Friday, March 2.

SECOND DIVISION.

MACDONALD'S JUDICIAL FACTOR *v.* FOWLER.

Succession—Legacy—Construction—Subject of Gift—Fee or Liferent—Bequest of "Interest."

The master of a steamship died unmarried leaving a holograph settlement which contained the following clause:—"I . . . hereby give and bequeath to my two sisters A and B, for their own use and benefit for life, the interest derived from all my estate and effects . . . and I hereby appoint C sole manager of the said estate and effects, the management of which he is to retain so long as he may deem fit, paying the interest derived therefrom to my two sisters jointly or separately." After the sisters' death "the interest" was to be paid to the testator's two brothers, subject to certain conditions. He further declared that under no circumstances was the capital to be subdivided so long as any of the above-named parties were living, "but in the event of their decease I would wish the interest to revert to the nearest and most needful relatives on my mother's side of our family, and same to be applied to the education and upbringing of their children, if any."

Held that the latter clause of the deed did not constitute a gift of fee of the estate and that the fee fell into intestacy—*diss.* Lord Young, who was of opinion (1) that the word "interest" in that clause meant "interest in the capital," and that the nearest relatives of the testator on the mother's side at the date of the death of the last survivor of the testator's sisters and brothers were entitled to the fee, and (2) that as the parties answering this description could not be ascertained till that event, and were the proper contradictors in the present claim by the heirs *ab intestato*, no judgment disposing of the fee could competently be pronounced so as to be *res judicata* in a question with these parties.

Captain John Macdonald, master of the steamship "Incharran," was drowned at sea on 14th September 1897, leaving a holograph *mortis causa* settlement, dated 7th March 1890, in the following terms:—

"I, the undersigned John Macdonald, hereby give and bequeath to my two sisters Christina and Anne Macdonald, for their own use and benefit for life, the interest derived from all my estate and effects, real and personal, and of what nature and quality soever; and I hereby appoint our uncle Duncan Macdonald sole manager of the said estate and effects, the management of which he is to retain so long as he may deem fit, paying the interest derived therefrom to my two sisters jointly or separately.

"I wish it to be distinctly understood that neither of my brothers Hector and Angus Macdonald are to participate either directly or indirectly, unless indeed, that some years hence either or both of them were found to be thoroughly reformed, and leading useful, active, honest, and industrious lives, when (in the event of their two sisters being dead) those in control may then continue paying the interest, equally divided, to said Hector and Angus Macdonald, but should either or both of them be subsequently found acting with impropriety, said interest, or the delinquent's portion of it, to be thereupon stopped. I wish this condition to apply to my sisters also, but at the discretion of those in control, and in a less stringent manner.

"This bequest, as also the foregoing remarks, are however subject to the following conditions, namely:—(1) That all my personal estate, large or small, is to be invested to the best possible advantage, consistent with safety, the interest only to be paid away as above, and under no circumstances is the capital to be withdrawn or handed over for sub-division so long as any of the above-named parties interested therein are living; but in the event of their decease I would wish the interest to revert to the nearest and most needful relatives on my mother's side of our family, and same to be applied to the education and upbringing of their children, if any.

"(2) That this document is only to take effect on my decease, and that I reserve the right of withdrawing, cancelling, or otherwise destroying this document at any time, and from any place I may deem fit, either by a subsequent writing by myself or some other person on my behalf.

"JOHN MACDONALD, on board s.s.
"Incharran," in Lat. 33, 17 N., Long. 24, 57 E.
March 7, 1890."

Captain Macdonald was never married. He was predeceased by his parents. His heirs *ab intestato* were the two sisters and the two brothers named in the settlement. He left no heritable estate. His moveable estate amounted to £3324, 10s. 7d. He was predeceased by his uncle Duncan Macdonald, and on 29th January 1898 William Russell Patrick, solicitor, Edinburgh, was appointed judicial factor on his estates.

Questions having arisen as to the rights conferred by the settlement, a special case was presented to the Court by (1) the judicial factor; (2) the two sisters of the testator, Mrs Christina Macdonald or Fowler with consent of her husband, and Anne Macdonald; (3) the *curator bonis* to Hector Macdonald, who was *incapax*, and Angus Macdonald; and (4) Mrs Kate Macdonald or Atherton and John Macdonald, the aunt and uncle of the testator on his mother's side, and his nearest relatives on his mother's side at his death, each of whom had five children.

The questions of law were as follows:—"(1) Are the second parties entitled to the fee of the whole estate equally between them? (2) Are the third parties entitled to the liferent of the estate upon the deaths of the second parties, and does the liferent

of the predeceaser accresce to the survivor? (3) Are the third parties entitled, along with the second parties, to the fee of the estate? (4) Are the fourth parties entitled on the death of the survivor of the second parties, or otherwise on the death of the survivor of the second and third parties, to payment of the fee of the estate? or (5) Are they, or the survivor of them, entitled on the occurrence of either, and which, said events to the liferent of the estate?"

The parties admitted that the second parties were entitled to the liferent of the whole estate absolutely and without condition jointly so long as they were both alive, and that upon the death of one of them the survivors would be entitled to the liferent of the whole.

Argued for the second parties — There was no valid appointment of the liferent either to the third parties or to the nearest and most needful relations of the testator on his mother's side. The trustee appointed by the truster, who was to exercise the discretionary power of judging whether the brothers were thoroughly reformed and of singling out the most needful relatives, was dead. Such a discretionary power could not be exercised by a judicial factor appointed by the Court—*Robbie's Judicial Factor* v. *Macrae*, February 4, 1873, 20 R. 358. These bequests were entirely dependent on the personal opinion of the particular person selected by the truster. He having died, the bequests were void from uncertainty. The fee being undisposed of in the will had fallen into intestacy, and had vested *a morte testatoris* in the second and third parties — *Spink's Executors* v. *Spink*, February 16, 1894, 21 R. 551. The fee had not been given to the nearest and most needful relatives on the mother's side of the testator's family. The word "interest" was void. The term "revert" and the fact that the interest was to be applied in the education and upbringing of children showed that interest meant income and not fee. This was the proper period to find out who was entitled to the fee. The fourth parties represented all those who at a future date could contend that a fee had been given to them by the deed.

Argued for the third parties — On the death of the second parties they would be entitled to the liferent of the estate. The condition attached to their getting the liferent must be held *pro non scripto*. As to the fee, they adopted the argument of the second parties.

Argued for fourth parties — They must be held to be the nearest and most needful relatives of the testator on the mother's side, otherwise the special case would be irregular, all parties interested not being represented. They argued with the second parties that there was no valid bequest of a liferent to the third parties, but merely a discretionary power to give them a liferent which could not be exercised by the first party. On the death of the survivor of the second parties, or at any rate on the death of the survivor of the second and third parties they were entitled to have the fee of the estate paid over to them. The testator by directing that as long as the second and third parties were alive the capital of his estate was not to be subdivided showed that what be meant by "interest" in the bequest to the fourth parties was interest in the capital. There was always a presumption against intestacy when the deceased had left a will. In any event they or the survivors of them were entitled to the liferent of the estate after the death of the second and third parties.

At advising—

LORD JUSTICE-CLERK—The testator in this case drew up a somewhat extraordinary will, by which his two sisters were to enjoy "the interest derived from all my estate and effects, real and personal," and expressing the exclusion of his two brothers, unless they should be found reformed from evil ways at a later period, and after his sister's death "those in control should in their discretion, if they see fit, pay the interest to them." He declared that none of the capital was to be paid away as long as any of these parties were living, and he concluded by expressing his wish that after their decease the "interest" was "to revert to the nearest and most needful relatives on my mother's side of our family, and same to be applied to the education and upbringing of their children, if any."

A question is raised as to whether this latter clause does not constitute a gift of fee; I have found myself unable so to read it. The word "interest," by which alone the gift is described, is used, as I read the clause, as he has repeatedly used it before in the will, as meaning proceeds, and I see nothing to indicate that he used it in any other sense. Indeed, the statement of the application to the education and upbringing of children points to the meaning being the same as in the other clauses.

If that reading is right, then the testator has not by his will disposed of the fee of his estate, which is therefore in intestacy, and I am of opinion that those who are entitled to succeed to him *ab intestato* are entitled to have it found that the fee belongs to them. It may be that the *corpus* will not be available for division for sometime to come. But they are entitled to such benefit as may accrue to them from having their right declared.

LORD YOUNG—This case although probably of little importance to the parties, involves the decision of a question of principle and procedure on which your Lordship has expressed an opinion in which I am unable to concur.

The parties are all agreed that the parties of the second part are entitled to the liferent of the whole testamentary estate and with right of survivorship.

They are also all agreed that after the death of both of the second parties, the third parties are entitled to the income also with survivorship. It is admitted by all, and was conceded in argument, that the conditional terms on which the testator grants the liferent to the third parties, and indeed also to the second parties, are impracticable, and so must be disregarded. That

disposes of the case so far as regards the income of the funds during the lifetime of the testator's brothers and sisters.

With regard to the capital, the testator directed that it should remain in the hands of the trustee or executor of his will so long as the liferents lasted, and apparently intended (or so it seems to me) that there should be a division of the capital. He says—"under no circumstances is the capital to be withdrawn or handed over for subdivision so long as any of the above-named parties interested therein are living." Now, I think that we should consider the expressions in the will of such a testator as we have here with a desire to avoid frustration of his intentions by a technical interpretation of his language. The testator goes on—"in the event of their decease," viz., the decease of his sisters and brothers, "I would wish the interest to revert to the nearest and most needful relatives on my mother's side, and same to be applied to the education and upbringing of their children, if any." I think that we must try to put a meaning on these words, and avoid, if reasonably possible, disregarding them as being unmeaning and inoperative. The second and third parties, as the heirs *ab intestato* of the testator, contend that these words are inoperative, giving neither capital nor income to the persons mentioned, and that they themselves, as heirs *ab intestato*, are thus entitled to the capital. I do not think that this is at all clear. On the contrary, my impression is that we must give effect to these words as applicable to capital or income—the one or the other. I incline to think that the testator intended them to apply to capital. I do not think it reasonable to impute to him the intention, or to construe his language as meaning, that a trust was to be kept up as long as relations on his mother's side existed to receive the income of the property. I think he intended that the capital should on the death of the last liferenter be handed over to the nearest and most needful relatives on his mother's side at that date. The word "interest" has many meanings. In this instance I think it means "interest in capital." Then as to the persons to whom the capital is to be handed over, I attach importance to the words "most needful." These words show that the testator did not mean the nearest relatives on his mother's side existing at his own death, because to speak of dividing funds among the persons who were most needful, it might be twenty or thirty years before the date of division, would be nonsense, which it would be unreasonable to impute to a sane testator. The period contemplated when the nearest and most needful relatives on the mother's side were to be ascertained was the death of the last survivor of the brothers and the sisters to whom the liferent was given.

That being my view, it leads up to this, that the persons who alone are or can be interested in the capital of this fund are not represented here, and indeed cannot be ascertained until the death of the last survivor of the second and third parties. This is a special case, and we can only deal with it on questions between or among those who are parties to it. The nearest relatives on the mother's side at the date of the testator's death are here, the fourth parties, but the persons who in my opinion (or according to my impression on reading the deed) are entitled to the capital, namely, the nearest and most needful relatives of the testator's on his mother's side at the date of the decease of the last surviving liferenter, are not here, and are unknown. While, therefore, agreeing that the factor should continue to hold the estate and pay the income as directed, while the second and third parties or any of them live, I do not think we can at present decide anything with regard to the last provision of the will, which in my opinion, or according to my present impression, is in favour of the nearest and most needful relatives of the testator on his mother's side existing at the death of the last survivor of these parties. The quality of "most needful" may possibly when the time comes be disregarded as too vague to be operative, as we are now, I understand, disregarding the quality of "found acting with impropriety" in the case of the liferenters. It will be understood from what I have said that I now refer to the words "most needful" only as showing that the testator meant the nearest relations on his mother's side, not at his own death but at the death of the last survivor of the liferenters. When that time comes there may or not be such relations (or only one such) in existence. Suppose only one, or as many as you please, the undoubted nearest at that time, and one and all of them as "needful" as could be desired. Suppose, for clearness, only one, and that he is advised to claim this capital from the factor or trustee, and does so, a multiplepoinding is brought, and the competing claimants are the nearest relative on the mother's side, and the executors or assignees of the second and third parties now before us, is the proposition maintainable or even stateable that a judgment by us in this case would be *res judicata* against the claim of this nearest relation on the mother's side who is no party to it, or his interest presented by any party to it.

LORD TRAYNER—The only question of importance presented in this case which we are in a position now to decide is whether the testator John Macdonald by his will disposed of the fee of his estate. He certainly left a liferent of it to his two sisters, and, as I think, to the survivors of them. Whether he has validly conferred a liferent on his two brothers after the death of the surviving sister may be open to doubt, but assuming that he did provide a liferent in favour of his brothers, he did so under conditions which cannot be ascertained to exist until the right, if it is a right, opens up by the death of both sisters. In like manner it appears to me doubtful whether there has been any liferent right validly constituted in favour of the testator's mother's relatives on the death of the testator's brothers and sisters.

There is no right of liferent certainly claimable at present by the fourth parties, because if the liferent ever opens up to the testator's mother's relatives, the fourth parties may not then possess the character which would alone entitle them to succeed. But as regards the fee of the testator's estate, I have formed a clear opinion that it is not disposed of by the will before us. The fee is not referred to at all, except in so far as the testator enjoins that it, which he describes as "the capital" of his estate, is not to be parted with by the trustee (now represented by the judicial factor) under any circumstances so long as his brothers and sisters are alive. He gives no direction as to where it is to go, or how it is to be disposed of, after their death. I cannot adopt the view that there is a fee conferred by implication on the four relatives of the testator's mother. What is directed to be given to them is "the interest" only, and this word is used in a clause in which the capital of the estate is mentioned, showing, as I think, that the testator had fully before him the distinction between capital and interest—that is, between fee and liferent.

The result of my opinion is, that as the testator died intestate as regards the fee of his estate, the same vested *a morte* in the brothers and sisters of the testator as his next-of-kin. No part of it however can be paid over to them, because whether the brothers are entitled to a liferent or not, there may be a claim for the liferent on the part of the four relatives of the testator on the mother's side. Nothing, however, can be decided with regard to such a claim until the death of both sisters and brothers, as it is only then that it can be ascertained who are the nearest and most needy relatives of the testator on the mother's side.

LORD MONCREIFF was absent.

The Court answered the first question in the negative, and the third question in the affirmative, and found that the second, fourth, and fifth questions could not be answered at present.

Counsel for First Party—Hunter. Agents—Patrick & James, S.S.C.

Counsel for Second Parties — Kincaid Mackenzie — R. Scott Brown. Agents — Macpherson & Mackay, S.S.C.

Counsel for Third Parties—Kemp. Agents—J. Stewart Gellatly, S.S.C.

Counsel for Fourth Parties — Chree. Agent—R. J. Calver, S.S.C.

Friday, March 2.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

WEBSTER'S TRUSTEES *v.* WEBSTER.

Succession—Vesting—Survivorship Clause.

A testator directed his trustees to pay the income of the residue to his wife so long as she remained his widow, and on her death or re-marriage, under deduction of a certain legacy, "to pay the whole residue and remainder of his estate to A, B, and C (children of his brother) *nominatim*, and the survivors and survivor of them equally between them, share and share alike, and should the said three children of my said brother all predecease me," then to dispose of it for certain other purposes detailed by him. A, B, and C all survived the testator, but A predeceased the period of payment. *Held* that the survivorship clause was controlled by the words which followed it indicating an intention against postponement of vesting, and that one-third of the residue had vested in A *a morte testatoris*.

Succession — Legacy — Interest—Postponed Payment—Residue.

A testator directed his trustees to pay the income of the residue to his wife so long as she remained his widow, and on her death or re-marriage, "in the event of a new church for St David's Parish having been erected before or within one year after" his "wife's death, and on condition that the whole of the debt incurred in erecting the said church shall have been cleared off at or before his wife's death, or within one year after her death," to pay to the Presbytery of Edinburgh £2500 for a certain purpose, and in case the above conditions were not complied with to dispose of this sum of £2500 for other purposes detailed by him, and to pay the residue to certain persons named by him. The widow married again, and the residue consequently became payable to the residuary legatees. But the trust had to be continued and the sum of £2500 retained by the trustees until it could be seen whether the church should be built and cleared of debt within one year after the widow's death. *Held* (by the Lord Ordinary, Stormonth Darling, and acquiesced in) that the income accruing upon this sum of £2500 from and after the date of the widow's re-marriage until it should be payable fell into residue.

Playfair's Trustees v. *Hunter*, July 18, 1890, 17 R. 1241, *followed*.

The Rev. Alexander Webster, sometime minister of the parish of St David's, Edinburgh, died on 30th May 1896 leaving a trust-disposition and settlement dated 13th September 1895, whereby he gave, granted, assigned, and disponed his whole means