

authority to borrow by qualifying it in some such way as Mr Montgomerie Bell suggests, and it will be for the petitioner to show cause why this should not be done. I think it may be a question of circumstances. Certainly no hard-and-fast rule can be laid down as to the rate on which the bond should be calculated. It will depend, moreover, less on the character and value of the estate, the amount of prior burdens affecting it, and the amount of the loan required. But it is a question for the next heirs, and if after due intimation they do not appear to oppose, I see no reason why the Court should interpose any difficulty."

Counsel for the Petitioner—Blackburn.
Agents—Russell & Dunlop, W.S.

Tuesday, November 8.

OUTER HOUSE.

[Lord Kincairney.

STEWART v. STEWART'S TRUSTEE.

Succession—Fee and Liferent—Payment of Annuity out of Capital.

It is a general rule that an annuity provided by trust-disposition falls to be made up out of capital if the income of the estate be insufficient to meet it. Terms of settlement held (by Lord Kincairney) not to indicate an intention that the payment should be limited to income so as to elide the general rule.

Succession—Fee and Liferent—Double Liferent on Same Estate—Right of Liferenter to Enforce Realisation.

A party whose only estate at his death consisted in the residuary interest in a trust fund on which an annuity absorbing the whole annual income had been charged in favour of his wife during her life, had provided, by marriage-contract, a liferent of his whole estate as at his death to his wife. Held that she was entitled to have the residuary interest realised, and to have a liferent of the income from the sum thereby obtained.

This was an action at the instance of Mrs S. Dalrymple Hay or Stewart, widow of the deceased James Stewart, against Leveson Douglas Stewart and others, trustees under the antenuptial marriage-contract between herself and her late husband, and also against the said L. D. Stewart as sole surviving trustee under the will of John Stewart, her husband's brother.

By the said marriage-contract Mrs Stewart was provided with a liferent of all the estate, heritable and moveable, which should belong to her husband at his death. In point of fact at his death in 1895 he possessed no property except a residuary interest in the property of his brother John Stewart, which was burdened with an annuity of £250 in favour of the present pursuer.

John Stewart by his last will and testament directed his trustees, *inter alia*, to

receive the "rents, issues, and annual produce" of his estate, and to pay thereout a certain sum for keeping up a policy of assurance, and subject thereto, to pay to his brother James during his life the annual sum of £250, and thereafter to apply the said sum to the maintenance and benefit of his wife. Subject to this annuity he bequeathed his whole estates to his brother James Stewart.

The income of the estate thus left by John Stewart proved to be insufficient to pay the annuity of £250 provided by him to the present pursuer, and she accordingly raised this action of declarator against the trustee under his will and against the trustees under her own marriage-contract.

The conclusions of the action so far as material to the present report were as follows:—"In the first place it ought and should be declared that under the said last will and testament of the said deceased John Stewart the pursuer is entitled to receive as from and after 19th December 1895, being the date of the death of her said husband James Stewart, out of the trust-estate of the said deceased John Stewart, an annuity of £250 during her life, or until she shall marry again, and that during the said period she is entitled to receive in each year full payment of the said sum of £250 from the said trust-estate, whether the income thereof in each year or in any particular year amounts to that sum and is sufficient to meet the said annuity or not; and that the defender the said L. D. Stewart, as sole surviving trustee acting under the said last will and testament, and his successors in office, are bound to make payment to her accordingly of the said sum annually out of the funds of the said trust-estate, whether income or capital. In the fourth place it ought and should be found and declared that in virtue of the obligation contained in the said contract of marriage between the said James Stewart and the pursuer the pursuer is entitled to receive the free annual income of the residue of the estate of the said James Stewart, and that in order to the providing and securing of the same the pursuer is entitled to have the interest of the estate of the said James Stewart in the estate of the said John Stewart (which interest is of a reversionary character) realised, and that it is the duty of the defender the said L. D. Stewart, as trustee acting under the said disposition and settlement of the said James Stewart, and as his executor, to realise the said reversionary interest accordingly, and to pay to the pursuer such sum as she may in the course of the process to follow hereon be found entitled to receive as a *surrogatum* for the income of the said reversionary interest between 19th December 1895 and the date when the price of the said reversionary interest shall be receivable, and to hold the balance that may result as a part of the estate of the said James Stewart, and to account to the pursuer for the income that may be derived therefrom."

The pursuer pleaded, *inter alia*—" (2) The income of John Stewart's trust-estate being insufficient to provide the pursuer with the

full annuity of £250 per annum, she is entitled to have the deficiency made up out of capital. (4) In respect that James Stewart's estate, to the liferent of which the pursuer is entitled, consists of a reversionary right and interest in John Stewart's trust-estate, the defender, James Stewart's trustee, is bound to realise the said reversion, and to pay the income of the price thereof to the pursuer in terms of the conclusions to that effect."

On 8th November 1898 the Lord Ordinary (KINCAIRNEY) pronounced an interlocutor sustaining the second and fourth pleas-in-law for the pursuer.

Opinion.—"This action has arisen out of the settlements of two brothers—John Stewart, who died in 1867, and James Stewart, who died in 1895. The pursuer is the widow of James Stewart, and the defences which have been lodged are for the sole trustee in both trusts.

"The principal questions which fall to be decided are two. The first relates to an annuity of £250 provided to the pursuer by John Stewart's trust, and is, whether seeing that the income derived from that estate is less than £250, she is entitled to have the deficiency in the annuity made up year by year out of the capital of John's estate; and the second question regards her right to payment of a liferent of the estate of her husband James, conferred upon her by her marriage-contract dated in 1849, and also by the trust-deed of her husband James. There is another question raised by the second conclusion, but parties are agreed about it; and there is a subordinate question raised by the fifth conclusion, which is not at present ripe for decision.

"The first question depends on John Stewart's trust-deed, which is very peculiarly framed. It makes provisions in favour of his widow, who has died (and there is no question about them), and in favour of the children of James while minors, and as they have all reached majority these provisions are inoperative. The provisions in favour of James and his wife, the present pursuer, which bear on this case are as follows:—He conveys his estate to his brother James as sole trustee in trust, to convert so much of it as was not personal estate into money, and to invest it as specially directed, with liberty to vary the investments, and he directed his trustee, or the trustees for the time being, to receive the annual produce of his estate in trust 'to pay to his brother James or permit him to retain the annual sum of £250 during his life, or until he do commit or permit some act or default, whether voluntary or involuntary, which shall be inconsistent with his personal enjoyment of the whole benefit thereof, and thenceforth to apply the same annuity for the benefit of his wife and children,' or 'to any woman who may become the widow of my said brother, for her life and until she shall marry again,' and on her death or second marriage to his brother's children until the youngest should attain 21 (an event which has happened). 'And on failure of such objects as aforesaid the said annuity shall cease.' There then fol-

low provisions in favour of the testator's wife, who is dead, and it proceeds—'And subject to the foresaid annuity and the trusts thereof, I give and bequeath all my said real estate and my said residuary personal estate to my said brother James Stewart, his heirs, executors, administrators, and assigns absolutely.'

"The facts are that James survived, John is now dead, survived by his widow, the pursuer, and by four children, all in majority, and the income of John's estate is insufficient to pay the annuity, and if it is to be paid in full it will diminish the fee or capital of John's estate, which is destined by John's deed to James Stewart, his heirs, executors, administrators, and assigns. James Stewart's children are called, but have not appeared. The defender as trustee on both estates resists the pursuer's claim, at least to the extent that he cannot admit it without judicial authority.

"The general rule is that a deficiency in the income of a trust-estate to satisfy an annuity must be paid out of the fee. That rule was recognised and applied in *Knox's Trustees v. Knox*, June 11, 1869, 7 Macph. 873; *Kinmond's Trustees v. Kinmond*, February 5, 1873, 11 Macph. 381, and *Adamson's Trustees v. Adamson's Executors*, July 14, 1891, 18 R. 1133. The defender did not, and I think could not, dispute that this was the general rule. But he maintained that this general rule was displaced when it was expressly provided that the annuity should be paid out of rents, which he maintained it was in this case. No Scotch authority was referred to in support of this position, but the case of *Birch v. Sherratt*, 1867, L.R., 2 Ch. Ap. 644, was quoted. That, however, was claimed as an authority for the pursuer, as it was there decided that the annual income should be supplemented out of capital to make up the annuity. In this case the whole estate is conveyed to James as trustee, and he is then superfluously directed to receive the annual income and to pay 'thereout' a certain premium on a policy of assurance, 'and subject thereto' to pay to James or permit him to retain (he being the sole trustee) the annuity, and the truster after his own widow's death, 'subject to the foresaid annuity and the trusts thereof,' bequeaths his whole estate to his brother James. I think that there is no such distinct direction to pay the annuity out of the rents and not otherwise as to displace the general rule. I do not know whether such a general rule is recognised in England, but I think that the case of *Birch v. Sherratt* is more in favour of the case of the pursuer than of the defender. I am therefore of opinion that on this first point the pursuer is entitled to succeed.

"The second question has seemed to me much more difficult. It was said to be novel in this country, and no Scotch decision on it was quoted. The question, as I have said, is as to the pursuer's liferent of her husband's estate, the fee of which is destined by his settlement after his death to his children. The argument was taken on the footing that James Stewart left no

estate whatever except what was destined to him by his brother John. That is still in the hands of John's trustee, and is apparently not payable to James' trustee until after the expiration of the annuity—that is to say, until after the death of the pursuer—so that the defender as James' trustee has at present no money in his hands out of which a liferent to the pursuer can arise or be payable.

“The pursuer, however, contends that James was not without estate when he died, and this consisted of the interest in John's estate, which had then vested in him, and that that estate now belongs to James' trustee. The value of that estate so belonging to James' trustee is the value of John's estate, deducting the present value of the pursuer's annuity. I understood from what was said at the debate that it now consists chiefly, if not entirely, of the house in North Mansionhouse Road, which forms the subject of the second conclusion, and which was bought by James as John's trustee with the money belonging to John's estate some years after his death.

“The pursuer contends that that is James' estate, and she contends that she is entitled to a liferent of it, and, as she contends, that can only be obtained by realising that estate, *i.e.*, John's estate, minus the annuity, and paying the interest of the sum realised, if any, while James' trustee will hold the fee of the sum realised for his children.

“Thus the pursuer claims (1) the annuity of £250 out of the income and capital of John's estate, and (2) the liferent of James' interest on John's estate. It seems a questionable and rather startling claim at first sight, but after consideration of the English authorities which were quoted in support of it I have come to think that it is founded on equity.

“Parties are agreed that James Stewart had at the date of his death a vested right in the estate bequeathed by John Stewart, but that that estate falls to be retained by John Stewart's trustee until the expiry of the liferent. Parties were at one on these points, and of course they were not argued. But I am not disposed to question the views of the parties on these points.

“It seems to me that the first question is, what is James' estate (supposing he had none but what he derived from John), of which the pursuer claims the liferent. Ought it to be described as the whole of John's estate under burden of this annuity—that is to say, practically the house under burden of the annuity—or would it be more correct to describe it as a reversionary interest out of John's estate—that is to say, practically the value of the house means the value of this annuity.

“If the pursuer's view were adopted it might be maintained that there could be no liferent at all of such estate payable to the pursuer, the income of it being exhausted and more than exhausted by her annuity. But I think that the latter is the more proper mode of expression, because (as parties are agreed) John's trustees, in fulfilment of that trust,

holds John's estate until the expiry of the annuity. The pursuer's counsel sought to test this question by the supposition that James was a bankrupt. He maintained that in such a case John's estate (*i.e.*, the house) could not pass to the trustee on James' estate, but that he could claim nothing but the reversionary interest, and I think that would be so.

“Holding, then, that James' estate is the reversion of John's, the question is, can James' trustee be called on to realise that reversionary interest which is not due or payable until the annuitant's death, for the purpose of paying the interest of the sum realised to the pursuer in satisfaction of her liferent.

“Suppose the pursuer were not herself the annuitant whose annuity burdened John's estate, would she be wholly deprived of her liferent of James' estate because the annuity exhausted the interest of John's. It was contended that to hold this would be to transfer the interest of the liferenter altogether to the interest of the *fiar*—in the same way supposing James' estate had been at present in the hands of his trustee, but had consisted of wasting property, as of a lease or a terminable annuity, it would not be equitable to pay the pursuer as liferenter the whole income of that wasting property, and so sacrifice the *fiar* to her. I am of opinion that that argument is consistent with equity, as it seems certainly supported by the English authority. It is manifest that it makes no difference on this point that the pursuer is herself the annuitant.

“The leading English case on this point is *Howe v. Earl of Dartmouth* (1802, 7 Ves. 137, 6 R. R. 96, Whyte & Tudor's Leading Cases, vol. i. 68), decided by Lord Eldon. In that case it was held that where estate was bequeathed for life with remainders over, and where it consisted in whole or part of perishable or wasting property (in that case terminable annuities), such wasting property should be realised and invested in 3 per cent. Consols, and that the liferenter should only take the interest on such investments. In that case Lord Eldon laid down that on the same principle of equity ‘future interests were for the sake of the tenant for life to be converted into a present interest, being sold immediately in order to yield an immediate interest to the tenant for life. As in the one case that in which the tenant for life has too great an interest is melted for the benefit of the rest, in the other, that of which, if it remained in specie he might never see anything, is brought in, and he has immediately the interest of its present worth.’

“These *dicta* appeared to have been followed, and to express the settled practice in England, with this qualification, that the rule will yield to any and even to slight indications of the wish of the testator to a different effect—*Morgan v. Morgan*, 1851, 14 Beavan 72; *Brandreth in re Pitcairn* [1896], 2 Ch. 199; *Williams on Executors*, ii. 1251. In *Harrington v. Atherton*, 1864, 2 De Gex, Jones, & Smith, 352, the circumstances somewhat closely resembled those in this case, and it was held that

where a widow had right to an annuity out of an estate, and also to the liferent of it, she was entitled to interest on the reversion of the annuity.

"No Scotch decision to the effect that other wasting securities or postponed interests should be reduced into the form of money or of permanent investments was noted. But in *Strain's Trustees v. Strain*, July 19, 1893, 20 R. 1025, Lord M'Laren referred to the case of *Howe*, and to the discussion on it in *Whyte & Tudor*, with approval, at least so far as related to the realisation of terminable interests—M'Laren on Wills, p. 1031—and I am not aware that there is either principle or practice with us which can be said to be opposed to the rule thus established in England. It appears to me that if the reversionary interest in John's estate were realised as the pursuer contends for, that would be substantially fair to both liferenter and fiar. Both would take a benefit, and the interest of the one would not be sacrificed to the interest of the other.

"The pursuer referred to *Pringle v. Hamilton*, March 5, 1872, 10 Macph. 621, and to *Muirhead v. Muirhead's Factor*, Dec. 6, 1867, 6 Macph. 95; *Chesterfield v. Chesterfield*, 1883, 24 Ch. Div. 643; and *Dempster's Trustees v. Dempster*, March 10, 1898, 35 S.L.R. 657, where when the estate of a deceased consisted in part of interests not due and payable until after his death, the actuarial value of such portions as at the date of the truster's death was held to form the value of those parts of the estate.

"I understand that according to the English practice it is not difficult to displace the general rule by indications of the intention of the truster. But it does not appear to me that there is anything to displace the general rule.

"It may be urged that as James Stewart must have known that John's estate had to be retained by John's trustee during the life of the pursuer, he could not be supposed to have conferred on the pursuer any interest in the income of that estate. That consideration might have raised a complicated and difficult question if the pursuer's claim depended on her husband's trust-deed or on his intention as there expressed. But it does not, for it depends on the marriage-contract. The pursuer's claim is that of a creditor, and the testamentary intentions of her husband are not material, and therefore there seems to be no indication of James Stewart's intention which can interfere with the application of the present rule.

"It is said that the value of the reversionary interest in this case is so speculative that it will be impossible to sell it except at great loss, and that the trustees should not be directed to sell it. It is made dependent on the widow's second marriage, and on the amounts to be deducted from the capital necessary to make up the annuity. But I rather think the defender exaggerated the difficulty. The marriage was fifty years ago, and probably the provision about second marriage may be disregarded, and if

so, then the value of the reversion would be found by ascertaining the actuarial value of the annuity and deducting it from the value of the whole estate. But I should desire to hear parties further as to the manner in which the reversionary interest is to be realised.

"I think that I am at present in a position to sustain the second and fourth pleas for the pursuer, and to discern in terms of the first, second, and third conclusions. I have not considered the second conclusion, because I was informed that parties were at one about it, and it was not explained at the debate. The defender did not object to the third conclusion. I could grant decree in terms of the fourth conclusions in part, but am not, as at present advised, prepared to hold that the pursuer is entitled to any capital sum out of the price of the reversionary interests as a *surrogatum* or otherwise.

"I think it premature to decide either that point or the point as to payment of Mr James Dalrymple Hay Stewart until the reversion has been sold and the sum available ascertained."

Counsel for the Pursuer — M'Clure.
Agents—Davidson & Syme, W.S.

Counsel for the Defender — Cullen.
Agents—Tods, Murray, & Jamieson, W.S.

Wednesday, November 16.

OUTER HOUSE.

[Lord Kincairney.]

TWEEDIE v. FORREST.

Reparation—Slander—Privilege—Malice.

A brought an action of damages for defamation against B, in respect of a certain statement alleged to have been made by B on two different occasions. In regard to the first occasion it was averred that the statement was made "in the knowledge that it was wholly unfounded," but this averment was not repeated with regard to the second occasion. B pleaded that his statement on the second occasion alleged, if made, was privileged. *Held* (by Lord Kincairney) that the averment in question might be read as applying to the second occasion as well as the first, and was a sufficient averment of particular circumstances inferring malice.

Observations (per Lord Kincairney) on the necessity of averring facts and circumstances from which malice may be inferred in an action on a defamatory statement when a plea of privilege is taken.

David Tweedie, 40 High Street, Peebles, brought an action against Thomas Forrest, farmer, Edston, concluding for £500 damages, in respect of alleged defamatory