

second place, that it is not averred there are funds held by the Board which have been specially dedicated by the donors to the support of the canons residentiary. In these circumstances, it must be assumed that any funds which the pursuer alleges to be in the hands of the Board are funds collected by them for Cathedral purposes in terms of the 13th section of the statutes. Now, in my opinion, that clause gives the Board an unlimited discretion with respect to the administration of these funds. So long as they are used for Cathedral purposes, it is for the Board and for the Board alone to determine at what time, in what way, or for what particular purpose they shall be applied. The statute gives canons residentiary no beneficial interest in these funds save what the Board may choose to accord to them. On these grounds I am of opinion that the judgment of the Second Division is right.

LORD MACNAGHTEN—My Lords, I concur. I agree entirely with the opinion of Lord Rutherford Clark. I do not think that the appellant has any right to insist on having provision made for him out of the funds in the hands of the Board of Management not appropriated by the subscribers to any specific purposes. It seems to me that the Board of Management have an absolute and unfettered discretion as to the administration of the funds in their hands within the limits prescribed by the statute for the Cathedral Church. The appellant's only right—if it can be called a right—is a right to be recognised as one of a class for whom the Board of Management may, if they think fit, in their discretion make provision.

The House affirmed the decision of the Second Division and dismissed the appeal with costs.

Counsel for the Appellant—Lord Advocate (Balfour, Q.C.)—Watt. Agents—A. Beveridge, for David A. Ross, S.S.C.

Counsel for the Respondents—Solicitor-General for Scotland (Asher, Q.C.)—Pitman. Agents—Grahames, Currey, & Spens, for J. & F. Anderson, W.S.

## COURT OF SESSION.

Tuesday, February 28.

### OUTER HOUSE.

[Lord Kincairney.

ROBB AND OTHERS (MITCHELL'S TRUSTEES) v. CABLES AND OTHERS.

*Succession—Testament—Construction of "Children"—Illegitimate Child.*

By his trust-disposition and settlement A. M. made a bequest of heritage to his son D. M. in liferent, "and to his lawful children at my death equally," whom failing to his married daughter Mrs L. in liferent, "and to the whole

children procreated or that may yet be procreated of her body."

At the date of the settlement Mrs L. had an illegitimate child, G. C., who lived with the testator, and for whom he made a special provision by legacy, designating her as his "granddaughter."

D. M. having died without issue, and subsequently Mrs L. having died leaving no issue but G. C., a competition arose between G. C., claiming under the destination to the "whole children" of Mrs L., and the widow of D. M., claiming under her settlement.

Held that the word "children" must be construed here in its ordinary meaning as applying to legitimate children only, the testator not having clearly indicated an intention to include G. C. in the bequest to the children of Mrs L.

This was a multiplepointing raised by David Robb and others, testamentary trustees of Alexander Mitchell, shipmaster, Dundee, to determine which of several claimants was entitled to his heritable estate.

The circumstances are sufficiently stated in the opinion of Lord Kincairney.

"Opinion.—I am of opinion that the claim of Grace Cables to the heritable property of the truster must be repelled.

"Alexander Mitchell, the truster, was a shipowner in Dundee. He died on 21st December 1872, leaving a trust-disposition and settlement prepared by his agent and executed only three weeks before his death. He was survived by his widow and by two children, David Mitchell and Mrs Loeffler, and by the children of a son William who predeceased him. He was survived also by a granddaughter Grace Cables, an illegitimate daughter of Mrs Loeffler, who was, when the truster died, about four or five years old, and who, as has been stated from the bar, lived with the truster at the date of his trust-deed. The trustees state that he was survived also by a legitimate son of Mrs Loeffler called George, who died in 1874 at the age of five, but the other parties do not admit that Mrs Loeffler had any child but Grace Cables, and no claim has been lodged by any representative of George Loeffler. The whole estate was inconsiderable, consisting almost entirely of two flats in a tenement in Dundee, in which, or in one of which, Mr Mitchell seems to have resided.

"The trust-deed is short, but I think it has not been drawn skilfully, and perhaps it was drawn hastily, having been executed so shortly before the truster's death. Its provisions are, shortly, these—The liferent of his whole estate is provided to his widow. Then the trustees are directed to deliver to Grace Cables, whom he designates 'my granddaughter,' or to someone for her behoof should she be in pupillarity or minority, the furniture in his bedroom, and to pay her a legacy of £50 'should there be cash to that amount remaining.' By the fourth purpose the truster directs payment of his moveable estate to David Mitchell and Mrs Loeffler equally, and failing either without issue to the survivor—an inopera-

tive purpose, as there was no moveable estate.

"The present question depends on the fifth purpose, which disposes of the whole heritage, consisting of the two flats above mentioned. He directs his trustees to convey one of these flats to David Mitchell 'for his liferent use allenerly, and to his lawful children at my death equally,' whom failing to Mrs Loeffler for her liferent use allenerly, 'and to the whole children procreated or that may yet be procreated of her body, and the survivors of such children equally among them, share and share alike, and the last survivor of them, and the issue of any of said children who may predecease leaving issue, such issue being entitled to the share of their deceased parent equally, and to their respective assignees in fee.'

"The truster then directs his trustees to convey the other flat to Mrs Loeffler for her liferent use allenerly, 'and to her children and their issue and assignees as aforesaid in fee.'

"Then there follows a clause which is in some respects very obscure, but which provides in certain events for delay in executing the conveyances directed until the youngest of said children or issue shall attain twenty-one, and it is provided that until then the trustees shall apply the nett annual proceeds 'for their clothing, aliment, and education.' There might be some difficulty in construing the whole of this provision, but for the present purpose that is not necessary.

"It was contended for Grace Cables that she is called by this purpose of the trust as one of the 'whole children' of Mrs Loeffler, and that as David Mitchell had no issue, and Mrs Loeffler no issue but herself—so she alleges—she is entitled, under the above destination, to the whole heritage. It was pointed out that the truster designates her 'his granddaughter,' and it is said that he must therefore have intended to include her in a provision in favour of the whole children of his daughter, and it was argued that this conclusion was strongly fortified by the contrast between the destination to David Mitchell's 'lawful children' and the destination to the whole children of Mrs Loeffler.

"It is contended, on the other hand, for Mrs Mitchell, widow of David Mitchell, and claiming in virtue of his settlement, that the term 'children' must be confined to legitimate children, and cannot be extended to illegitimate children without the clearest indication of the testator's intention to that effect, and various English authorities were quoted in support of that position. There have been a great many English decisions on this point, some of which seem to carry this principle further than it is easy to follow. The cases quoted in support of this rule were—*Harris v. Lloyd*, July 8, 1823, Turner & Russell, 310, which is not a very important authority on the question; *Bayley v. Mollard*, June 12, 1830, 1 Russell & Milne, 581; *Dorin v. Dorin*, April 16, 1875, L.R., 7 H. of L. 568; *Megson v. Hindle*, 15 Ch. Div. 198; *Branston*, 1887, 35 Ch. Div. 551. These

cases appear to show that it is an established principle of the English Courts in the construction of testaments that the word 'children' must, *prima facie*, be held to mean legitimate children only, just as if the expression legitimate children had been used—*Dorin v. Dorin*—and that in order to let in illegitimate children, under a bequest to children, there must be deduced from the will such a strong probability of the testator's intention to include illegitimate children that a contrary intention cannot be imputed to him—*Megson v. Hindle*, *per Cotton*.

"On the other hand, counsel for Grace Cables cited *Hill v. Crook*, L.R., 6 H. of L. 265, and *in re Humphries*, August 4, 1883, 24 Ch. Div. 691, *per North, J.*, in each of which cases the indications of the testator's intentions in his will were held sufficient to confer a right on an illegitimate child under a bequest to children.

"Although this question has occurred so frequently in England it does not seem to have occurred in Scotland at all. No Scotch decision was referred to at the debate, and I have not myself been able to discover any. There is much in the English decisions of weight and authority, but I hardly think it would be safe to follow them implicitly. The rule seems in England to be, or to have become, technical and conventional, and the justice and policy of it when carried so far as it has been in England have been questioned—*Per Lord Selborne in Dorin v. Dorin*; also *Barlow v. Orde*, L.R., 3 P.C. 164.

"The only general rule of interpretation of settlements with us is that effect shall be given to the intentions which the testator clearly or adequately expressed. But in the ordinary use of language the word 'children' certainly means legitimate children only. Lord M'Laren has observed that 'bequests to the testator's children or to the children of another person are uniformly construed as applying solely to lawful children, nor does it appear that in any case a claim has been put forward in our Courts on behalf of illegitimate children to the benefit of a designative bequest'—M'Laren on Wills, i. 642.

"The question then in this case is, whether the testator has clearly indicated his intention to include Grace Cables in the bequest to the children of Mrs Loeffler? Now, he treats her separately and distinctively. He makes an independent provision for her, not by any means inconsiderable considering that he had but little to give. Then he divides the rest of his moveable estate (which no doubt was, when he made his will, little or nothing) between his two surviving children or the survivor of them failing issue of the predeceaser. He makes in this purpose no distinction between the issue of his son David and his daughter Mrs Loeffler. I think it would not have been possible to have held that Grace Cables was called by this clause. Then he comes to deal with his heritable property, and no doubt there is an important difference in the words which refer to the children of David, and those which refer to

the children of Mrs Loeffler—'the whole children procreated or that may yet be procreated of her body.' The argument for Grace Cables implies that this means the whole children, legitimate and illegitimate, procreated or which may yet be procreated—that is to say, it is or must be maintained that this is a bequest which includes not only an existing illegitimate child, but any illegitimate children who might thereafter be born to Mrs Loeffler. Now, it appears to me that that is a construction which cannot be admitted if it be possible to avoid it. A bequest to illegitimate children to be born might no doubt possibly be made, and it may be that it would receive effect, although that is doubtful—*M'Laren*, i. 643. But such a bequest would be so contrary to ordinary usage, and so inconvenient, seeing that a man's legitimate children are publicly acknowledged, whereas the illegitimate children of a woman are usually concealed, and the illegitimate children of a man only discoverable by proof and inference, that it is hardly possible that it could be inferred, especially in a formal deed framed by a man of business. But the claim of Grace Cables cannot be maintained unless the implication from the deed be carried that length. It seems impossible to maintain that the bequest includes Grace Cables, but would exclude an illegitimate child of Mrs Loeffler born afterwards.

"I think that the circumstance that Grace Cables, although called a grandchild, is dealt with separately, and receives a separate provision, is much against the view that she is to be classed with the other children born or to be born.

"It is certainly true that the contrast between the words of destination to the children of David Mitchell and those of Mrs Loeffler gives considerable countenance to Grace Cables' argument, which is perfectly fair and legitimate argument on the deed. All I can say about it is that it appears to me to give too much weight to differences of expression in a deed which is loosely and

unskilfully put together, and I do not think the expressions sufficient to supply by inference the want of an express inclusion of Grace Cables in the general bequest to children. I can hardly doubt that any agent directed to frame a family settlement which would include an illegitimate child among legitimate children born or to be born would have taken care to do so expressly.

"These considerations apply also to the subsequent and ill-framed clause providing for the maintenance of the children while payment was withheld. I read these provisions as applicable to legitimate children only.

"Grace Cables being excluded from the bequest of heritage, the argument of Mrs Mitchell was that the testator had died intestate *quoad* his heritage, and that the right to it passed to David Mitchell, who is said (without contradiction) to have been his eldest son and heir-at-law, and who survived until 1889, and that it passed to her by his settlement. The sufficiency of his settlement to carry whatever right was vested in him was admitted by Mrs Lewis and Mrs Manzie and Ann Hay, who claim as representatives of the truster and of David Mitchell, and who explained that they had made their claim in ignorance of David Mitchell's settlement by which they were, as they admitted, excluded.

"The claim for David Loeffler has been withdrawn, and there is therefore—the claim of Grace Cables being repelled—no claimant opposing Mrs Mitchell." . . .

The defender Grace Cables reclaimed, but the reclaiming-note was ultimately withdrawn.

Counsel for the Real Raisers—Kennedy. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Claimants—Rhind—Lyon Mackenzie—A. M. Anderson—W. Thomson. Agents—W. & J. L. Officer, W.S.; A. S. Muir, S.S.C.; and J. Douglas Gardiner & Mill, S.S.C.