

Saturday, July 9.

## SECOND DIVISION.

### WHITTET'S TRUSTEES v. MICHELL.

*Succession—Construction of Terms—Destination in Favour of Spouses and "their Children," exclusive of Husband's Children by Second Marriage.*

In his trust-disposition and settlement a testator directed his trustees on the occurrence of a certain event to divide the residue of his estate equally among his nephews and nieces. At the date of the settlement one of his nephews and one of his nieces were spouses with a family of two children. By codicil the testator directed his trustees to retain out of the shares of residue falling to this nephew and niece the sum of £200, "and to pay and divide the same among their children equally, share and share alike." The niece died before the testator.

Held that the intention of the testator was to make a special provision of £200 in favour of the issue of the marriage of his nephew and niece, and that the children of the nephew by a second marriage were not entitled to any part of that sum.

James Whittet, merchant in Perth, died on 7th November 1876, leaving a trust-disposition and deed of settlement dated 10th January 1870, and codicil thereto dated 14th February 1873. By said trust-disposition and settlement he assigned and disposed his whole means and estate to trustees for the following purposes, *inter alia*:—1. Payment of debts. 2. "That the said trustees shall hold the residue of my estate during the respective lives of my sisters Susan Whittet, Jean Whittet, and Nancy Whittet," and make payment to his sisters of such alimentary allowance as they shall think necessary. 3. "Upon the death of the last survivor of my said sisters, to divide the residue of my said estate, heritable and moveable, equally among my nephews and nieces, share and share alike: Declaring that in case any one or more of my nephews or nieces shall happen to predecease me or die without having received payment of his or her or their share of my said estate, then such share or shares of the nephew or niece so dying shall accrue to the survivor or survivors equally among them, share and share alike: Providing nevertheless, that if such nephew or niece so dying shall have left lawful issue, then such issue shall have right to the share or respective shares of my estate which their deceased parent or parents would have been entitled to if living." By said codicil the said James Whittet, *inter alia*, appointed his said trustees "to retain out of the shares falling to my nephew James Murray Whittet, and my niece Mrs Jane Whittet, the sum of £200, and to pay and divide the same among their children equally, share and share alike."

At the date of the said trust-disposition

and settlement, James Murray Whittet and Mrs Jane Whittet, who were respectively a nephew and niece by blood of the testator, were spouses and had two children, Mrs Cecilia Whittet or Michell and Jeannie Mary Whittet. No more children were born of this marriage.

On 8th March 1874 Mrs Jane Whittet died, thus predeceasing the truster.

At his death in 1876 the testator left personal estate to the amount of about £3444, but left no heritable estate. The trustees accepted office and administered his said estate.

On 18th June 1879 James Murray Whittet entered into a second marriage with Emily Newcombe. Six children were born of this marriage.

After the death of Nancy Whittet, the survivor of the testator's sisters, in or about the 25th August 1890, the trustees divided and paid over the residue in terms of the trust-disposition and settlement, with the exception of said sum of £200, which he had appointed them to retain out of the shares falling to his nephew James Murray Whittet and his niece Mrs Jane Whittet, wife of the said James Murray Whittet.

A question having arisen with respect to the parties entitled to participate in the said sum of £200, the present case was presented to the Court for the decision of the point.

The first parties to the case were the trustees, the second parties were the two children of the marriage between James Murray Whittet and Jane Whittet, the third parties were the six children of the marriage between James Murray Whittet, and Emily Newcombe.

The second parties maintained, that being the only children of the marriage of James Murray Whittet and Jane Whittet, they were entitled—first, to payment equally between them of the whole of said sum of £200; or second, to payment equally between them of the whole of said sum of £100 retained from the share bequeathed by the deceased to their mother, and also to a share with the children of the said second marriage of the sum of £100, retained from the share of their father, the said James Murray Whittet.

The third parties maintained that the true interpretation of the direction by the deceased to retain £200 out of the shares falling to his nephew James Murray Whittet and his niece Mrs Jane Whittet, and to pay and divide the same "among their children equally share and share alike," was to vest said sum of £200 in the whole children of the truster's nephew, the said James Murray Whittet, whether of his first or his second marriage, and that *per capita*.

The questions at law submitted were—“(1) Are the second parties, being the only children of the marriage between the said James Murray Whittet and Jane Whittet, entitled to payment equally between them of the sum of £200 in question? (2) In the event of the preceding question being answered in the negative, are the second parties exclusively entitled to payment equally between them of the sum of £100,

retained out of the share falling to their mother, the said Jane Whittet, and also to share equally with the children of the second marriage of their father in the sum of £100 retained out of the share bequeathed to him? (3) In the event of the preceding questions being answered in the negative, are the third parties, being the children of the second marriage of the said James Murray Whittet, entitled to participate equally share and share alike with the second parties in the said sum of £200?"

Argued for the second parties—It was plain from the deeds that the truster did not contemplate the children of one of the spouses by a second marriage succeeding, but had confined the division of the £200 to the joint children of his nephew and niece.

Argued for the third parties—A generous construction should be given to the words of the clause, and the words "their children" were popular and general words, and included not merely the joint children of the nephew and niece but all the children of either nephew or niece—*Buchan v. Porteous*, November 13, 1879, 7 R. 211.

At advising—

LORD TRAYNER—The late James Whittet by his trust-disposition and settlement dated in January 1870 directed his trustees on the occurrence of a certain event to divide the residue of his estate equally among his nephews and nieces. At the date of that settlement he had a nephew James Murray Whittet and a niece Jane Whittet, who were spouses with a family of two children. By codicil dated February 1873 the truster directed his trustees "to retain out of the shares falling to my nephew James Murray Whittet and my niece Mrs Jane Whittet the sum of £200, and to pay and divide the same among their children equally, share and share alike." Mrs Jane Whittet died in March 1874, predeceasing the truster, who survived till November 1876. About two years and a half after the truster's death (viz., in June 1879) James Murray Whittet entered into a second marriage, of which there were born six children.

The question now to be determined relates to the construction to be put upon the words "their children" used in the direction contained in the codicil which I have quoted. For the second parties (the two children of the marriage between James and Jane Whittet) it is contended that these words directly designate them—and them alone—as being the only persons who are the children of James and Jane Whittet as spouses. It is maintained, on the other hand, by the third parties (the children of James by his second marriage) that the words under construction are to be read as designating any children descended from James and Jane, or either of them.

I do not think this question attended with any difficulty, and am of opinion that the contention of the second parties is sound.

It appears to me from the terms of the

trust-disposition and codicil taken together that the intention of the testator was, first, to benefit his nephews and nieces, and second, out of the benefit so conferred on his nephew and niece James and Jane, to make a special provision in favour of their issue—that is, the issue of their marriage. The third parties cannot claim to be the issue of James and Jane Whittet, and if they cannot claim that character, I think they are not the parties or among the parties that the provision in the codicil intended to favour. There are various considerations which go to support the view that the provision in the codicil was intended only to favour or confer benefit on the children of the marriage between James and Jane. The testator was not here providing for the issue of his nephews and nieces generally, nor was he providing for the possible issue of nephews and nieces yet unmarried. He was dealing—and dealing in an exceptional manner—with the interests of a nephew and niece then married and having issue. In these circumstances, the natural construction to put upon the testator's expression is one which is appropriate to the existing facts, and accordingly when the testator speaks of "their children," it seems much more probable that he is speaking of the children of a marriage then existing rather than children of another marriage which he had then no reason to anticipate would ever be entered into. Further, it is difficult to suppose that the truster (who in the distribution of the residue of his estate had shown equal favour for all his nephews and nieces) should have directed a part of Jane's share to be retained from her and given, to any extent, among the children of her husband and another wife to the detriment and disadvantage of her own children; but it is quite intelligible that he should have directed the retention of a part of the share of each of James and Jane for the purpose of giving it to their joint issue, for that was merely retaining from the parents what he gave to their children.

The case of *Buchan* was referred to as an authority in favour of the contention of the third parties. That case, however, cannot be regarded as an authority conclusive of the question here. The question in that case, as in the present, was, what was the intention of the testator? and the answer to such a question must depend on the particular facts and circumstances which each case presents. The present judgment does not conflict in the least with the decision pronounced in *Buchan's* case.

I am of opinion that the first question should be answered in the affirmative, and that being done renders it unnecessary to answer the other two questions.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court answered the first question in the affirmative.

Counsel for First Parties — Morison.  
Agent—Alex. Morison, S.S.C

Counsel for Second Parties — Dewar.  
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Counsel for Third Parties — Graham  
Stewart. Agent—Alex. Morison, S.S.C.

Tuesday, July 12.

## FIRST DIVISION.

[Lord Low, Ordinary.]

### THE SICKNESS AND ACCIDENT ASSURANCE ASSOCIATION, LIMITED v. THE GENERAL ACCIDENT ASSURANCE CORPORATION, LIMITED.

*Insurance—Insurance against Third Party Risks—Action of Relief by One Insurer against Another.*

A tramway company effected policies of insurance against claims of compensation for injuries caused by its vehicles with two insurance companies. One of these companies having indemnified the tramway company for a loss covered by its policy, brought an action of contribution against the other insurance company, alleging that the loss in question was covered by both policies.

*Held* that the pursuers had a title to sue.

*Insurance—Agreement to Insure—Condition that Insurance not to Take Effect until Premium Paid—Insurance “from” a Particular Date.*

An insurance company agreed to insure a tramway company against accidents for twelve months from 24th November 1888 inclusive, the agreement being subject to the condition that no insurance should be effected until the premium was paid. An accident occurred on 24th November, before the policy had been issued or the premium paid, and for the loss resulting from this accident the insurance company at once repudiated liability. On 26th November the premium was paid, and the insurance company acknowledged receipt of it as premium “for the risk from the 24th inst.”

*Held* (1) — following *Canning v. Farquhar*, 18 Q.B.D. 727 — that after the accident on 24th November the insurance company were not bound to issue a policy for the risk from 24th November inclusive; and (2) that they did not by the terms of the receipt undertake liability except for accidents occurring after the 24th.

On 16th November 1888 the General Accident Assurance Corporation, Limited, signed and issued to the South Staffordshire and Birmingham Steam Tramways Company a policy, whereby they agreed, in consideration of a premium of £240, to

indemnify the assured up to a specified amount against claims for compensation on account of personal injury or injury to property caused by the assured's vehicles during the period from November 17th 1888 to November 17th 1889. The policy contained this clause—“No assurance shall be held to be effected until the premium due thereon shall have been paid.”

As the Tramway Company were already insured with the Sickness and Accident Assurance Company for the twelve months from 24th November 1887, the secretary of the Tramway Company, Mr Hatchett, on 19th November 1888 wrote to Mr Mizon, the manager of the General Accident Assurance Corporation, as follows—“The date from which I desire to be covered is from the 24th instant inclusive, and not the 17th instant.”

Mr Mizon replied on the following day—“I shall be pleased to make the alteration in policy required by your directors.”

On the same day Mr Mizon wrote to Mr Miller, the secretary of the General Accident Assurance Corporation—“There are one or two slight alterations in this policy required to be put in order before the matter is finally completed, viz.—1. As to date. The risk to commence from the 24th inst. (inclusive), and not the 17th inst.” . . .

Mr Miller replied on the following day—“I note this risk commences from the 24th.”

On the night of the 24th, before the premium had been paid or the new policy issued, a serious accident occurred to one of the Tramway Company's cars, whereby a number of persons were injured.

On 26th November Mr Hatchett wrote to Mr Mizon, enclosing a cheque for £240, “being premium on policy for third party risk.”

On 29th November Mr Mizon acknowledged receipt of the cheque sent by Mr Hatchett in payment of the premium in these terms—“I am much obliged for your favour enclosing cheque, value £240, for the third party risk of the So. Staffd., &c., Tram. Co. from the 24th inst.”

The amount of damages incurred by the Tramway Company owing to the accident of 24th November was £833, 4s. 9d., and this sum they recovered from the Sickness and Accident Assurance Association after some litigation in the English Courts.

The Sickness and Accident Assurance Association thereafter brought the present action against the General Accident Assurance Corporation for payment of one-half of the sum which they had paid to the Tramway Company.

The pursuers averred that the defenders were liable under the policy issued by them to the Tramway Company for the damage which had resulted from the accident of 24th November.

The defenders denied this averment, and pleaded, *inter alia*—“(1) No title to sue. (4) In respect that the policy of insurance issued by the defenders to the Tramway Company did not at the date of the accident cover the same risk as was covered by the policy issued by the pursuers to the