Saturday, December 21.

FIRST DIVISION.

SPECIAL CASE—HILL.

Succession—Heritable and Moveable—Interest, Bequest of.

A testator bequeathed the interest of £6000 to his brother A until the youngest son of another brother should attain majority. A died, and was survived by a widow and an only son B, who died in pupilarity. *Held*, in a question between (1) B's heir-at-law and executor-dative, and (2) his mother, that the accruing interest was part of the moveable estate of B, and that his mother was entitled to one-third of the interest.

This was a Special Case for James Hill, farmer, Braidieston, Forfarshire, and Mrs Elizabeth Todd or Hill, widow of Robert Hill, farmer at Hallyards, Perthshire. The circumstances set forth in the case were as follows:—

David Hill of Hillgarden, and tenant of the farm of Hallyards, executed, on 6th November 1860, a trust-disposition and deed of settlement, by which his whole property, heritable and moveable, was conveyed to trustees, who were also in the same deed appointed his executors. The purposes of the trust were declared to be as follows:—"*First*, In respect that the main object of this trust is to form a clear capital trust-fund of £6500 sterling, to be disposed of, under the management of my trustees, in manner underwritten, and that over and above the said Coupar-Angus heritable properties, the disposal whereof is hereinafter provided for; declare and enjoin that my brother Robert shall provide funds to my trustees for paying all my just and lawful debts, deathbed and funeral expenses, and the expense of the executry, including the stamp of the inventory of my personal estate, &c. *Second*, My trustees shall make over to my brother Robert the lease of Hallyards for the whole remaining years thereof, and also my whole crop, stocking, household furniture, and moveables thereupon, and my other moveable means and estate, wherever situated, and also my heritages, except what is hereafter specially disposed of, at the sum of £3500 sterling, which he shall be required to pay over to my trustees as soon after my death as he and they arrange, and at least within six months; and as this sum, with £3000 I have now in the bank, will form a capital of £6500, which will be the full money-fund under the trust, I direct this amount of capital to be disposed of in manner following, viz., my brother Robert shall have the whole interest of £6000 until the youngest son of my brother Dr Andrew Hill attains the age of twenty-one years complete, and at this period the said £6000 shall be divided as follows,—each of my brother Andrew's two youngest sons, George and David, shall be paid the sum of £2000, and my nephew Robert, only son of my brother James, shall be paid the sum of £1000, and each of his two daughters Jane Ann and Jessie shall be paid the sum of £500; and my reason for making this distinction in the amount of these bequests to my respective brothers' children is, because, from my brother Andrew's infirm state of health, he is unable to do anything for his family; and this I do from no other motive but the wish to deal fairly towards my nephews and nieces." Then follow directions as to the disposal of "the remaining £500 not disposed of as above out of the said capital of £6500," and also as to the disposal of his heritable property. David Hill, the truster, died on 10th November 1860, and Robert Hill, his brother, implemented the conditions imposed on him by the settlement, by paying the debts of the truster, the trust-expenses, and the £3500 mentioned in the said deed. In respect of this he obtained possession of the farm of Hallyards, and of the crop and stocking thereon, and besides, drew the interest on the said sum of £6000 until Martinmas 1863. On February 28, 1864 he died, survived by his widow, one of the parties to this case, and an only child, Robert Hunter Hill. James Hill, the other party to this case, and immediate younger brother of Robert, was appointed factor on the estate of the said Robert Hill, by the commissary-depute of Perth, on 16th March 1864, and thereafter, by decree, dated 8th April 1864, executor-dative *qua* factor, and gave up an inventory of the personal estate, and obtained confirmation; and, on May 3, 1865, Mr David Henderson Halkett, agent for the Bank of Scotland at Alyth, was, on the joint application of the said James Hill and Mrs Elizabeth Todd or Hill, appointed *factor loco tutoris* to the said Robert Hunter Hill by the Court of Session.

An action of multiplepoinding was brought shortly after the death of the said Robert Hill, to have it established to whom the right to the interest of this sum of £6000 that might accrue after that event had passed; and the Court, after hearing the representatives of Mr David Hill *ab intestato*, the tutors for Dr Hill's children, and Robert Hill's executors, found that the future produce of the sum in question had descended to Robert Hill's executors, who were entitled to its enjoyment until the period fixed by the settlement for the division of the capital itself.

Robert Hunter Hill died on July 22, 1871, the interest up to the term of Whitsunday preceding having been paid to the said David Henderson Halkett, and entered in his accounts given up for audit to the Accountant of Court. The said Robert Hunter Hill was a pupil at his death. The youngest son of Dr Andrew Hill is still a minor, and will not attain majority till 1878.

James Hill, one of the parties hereto, was the heir-at-law and executor-dative decerned of his late nephew Robert Hunter Hill, and, as such, claimed the interest on the said sum of £6000 sterling till the period of division. Mrs Hill, the other party hereto, claimed to participate in the said interest from her son's death till the arrival of the said period of division,—contending that it formed part of her son's moveable estate, to one-third of which she was entitled under the Moveable Succession Act of 1855.

On this statement of facts the following questions were submitted for the opinion and judgment of the Court:—"(1) Does the interest on the said fund of £6000, from the date of the death of the said Robert Hunter Hill till the majority of Dr Andrew Hill's youngest son, form part of Robert Hunter Hill's moveable estate; and is the said Mrs Elizabeth Todd or Hill entitled to participate therein until the period fixed for division of the capital? Or (2) Is she entitled to participate only in that part of it which had become due at the date of her son's death?

It was argued for the first party, James Hill, hat the right to the estate of interest was a right

bearing a tract *futuri temporis*, and was therefore to be dealt with as heritable. For the interest was not an estate at present in existence, but an estate to arise in the future, and to the existence of which a future tract of time was necessary. Therefore it was argued the right was heritable and not moveable. Stair, 2, 1, 4, and 3, 5, 6. Erskine's Institute, 2, 2, 6.

It was argued for the second party that the right was moveable. The bequest was of the "whole interest," until a certain event occurred, and this was to the same effect as if the trustees had been directed to accumulate the interest and pay it in a slump sum when the said event occurred.

Muirhead v. *Muirhead*, 6 Macph. 95.

At advising—

LORD PRESIDENT—This question arises under the trust-disposition of Mr David Hill, in which he makes a kind of bargain with his brother Robert Hill in the following terms—"I declare and enjoin that my brother Robert shall provide funds to my trustees for paying all my just and lawful debts, death-bed and funeral expenses, and the expense of the executry, including the stamp of the inventory of my personal estate, &c. *Second*, My trustees shall make over to my brother Robert the lease of Hallyards for the whole remaining years thereof, and also my whole crop, stocking, household furniture, and moveables thereupon, and my other moveable means and estate, wherever situated, and also my heritages, except what is hereafter specially disposed of, at the sum of £3500 sterling, which he shall be required to pay over to my trustees as soon after my death as he and they arrange, and at least within six months; and as this sum, with £3000 I have now in the bank, will form a capital of £6500, which will be the full money-fund under the trust, I direct this amount of capital to be disposed of in manner following, viz., my brother Robert shall have the whole interest of £6000 until the youngest son of my brother Dr Andrew Hill attains the age of twenty-one years complete." Now, it was held by a previous judgment of this Court, that there was here given to Robert Hill a legacy of the interest of the £6000, and that the right thus given to him did not expire at his death, but went to his representatives, and so the interest of the sum was drawn by the guardians of Robert Hunter Hill, and applied for his benefit. Then Robert Hunter Hill died in pupillarity, and this event has given rise to the question whether the accruing interest is heritable or moveable. If it is heritable, the first party to this case takes the whole of the accruing interest, but if it is moveable, then one-third must go to the mother of the pupil.

It was maintained for the first party that the right which was in the pupil Robert Hunter Hill was heritable, because it bore a tract *futuri temporis*. This raises a question in a somewhat forgotten region of law. It is certain that some rights which bear a tract *futuri temporis* are in law heritable, although in their nature moveable. Lord Stair enumerates these rights as reversions, pensions, and tacks, and I do not think that there is any authority for carrying the rule farther. Erskine lays down the correct principle upon which the rule is founded. He says, "Rights which have a *tractus futuri temporis* are also heritable. These are rights of such a nature that they cannot be at once paid or fulfilled by the debtor, but continue for a number of years, and carry a yearly profit to the creditor while they subsist, without relation to any capital sum or stock, *e.g.*, a yearly annuity or pension for a certain term of years." Now, it is clear that the rights enumerated by Stair as heritable, answer to this description, that they are without relation to any capital sum or stock, that is, either belonging to the debtor or the creditor in the obligation. The only authority which throws any doubt on this position, is Bell in his Commentaries, vol. ii, p. 4. He there says:—"Rights having a tract of future time, though of a personal nature, and unconnected with land, are heritable. The precise character of such a right is, that it is periodical and future; the payments not being the mere fruits and accessories of a capital or principal debt vested in the person who holds the right, but falling to the creditor as periodical payments, independent of each other, the right to each vesting only at the elapse of the successive terms of payment. A right of annuity is a proper example; so is a liferent of a sum; so the husband's interest in a bond due to his wife, of which the capital is hers, the interests only as they accrue being his." Now, Bell here seems to extend the doctrine, and the case of a husband's interest in a bond due to his wife is very much the kind of right we are at present considering, viz., interest on a capital sum. But Bell is in error in supposing that it has ever been decided that the husband's interest in his wife's bond is a right bearing a future tract of time, and a heritable right. The case of *Clunie's Creditors*, quoted by Bell, does not decide that. In his Principles, however, Mr Bell expresses himself more happily. In paragraph 1480 he says:—"Rights having a future tract of time are heritable; such are liferents; also debts giving a periodical right without having relation to a capital sum or principal, as an annuity. It has been suggested that patent rights and copyrights, as having a tract of future time, seem to be heritable. But this has never been decided." Now, in the first part of this passage Mr Bell varies the language of the Commentaries, and uses the same language as Erskine. The reference to patent rights is not material to the present case, although light is thrown on the subject by the general law in the case of *The Advocate-General* v. *Oswald*, 10 D. 980, in which case it was decided that patent rights are moveable, and that all accruing profits of the patent go to the executor. Now, what is said to be heritable in this case is only the interest of a capital sum, and I am clearly of opinion that it is not a right of the nature contemplated in the rule. This being so, the second party to this case is entitled to one-third of the interest of the £6000.

LORDS DEAS and ARDMILLAN concurred.

LORD JERVISWOODE—I am of the same opinion as Lord Ardmillan. It seems that the capital sum, from which the interest flows, is strictly moveable, and not heritable. No doubt the right has what may in some cases give what would otherwise be moveable a heritable character—that is, a tract of future time. The terms of the bequest are—"my brother Robert shall have the whole interest of £6000 until the youngest son of my brother Dr Andrew Hill attains the age of twenty-one years complete." Now, under this bequest it seems to me to be impossible to hold that the first payment of interest could be anything

else than the payment of a moveable sum, and I cannot see how the fact that further payments are to be made in the future can change the character of the right. I therefore agree with your Lordship in holding that the accruing interest is part of the moveable estate of Robert Hunter Hill.

The Court held that the accruing interest was part of the moveable estate of the deceased Robert Hunter Hill, and that his mother was entitled to one-third thereof under the Moveable Succession Act of 1855.

Counsel for James Hill—Watson and M'Lean. Agents—J. & J. Gardiner, S.S.C.

Counsel for Mrs Hill — Fraser and Duncan. Agents—Jardine, Stodart, & Frasers, W.S.

Tuesday January 7.

SECOND DIVISION.

[Lord Mure, Ordinary.

DUNCAN'S TRUSTEES *v.* SHAND.

Obligation—Promissory Note.

A holograph document couched in the terms "I promise to pay on demand the sum of £100, value received "—*Held* (1) That it was not a promissory note. (2) That it could not by subsequent letters written by the granter be raised into a valid obligation."

Observed—It should be understood in the profession that where documents are included in an inventory which is given in by a party at the close of his proof, the counsel on the opposite side must satisfy themselves that there is no objection to the competency of these documents as evidence, as they will not afterwards be allowed to state such objections.

This case came up by a reclaiming note against the Lord Ordinary's interlocutor of 22d June 1872, which was as follows:—

"22*d June* 1872.—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions, before answer allows parties a proof of their averments applicable to the possession by the late Dr Duncan of the promissory-note in question, and to each a conjunct probation, and appoints the proof to be taken before the Lord Ordinary on a day to be afterwards fixed.

"*Note.*—Until the facts relative to the possession of the document in question by the late Dr Duncan are ascertained, the case will not, it is thought, be in a position for disposing of any of the pleas raised in defence, or to enable the Court to decide whether the rules on which the decision in the case of *Fair*, 24th June 1801, Hume, p. 47, D. p. 1677 *Ogilvie*. 24 June 1804, M. Appx. Bill, No. 17; and *Macdonald*, 13th June 1817,—proceeded, admit of being here applied."

Thereafter, on the 22d and 26th November last, the following interlocutors were pronounced in the cause by the Second Division:—

"The Lords, on the motion of the pursuers, allow them a proof of the debt sued for, and appoint the same to proceed before the Lord Justice-Clerk on Saturday the 30th of November current, in the Parliament House, at one o'clock, and grant diligence."

"The Lords, on the motion of the defender, grant diligence for recovery of the writings specified in No. 23 of process, and to Mr Donald Crawford, advocate, to receive exhibits and take the deposition of havers, to be reported *quam primum*."

Accordingly a proof was led (Nov. 30th) before the Lord Justice-Clerk, and the case came up for hearing before the Second Division on 21st December.

The document on which the action was founded was as follows:—

"*Edinburgh 2d February*, 1869.—I promise to pay on demand the sum of £100 Sterling, value received. ISABELLA SHAND."

There were also produced a number of letters relative to the matter.

For the pursuers it was argued, that although the document erroneously termed a promissory note in the course of the correspondence was not perhaps sufficient to constitute a legal obligation, nevertheless it was entirely holograph of the defender, and was referred to by her all through as intimately connected with the transaction in question. The principal letters referred to were those of Miss Shand, of date 5th February 1869 and of 15th January 1872; the first is in answer to one of Mr Balfour's of the same date, and the two letters were as follows:—

"4 *Thistle Court, Edinburgh, February* 5, 1869.

"Madam,—I beg to remind you of the arrangement made yesterday, in terms of which you promised either to pay me £50 of the £100 which you got from Dr Duncan, or to find security to my satisfaction for the payment of the first £50 within a month, and the second £50 within two months, and this was to be done not later than Monday morning at eleven. We shall delay taking any proceedings against you till that hour.—Your most obedient servant, J. M. BALFOUR."

"13 *Maitland Street, 5th February* 1869.

"Sir,—I called for Mr Barbour to-day, to ask him to become my security to Dr Duncan, but unfortunately he was out. Mrs Barbour assured me I should see him to-morrow, when I hope to come to some arrangement with you. I have received your note.—I am, yours, &c., ISABELLA SHAND."

The other letter, with that which called it forth, was in these terms:—

"*Aberdeen*, 11*th January* 1872.

"Dear Madam,—We received your letter of 10th inst. Had you received the £100 from Dr Duncan on 2d February 1869 in payment of a debt, it is obvious you would not have granted your bill to him.

"Mr James Balfour, one of Dr Duncan's executors, handed over the bill as evidence of a debt legally due by you to the deceased, and as forming part of the residue falling to his minor grandchildren. In these circumstances, it is the duty of the trustees to recover payment, and we hope you will arrange for an immediate settlement, so as to avoid the disagreeable necessity of legal proceedings in terms of our instructions.

"We are sure Dr Duncan's trustees will not disregard any debt which may have been legally due by him.—Yours, &c., EDMONDS & MACQUEEN."

"*Edinburgh*, 25 *Charlotte Square*,
"15*th January* 1872.

"Dear Sir,—In reply to yours of 11th January, I beg to say that I will arrange as soon as possible