challenge, upon any competent ground, any operations upon the surface of the said lands by the appellant (defender) or his tenants or successors, and to them their defences thereanent; and to find the appellant (defender) entitled to the expenses incurred by him in the said Court, and to do further in the said cause as shall be just and consistent with this judgment."

The defender, the Duke of Hamilton, presented a petition to have this judgment of the House of Lords applied, and, *inter alia*, asked the expenses of the said petition to apply the judgment.

KEIR, for him, contended that, where the application of a judgment was necessary in order to the successful party obtaining the benefit of it, he was entitled to the expenses of the petition. Authorities—*Collins* v. *Young*, May 31, 1853, 15 D. 702; *Pitt*, June 4, 1864, 2 Macph. 1153; and *Fleeming* v. *Howden*, Nov. 6, 1868, 7 Macph. 79.

WATSON for the respondent.

The Court allowed the expenses of the petition in conformity with the previous practice.

Agents for Petitioner—Tods, Murray, & Jamieson, W.S.

Agents for Respondent—Graham & Johnston, W.S.