Thursday, February 23.

FIRST DIVISION.

BOWIE'S TRUSTEES *v.* BLACK.

Succession—Testament—Issue.

A destination to "issue," if there is nothing to indicate a more limited signification, includes direct descendants of every degree.

Succession—Vesting—Interposition of Liferent.

A testator directed his trustees "to hold" his heritable estate in trust for his son in liferent and the son's lawful issue in fee, whom failing for the son of one of the testator's daughters in liferent and his lawful issue in fee, whom failing for two of the testator's other daughters in liferent *seriatim* and their lawful issue in fee, whom failing for the testator's nieces in fee; and the trustees were ordained "to convey my property accordingly."

The two first-named liferent beneficiaries died without leaving issue, but at the date when the liferent opened to the third she had a son and a daughter alive. The son survived her, but the daughter predeceased her leaving children. *Held* that the fee of the estate vested in the issue of the liferentrix at the date of the opening of her liferent.

Mr James Bowie died in January 1824 leaving a trust-disposition and settlement dated April 18, 1821. By this trust-disposition he conveyed his whole estates to a trustee, whom he directed "in the seventh place, for payment to my son William Bowie and his heirs, of all the residue and remainder of my moveable property including any legacies above bequeathed that may fall by predecease or otherways, but excepting my household furniture, plate, and other effects in my dwelling-house." He further directed—"And in the last place, it is my will, and I hereby direct, that my trustees shall hold my whole heritable property, with the household furniture, plate, and other effects in my dwelling-house, in trust for my said son William Bowie in liferent, and his lawful issue in fee, whom failing for James King, eldest lawful son of the said Mary Bowie and Alexander King, for the said James King's liferent and his lawful issue in fee, whom failing for my said daughter Elizabeth in liferent and her lawful issue in fee, whom failing for my said daughter Ann in liferent and her lawful issue in fee, whom all failing for my said nieces Eliza and Ellen M'Kenzie, equally between them and their heirs and assignees whomsoever; and I ordain my said trustees to convey my property accordingly."

The said William Bowie, Mary Bowie, Elizabeth Bowie, and Ann Bowie were all illegitimate children of the truster. The estate was managed by the trustee till his death in 1840, and thereafter it was managed and the rents received by the liferenter William Bowie.

William Bowie died without issue in 1845, leaving a general *mortis causa* settlement in favour of James Hunter Ross, who thereafter claimed to have right to the heritable estate left by Mr James Bowie, and raised an action of declarator to that effect. The action was defended by James King the next liferenter, and on 22nd June 1847 the Court rejected the claim of James Ross, holding that William Bowie had merely a liferent interest (see report of case *Ross* v. *King and Others*, 9 D. 1327). James King died on 28th February 1877 without leaving issue, having possessed and enjoyed the whole heritable estate until his death. He disponed his whole estate to his brother Alexander King, who in respect thereof entered into possession of the estate.

Mrs Elizabeth Bowie or Black, being the liferentrix next in succession to James King, raised an action against Alexander King for declarator that the heritable estate in question belonged to her for her liferent use allenarly and to her issue in fee, and obtained decree accordingly. Mrs Black thereafter craved the Court to appoint her husband and Mr Alexander Rankin as trustees under Mr James Bowie's settlement, and this appointment was made.

Mrs Black continued to enjoy the liferent of the estate till her death on 27th April 1896.

At the date when the liferent opened to Mrs Black, viz., on the death of James King on 28th February 1877, she had two children alive, David Auld Black, who survived her, and Mary Black, who died on 5th December 1877, leaving two children.

A special case was presented to the Court by (1) the trustees under Mr James Bowie's settlement; (2) David Auld Black; and (3) the two children of Mary Black.

The contentions of the parties as stated in the case were—"The second party maintains (1) that the term 'lawful issue' occurring in the said settlement means immediate lawful children to the exclusion of grandchildren; (2) that the fee of the heritage did not vest until his mother's death; and consequently (3) vested in him at that date as his mother's only surviving lawful child; or otherwise, and in the event of its being held that the fee of the testator's heritage vested on the opening of the succession to his mother, he maintains that the one-half thereof vested in him at that date as one of his mother's two immediate children then surviving. The third parties maintain on the other hand (1) that the fee of said heritage vested at the date when the liferent opened to their grandmother Mrs Elizabeth Bowie or Cameron or Black, in her only lawful children then surviving (there being none after born), that is to say, in the second party, and in their mother Mary Black or M'Bride, afterwards M'Kechnie, in equal shares; and (2) that they are now entitled equally to their mother's share so vested, in respect that the term 'lawful issue' occurring in the said settlement is not restricted to immediate lawful children but includes grandchildren; or (3) that even in the event of its being held that the fee

of said heritage did not vest until the death of Mrs Elizabeth Bowie or Cameron or Black, they are entitled to have made over to them one-half of said heritage."

The questions submitted for the judgment of the Court were—"1. Did the fee of the estate vest in the 'issue' of the liferentrix Mrs Black (1) at the date of the birth of her eldest child; or (2) at the date of the opening of her liferent; or (3) at the date of her death? 2. Does the word 'issue' in the destination in the truster's settlement in favour of Elizabeth Bowie in liferent and her lawful issue in fee include grandchildren? 3. Does the whole estate in the hands of the first parties fall to be conveyed and paid to the second party? 4. Does the said estate fall to be conveyed and paid to the extent of one-half to the second party, and to the extent of the other half to the third parties?"

Argued for second party—(1) "Issue" had no fixed meaning, but must be interpreted subject to the provisions of the deed in each case, and there was no general presumption—*Turner's Trustees* v. *Turner*, March 4, 1897, 24 R. 619, at 621; *Young's Trustees* v. *M'Nab*, July 13, 1883, 10 R. 1165; *M'Murdo's Trustees* v. *M'Murdo*, January 28, 1897, 24 R. 458; *Innes* v. *Coghill*, October 22, 1897, 25 R. 23. There was nothing in the present deed to show that it was intended to include in "issue" anyone except children. The testator was not *in loco parentis*, his children being illegitimate, and accordingly the Court would not extend the meaning of "issue." Its proper meaning here was "heirs in heritage.—Ersk. iii. 8, 47; *Ranken and Others*, June 17, 1870, 8 Macph. 878; *Connell* v. *Grierson*, February 14, 1867, 5 Macph. 379. (2) There could be no vesting until the period of division—that was, until the death of the liferentrix. The result of the direction to hold was that the trustees could only convey the estate when the whole class of fiars had appeared, and that could only be at the death of the liferentrix. If she and one child had come and demanded a conveyance the trustees would not have been entitled to give it.

Argued for third parties—(1) "Issue" must be held to include descendants of every degree—*Turner's Trustees* v. *Turner*, *supra*; *Macdonald* v. *Hall*, July 24, 1893, 20 R. (H.L.) 88; *Hickling's Trustees* v. *Fair*, August 1, 1898, 35 S.L.R. 975. (2) As the liferentrix had a child at the date of the succession opening to her, the fee vested in that child. It was clear from the case of *Ross* v. *King*, June 22, 1847, 9 D. 1327, that if any liferenter had children the fee would vest in those children—*Douglas* v. *Thomson*, January 7, 1870, 8 Macph. 374; *Cunningham* v. *Cunningham*, November 30, 1889, 17 R. 218. Accordingly, the trust ought now to come to an end.

Lord Adam—The question here arises on the construction of a settlement made so long ago as 1821. Apparently the settlement and the parties called to share the benefits under it have had a somewhat adventurous career, having already been twice in Court. Various attempts have been made to take benefit under the settlement by parties who were found not to be entitled to do so, and in the result we have now to consider the question—"Who are entitled?"—just as if it had arisen in 1821.

The facts which have given rise to the question are these—[*His Lordship here stated the facts*].

The first question to be decided is that raised by the second question put in the case—Does the word "issue" in the destination in the truster's settlement include grandchildren?

In my opinion the term "issue" is a flexible word and capable of interpretation and limitation, but it appears on the authorities that, if there is nothing said to show that it is used with a limited signification as applicable to direct children only, then the term includes grandchildren. I think that is the case here, and accordingly in my view the second question falls to be answered in the affirmative.

If the term includes grandchildren, then perhaps it is not material to determine when the right vested, but I think that the fee vested in the issue (meaning thereby children and grandchildren) as soon as the succession opened to Elizabeth, she then having a child alive. It was argued to us that as there was no fiar named in the settlement the liferenter might have demanded a conveyance from the trustees. It is not of importance to determine that question. The result would have been the same. The trustees are directed—[*quotes clause*]. Now, it has been decided in *Ross* v. *King* that the fee has not vested in the preceding liferenter. During all this time, therefore, the trustees have been holding for the liferenters and for the fiar so soon as he came into existence. Now, I think that as soon as a child was born, the fee vested in that child, other children as soon as they came into existence taking a share on the authority of the case of *Douglas* and other cases. Accordingly as a child was born to Elizabeth, at the date of the succession opening to her, the fee in my opinion vested in that child. But I do not think, as I have pointed out, that it is material to decide this question, for if I am right in holding that issue includes both children and grandchildren, then the third parties take even if the vesting only took place on the death of Elizabeth, because they were among her lawful issue at that date. Accordingly, in my opinion, the third question falls to be answered in the negative, and the fourth question in the affirmative.

Lord M'Laren—I do not think there is any difficulty in the construction of this very simple settlement, unless it were suggested that owing to the remote period at which the will was made there has been some change in the meaning of the English language—a contingency which we need scarcely consider. Applying the ordinary principles of construction, we have a case where there is a long list of beneficiaries under a trust with interests in liferent and in fee, and we have come now to the last

branch in the destination. That is an important point to bear in view, because if there had been any appearance on behalf of other branches—*e.g.*, for the daughter Ann's issue—that might have affected the question of vesting. I understand, however, that counsel on both sides are satisfied that these branches of the destination have ceased to exist.

Well, when a destination begins and ends by directing trustees to hold for one person in liferent and his issue in fee, such liferent and fee must necessarily vest concurrently. It is a very old rule that the mere interposition of a liferent does not suspend the vesting of a fee. I therefore agree that the first question should be answered by affirming the first alternative.

But even if we decided otherwise that there was no vesting till the death of the liferenter, the result would be the same as regards the interest of the parties, because the destination is to "issue," and in my opinion that includes grandchildren as well as children. It has been more than once observed judicially that the word "issue" is not a word of fixed and inflexible meaning, and that we must look to the terms of the deed to see whether it has any special signification therein. But if there is nothing to suggest a special meaning, it is merely equivalent to descendants or progeny, and includes all claiming by natural descent from the progenitor. Accordingly, if it were necessary, I think we should answer the second question in the affirmative.

LORD KINNEAR—I entirely agree with the judgment proposed, and for the reasons given by your Lordships. I desire to add—because I do not think the point has been adverted to—that I see no ground whatever for holding that "issue" must be construed to mean heirs in heritage. It must have its ordinary and natural meaning, and therefore for the reasons given I am prepared to concur.

It is clear enough that nothing we can decide in this special case can affect any interest of persons called on the failure of Elizabeth in liferent and her lawful issue. No judgment given here can be *res judicata* against them, for they are not parties to this case. But that is no reason for our declining to answer the question put to us by the actual parties, on the assumption, which is probably well founded, that the right must either be in the second party or in the second and third parties.

The LORD PRESIDENT was absent.

The Court answered the second alternative of the first question in the affirmative, the second and fourth questions in the affirmative, and the third question in the negative.

Counsel for the Second Party—W. Campbell, Q.C—Glegg. Agent—James Purves, S.S.C.

Counsel for the Third Parties—Craigie—Younger. Agent—Henry Bower, S.S.C.

Friday, March 3.

FIRST DIVISION.

[Lord Stormonth-Darling, Ordinary.

DUKE OF ATHOLL AND OTHERS *v.* WEDDERBURN AND OTHERS.

Salmon-Fishing—Fixed Engine—Nets.

A certain net known as a "toot-and-haul" net was used for salmon-fishing in the river Tay. The mode of using it was that instead of being paid out from a rowing boat and hauled in as soon as the boat had completed its circuit, one end of the net was fixed to a boat anchored in the river (as in the case of net-and-coble fishing), a rope being carried thence to the shore, while the other was attached to a post on the shore. It was thus fixed in the water for several hours at a time. About fifteen yards of the net was turned in towards the shore so as to form a hook, but there was nothing of the nature of a bag or chamber to prevent the escape of the fish, or to catch the fish automatically. A man was stationed in the boat, who when he saw or felt a fish strike the net, cast loose the net and signalled to men on shore who thereupon drew in the net to shore as in the case of a sweep-net.

Held (*following* the rule laid down by Lord Westbury in *Hay* v. *Magistrates of Perth*, 4 Macq. 535) that this mode of fishing was illegal.

This was an action at the instance of the Duke of Atholl and others, proprietors of salmon-fishings on the Tay or its tributaries situated above Mugdrum Island, against Captain Wedderburn of Birkhill, Fife, and other proprietors and tacksmen of fishings below the fishings of the pursuer. The summons concluded for declarator that "the defenders are not entitled to fish in any part of the river and estuary of the Tay for salmon or fish of the salmon kind with nets of the description known as the toot-and-haul nets or with stell-nets, or with nets of a similar kind;" and for interdict against the defenders using such nets.

The pursuers described the net and method of working it as follows:—"(Cond. 3) . . . This net is from 5 to 10 yards in depth, and generally from 70 to 100 yards in length, the mesh thereof being from 8 to 10 inches all round. The net is fitted with a heavy rope at the bottom, while a cord runs along the top with cork floats, placed at distances of from eight to nine feet apart, which keep the net perpendicular while in the water. When the net is in working order one end of it is fixed by a rope with a block for tightening, called the tow-line, to a post sunk in the shore. From this point the net runs outwards from the shore and against stream or current, forming an arc, and at a point from fifty to seventy yards out from the shore the top of the net is attached to a boat anchored outside the net. The 'anchor' is very often a fixed