

done, we have no alternative but to dismiss the reclaiming-note as incompetent. With reference to the case of *Kirkwood*, I should like to reserve my opinion as to whether, when the whole subject-matter of the action, including expenses, is disposed of, and all that remains to be done is merely executorial, that may or may not be treated as a final interlocutor.

LORD M'LAREN—In considering the provisions of the Act of 1868 it must be kept in view that the policy of the Act is to discourage intermediary reclaiming-notes, while providing that a reclaiming-note shall bring all previous interlocutors under review. If the point were doubtful, I should venture to think that the provisions of section 53 do not amount to making expenses a part of the subject-matter of the cause, but are merely provisions inserted in case anyone should think that it was necessary to have the expenses taxed, modified, or decerned for before the whole cause was taken to be decided. But as this matter has been considered for many years, it is impossible now to go back on the decisions. In the present case there is no finding disposing of expenses, and therefore there is a part of the subject-matter of the cause not disposed of. Of course it would have been competent to get the leave of the Lord Ordinary to reclaim, and for anything I know, it may still be competent to get his leave. For these reasons, though with some doubt, I concur with your Lordship.

LORD KINNEAR—I quite agree. These provisions of the Act of 1868 were judicially construed very shortly after the Act was passed, and the construction then put upon them by the highest authority has been uniformly followed. It is out of the question to raise the point again, as if it were now a new one. I see no reason for hesitating to accept the construction which these sections have received. At the same time I quite agree with Lord Adam that we should reserve our opinions on the special point that might have arisen if the Lord Ordinary had disposed of the expenses in the cause, so far as already incurred. That question does not arise, and the case of *Kirkwood* is sufficient to show that a point might be taken in such a case which we are not required to consider at present.

The Court dismissed the reclaiming-note.

Counsel for the Reclaimers—Guthrie, Q.C.—Younger. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Dundas, Q.C.—Cooper. Agents—Hope, Todd, & Kirk, W.S.

Thursday, May 17.

## SECOND DIVISION.

[Lord Pearson, Ordinary.

### BROWNE'S TRUSTEES v. BROWNE.

*Succession — Conditional Institution or Substitution — Direction to Invest in Heritage — No Evacuation of Destination.*

A testator who died in 1845 left a trust-disposition and settlement in which he directed his trustees to divide the residue of his estate into as many shares as he might have children at the period of his death, the issue of a predeceasing child being entitled to the share their parent would have taken if he or she had survived the testator. As to the daughters' shares, he directed his trustees upon a daughter attaining majority or being married "to invest the shares falling to such daughters either in the purchase of heritable property or upon heritable security, taking the rights thereto in favour of such daughters in liferent for their liferent use alienably, exclusive of the *jus mariti* or right of administration of any husband, and to their lawful issue respectively, and failing such issue, then to the survivors of my said children, equally among them, share and share alike, in fee."

The testator was survived by several children, including a daughter A, who married in 1846 and gave birth to a child in 1848. The child died in 1849. A herself died in 1850, survived by her husband. The testator's direction to his trustees to invest in heritable property or heritable securities was never carried out by them.

Held that the destination in the testator's settlement imported a substitution, and not merely a conditional institution, in favour of his surviving children, and that the share liferented by his daughter A fell to such surviving children in respect of her only child having died without evacuating the destination.

*Watson v. Giffen*, January 23, 1884, 11 R. 444, followed.

*Cunningham v. Cunningham*, November 30, 1889, 17 R. 218, distinguished.

In July 1898 the trustees of James Browne, who died on 9th February 1845, raised an action of multiplepoinding for the purpose of determining who were entitled to the fee of the portion of his estate which had been liferented by his daughter Isabella under his trust-disposition and settlement dated 25th January 1842, and which had been set free by the death of Isabella unmarried on 8th December 1897.

The facts of the case and the claims of the various parties are fully set forth in the opinion of the Lord Ordinary (PEARSON).

On 28th December 1899 the Lord Ordinary pronounced the following interlocutor:—

"Finds that the fund *in medio* vested to

the extent of four-fifths thereof in Robert Bennet Browne as the sole surviving child of the testator, and to the extent of the remaining fifth thereof in Mary Jane Ewing Smith, as legatee of the deceased Isabella Jane Browne, and appoints the cause to be enrolled for further procedure, reserving all questions of expenses, and grants leave to reclaim."

*Note.*—"This question arises in the succession of James Browne, insurance broker in Glasgow, who died in 1845, leaving a trust-disposition and settlement, the trustees under which are the pursuers' and real raisers. Mr Browne was survived by one son and four daughters. His son Robert Browne is still alive and his interest is represented by the claimant Mr M'Clelland, the trustee in his sequestration, and Mr Anderson, his assignee. I was informed that these two claimants had agreed to reserve meanwhile all questions arising *inter se*.

The four daughters are all now dead. Mary died in 1850, predeceased by her only child Alexander (born September 1848, died October 1849), who died in infancy, and survived by her husband Colin Brown, who has since died, and is represented by his trustees. Jane (Mrs Smith) died in 1856, leaving four children, who are also claimants. Janet (Mrs Duncan Brown) died in 1890, leaving an only child, the claimant Mrs Morgan. Isabella died unmarried in 1897; and it is upon her death that this action is now raised for distribution of the remaining part of the estate.

"By the residuary clause of the testator's will he directed his trustees to hold the residue for behoof of his children, and to divide the same into as many shares as he might have children at the period of his death, the issue of a predeceasing child being entitled to the share their parent would have taken if he or she had survived the testator. The shares of sons were to be payable on their respectively attaining the age of twenty-one. As to the daughters' shares, he directed his trustees, upon a daughter attaining majority or being married, 'to invest the shares falling to such daughters either in the purchase of heritable property or upon heritable security, taking the rights thereto in favour of such daughters in life-rent for their life-rent use alienably, exclusive of the *jus mariti* or right of administration of any husband and to their lawful issue, respectively, and failing such issue, then to the survivors of my said children, equally among them share and share alike in fee.' Then followed a declaration as to the shares of deceasing children, the effect of which I shall consider presently.

"From the truster's death in 1845 until the death of Mary (Mrs Colin Brown) in 1850, the income was divided and paid to the five children in five equal shares. From April 1850 until December 1858 the income was divided and paid equally among the remaining four children, including the issue of Jane (Mrs Smith) after her death in 1856. It was assumed by all concerned that Mary's infant son Alexander, who predeceased his mother, took no share of the residue, and

therefore transmitted nothing to his representative, namely, his father Colin Browne.

"In December 1858 the trustees made up a scheme of division of the residue proceeding on the same assumption. They divided it into four equal shares of about £8500 each. One of these shares they paid to Robert Browne, another they paid to the family of Mrs Smith, and the other two shares they retained for Janet (Mrs Duncan Brown) and Isabella as life-renters. On Janet's death in December 1890 her share was paid to her daughter Mrs Morgan and her marriage trustees. There remained in the hands of the testamentary trustees the one-fourth life-rented by Isabella, which was set free for division on her death in December 1897. It consisted (1) of her original fifth of the residue, and (2) of one-fourth of Mary's fifth, and is now the fund *in medio*.

"The main question is raised by the claim of Colin Brown's trustees. Their contention is that the fee of the fifth share life-rented by Mary (Mrs Colin Brown) vested in her infant son Alexander notwithstanding his predecease of his mother, and was transmitted through him to his father Colin Brown. They contend (1) that one-fourth of that fifth was wrongly paid away by the trustees to each of Robert Brown, the Smith family, and Mrs Morgan, and that the remaining fourth of it is included in Isabella's share now *in medio*, and (2) that the fund *in medio* is liable to make good these overpayments, either generally as being the balance of the estate still undivided, or at all events to the extent to which any claimant now to be ranked on the fund has benefited by the overpayments. The other claimants meet these demands with pleas of *mora* and prescription, as well as with the plea that the fund *in medio*, being only Isabella's life-rented share, the accounts cannot be opened up generally and re-stated in this action. But the first question is, whether Colin Brown's trustees are right in the view which they submit on the construction of the residuary clause, namely, that Alexander Brown took a vested fee in the fifth share life-rented by his mother, and transmitted it to his representatives. In my opinion this contention is not well founded.

"It is to be observed, in the first place, that the daughter's shares were directed to be invested by the trustees in the purchase of heritable property or upon heritable security, the rights thereto being in favour of the daughters in life-rent for their life-rent use alienably, exclusive of the rights of husbands, 'and to their lawful issue respectively, and failing such issue, then to the survivors of my said children equally among them, share and share alike, in fee.' This direction was not observed by the trustees, who in fact made no such investments, but I apprehend that according to a well-settled rule of trust law this omission can make no difference in the beneficial rights, which must be ascertained as if the trustees had done that which they were directed to do. Now, if they had purchased heritage with Mary's share, and

taken the title thereto in the terms I have quoted, I do not think it could have been contended that the words 'failing such issue, then to the survivors,' imported merely a conditional institution. They are, according to ordinary acceptance, words of substitution, and are apt to carry the fee to the survivors of the class referred to upon the failure of the institute without defeating the destination. In my opinion, upon Mary's death predeceased by her issue, the fee was carried to the surviving children of the testator, or as certain of the claimants contend, to such survivors along with the surviving issue of predeceasers. In either view the claim of Colin Brown's trustees is excluded.

"In support of their claim they relied mainly on the case of *Cunningham* (1889), 17 R. 218. In that case trustees were directed to lend out the daughters' shares on real security, and to take the bonds so that the interest should be paid to them during their life, and the principal sum after their death 'to be paid or divided equally among the decesser's lawful issue, and failing issue equally among my own children surviving at the time.' It is to be observed, however, that in the case of *Cunningham* the present question did not and could not arise for decision, being excluded by the facts. In that case issue did not fail in any view, for the life-rentrix was survived by five children, and the question was whether the representatives of her other children, who had predeceased her, were entitled to participate in the fee of the share. They were held entitled to do so. But there was no question raised in that case with surviving uncles and aunts, children of the testator.

"The next question is as to the meaning of the expression 'survivors of my said children' in the destination of the fee of the daughters' shares. It is contended by the surviving children of those daughters of the testator who predeceased Isabella that the word 'survivors' is open to construction, and must here be read as including the issue of predeceasers, and that either on this ground or by the operation of the *conditio si sine liberis*, they are entitled to share *per stirpes* in the fund *in medio*. It appears to me that the *conditio* is implied and excluded by the terms of the will, the contingency of issue having been distinctly in the contemplation of the testator in the adjoining clauses. As to the other ground, it rests mainly on the declaration which immediately follows the direction to invest, and I am of opinion that it is founded on a misconception of the purpose and import of the declaration. This appears to me to relate back, not to the immediately foregoing destination, but to the earlier clause as to the division of the residuary estate. It is conditioned upon one of three events, none of which happened in the case of Isabella, namely, the death of a child of the testator—(1) before the testator himself, or (2) before receiving payment, or (3) before the investment of her share (that is, as I read it, before the share was or ought to have been invested). I take it that this declaration was intended

to apply to deaths occurring in the earlier and intermediate period which might elapse before the trustees were in a position to pay to sons or invest for daughters, and not to qualify or interpret the destination to be inserted in the investments. It provides that on the occurrence of such deaths the issue of predeceasers was to come in along with survivors, and the prominence which is given to this idea in the declaration rather emphasises its omission from the destination of the fee.

"The fund *in medio*, being the share life-rented by Isabella, includes (as I have said) one-fourth of Mary's share; and a question is raised whether this, which must be regarded as an accruing share, was subject to the restriction to a life-rent or was at Isabella's disposal. It seems clear on the authorities, and was not disputed by those claiming in Robert Browne's interest, that the latter is the sound view. This being so, this part share (which amounts to a fifth of the fund *in medio*) passes under Isabella's will to the claimant Mary Jane Ewing Smith.

"The result is that I hold the fund *in medio* to have vested in Robert Browne as to four-fifths, and in Mary Smith as to one-fifth. And as the parties concurred in desiring this question of vesting to be decided before the rest of the case is disposed of, I have granted leave to reclaim."

The claimants Colin Brown's trustees reclaimed, and argued—"Failing issue" meant "failing having issue," not "failing leaving issue." It was a case of conditional institution, and whenever Mary Brown's child Alexander was born the conditions were satisfied, and the fee of her share vested in him. It now belonged to the claimants as representing his heir. The case was ruled by *Carleton v. Thomson*, July 30, 1867, 5 Macph. (H.L.) 151, and *Cunningham's Trustees v. Cunningham*, November 30, 1889, 17 R. 218. The latter case was especially in point. In it as in the present there was a direction to the trustees to invest in real security. The judgment of the Lord Ordinary reversed these authoritative decisions, and was therefore unsound.

Argued for the other claimants—What had to be kept in view was that the present case dealt with heritage. The testator directed that the shares falling to daughters should be invested in heritable property or heritable securities. The rules with regard to heritage therefore applied. It was not a conditional institution but a substitution. "Failing issue" did not mean "failing issue coming into existence," but "failing issue taking up and evacuating the destination" after coming into existence. Mary Brown's child Alexander died without evacuating the destination, and the property therefore descended to the claimants as substitutes in the deed—*Bell's Principles* (10th edition) sec. 1693; *Henderson v. Dougal*, February 12, 1841, 3 D. 548; *Watson v. Giffen*, January 23, 1884, 11 R. 444; opinion of L.P. Inglis, 451. The intention of the testator, as shown in the deed, was that there should be substitution. He

desired to exclude all chance of his sons-in-law succeeding to his estate. The case of *Carleton, supra*, dealt with moveable estate, and had therefore no application in present circumstances. In *Cunningham, supra*, the testator had directed that the principal sum was to be "paid," which necessitated a money division. And in that case some of the issue were in existence, so no question arose with the substituted heirs. The case of *Cunningham* therefore did not rule the present.

At advising—

LORD TRAYNER—The question decided by the Lord Ordinary, and brought before us by this reclaiming-note, has reference to that share of his estate destined by the testator to his daughter Mary. The manner in which that share is dealt with by the testator in his settlement is this—he directs his trustees to invest that share either in the purchase of heritable property or upon heritable security, taking the rights (that is the formal title) thereto in favour of his daughter in liferent for her liferent use alienably, and to her lawful issue, and failing such issue, then to the survivors of his own children, share and share alike, in fee. It is on the meaning and effect of this destination that the question arises.

Mary was married to Colin Brown in the year 1846, and gave birth to a child in September 1848, who died in October 1849. The child was survived by its father and mother. The mother Mary Brown died in April 1850, but her husband survived until December 1896, leaving a settlement in favour of trustees, who are claimants in this process. They claim the share destined to Mary in liferent and her issue in fee, on the ground that under the destination in the settlement of Mr Browne (Mary's father) the fee of that share vested in Mary's child, that Colin Brown (the child's father) is heir to his son, and that that share was carried to them, the claimants, by the settlement under which they are acting. The whole other claimants oppose this claim on several grounds, but the one ground insisted in before us was, that although the said share vested in Mary's child, yet there was a substitution in favour of the testator's own surviving children failing Mary's issue, and as Mary's child did not evacuate that destination, the share fell to them as substitutes, and not to Colin Brown as heir to his son.

I think it clear enough that what the testator left to his daughter Mary and her issue was heritable estate. The share was to be invested in the purchase of heritable property or in heritable security, and from the collocation in which these words are placed I think it not unreasonable to infer that the purchase of property rather than heritable security was to be preferred. But as regards the point now under consideration, the taking of heritable security was the same as purchasing heritable property, for at the date of the testator's settlement and death such securities were heritable *quoad* succession. I think the careful

direction given to the trustees as to the destination to be inserted in the rights or title of the property bought, or the security title taken, also points to the conclusion that the testator intended to leave to Mary and her issue heritable property. The destination was a usual and proper one in dealing with heritage, and unusual and probably might have been ineffectual in dealing with a sum of money. If, then, the estate destined to Mary in liferent and her issue in fee was heritable, the presumption is that the destination-over to the testator's own surviving children was a substitution of such survivors to Mary's issue—*Watson*, 11 R. 450. If that presumption is given effect to, the result is that the share destined to Mary's son now falls to the survivors of the testator's children, as the destination to them was not, and in the circumstances could not, be evacuated. On the principles laid down in *Watson's* case, I reject the contention that the right conferred on the surviving children of the testator was not a substitution but conditional institution. It remains only to be asked whether there is anything in the terms of the testator's settlement to exclude or rebut the presumption in favour of substitution. I can see none. Indeed, there are indications in an opposite direction, and I gather the testator's intention to have been, that if the share liferented by Mary was not beneficially taken up by her issue, he preferred his own surviving children to any other as his successors in that share. The result I have reached on the question debated before us is the same as that reached by the Lord Ordinary. But we were told that the manner in which the Lord Ordinary's interlocutor is expressed leads to the exclusion of the claims, or part of the claims, on the fund *in medio* now maintained for Mrs Morgan and her marriage-contract trustees. I think we should not deal with this matter until the Lord Ordinary has pronounced his final judgment ranking the claims and so disposing of the whole cause. In that view I would suggest that the interlocutor of the Lord Ordinary should be recalled, and the case remitted to his Lordship to proceed with and dispose of the cause.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG—I think the only difficulty in this case—and I found it a serious one—arises from the decision in the case of *Cunningham*, but after the best consideration I can give the matter I concur in the opinion expressed by Lord Trayner. I should only wish to add that irrespective of the case of *Cunningham* our decision is in accordance with the wish of the testator, as I judicially gather it from the expressions in the trust-deed. It is also to be noted that Colin Brown (the father of the child who died in 1849) throughout the remainder of his life from 1849 to 1896 acted and abstained from acting in the view that it was according to the testator's wish that Mary's share should go on the death of the child not to him but to the children of the truster. After Colin's death his trustees

also acted on that footing down to 1898—nearly half-a-century after the date of the child's death. It would be strange and unprecedented if such a claim as the present, brought forward in such circumstances after half-a-century, should be sustained. This therefore also strongly favours the view that the opinion expressed by Lord Trayner and assented to by myself is in accordance with the intention of the testator.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor:—

“Recal the interlocutor reclaimed against: Find that the share of his estate destined by the late James Browne to his daughter Mary in life-rent, and her issue, whom failing to the survivors of his own children, in fee, falls to such surviving children in respect of the death of Mary Browne's only child, to whom said surviving children of the testator were substituted in said destination: Find the said claimants entitled to the expenses of the reclaiming-note out of the fund *in medio*: Remit to the Auditor to tax the same and to report to the Lord Ordinary: Remit to the Lord Ordinary to repel the claim for Colin Brown's trustees, and thereafter to proceed with the cause and determine the rights of parties now claiming on the fund *in medio*, and with power to him to decern for the taxed amount of the expenses hereby found due.”

Agents for the Pursuers and Real Raisers—Campbell & Smith, S.S.C.

Counsel for the Claimants Colin Brown's Trustees—Solicitor-General (Dickson, Q.C.)—Cullen. Agents—Young & Roxburgh, W.S.

Counsel for the Claimants Children of Mrs Smith—H. Johnston, Q.C.—Sandeman. Agents—Dalgleish & Bell, W.S.

Counsel for the Claimant M'Clelland—Leadbetter. Agents—Forrester & Davidson, W.S.

Counsel for the Claimant Anderson—Kincaid Mackenzie—Blackburn. Agents—Bell & Bannerman, W.S.

Counsel for the Claimant Mrs Morgan—Boswell. Agents—H. B. & F. J. Dewar, W.S.

Friday, May 18.

# FIRST DIVISION.

MILLAR (LORD NAPIER AND ETTRICK'S TRUSTEE) v. LORD DE SAUMAREZ.

*Service of Heirs—Extract Decree of Special Service—Right to Obtain Extract Decree—Completion of Title—Titles to Land Consolidation Act 1868 (30 and 31 Vict. cap. 101), secs. 36 and 38—Right in Security—Bond and Disposition in Security.*

Under the provisions of sections 36 and 38 of the Titles to Land Consolidation Act 1868 anyone is entitled, on payment of the prescribed fees, to obtain an extract of a decree of special service pronounced on the petition of some-one else, which he may use as a link, equivalent to a general disposition from the ancestor to the heir, in making up his title under any disposition granted by the person served.

The heir-apparent of an entailed estate granted a bond and disposition in security, whereby he disposed to the creditor the entailed estate. He was afterwards sequestrated. On the death of the heir in possession the trustee in the sequestration obtained decree of special service on a petition in the name of the bankrupt. The heritable creditor obtained an extract of this decree, and expedite and recorded a notarial instrument on this extract and his bond. *Held* that he had validly completed his title, and was entitled to a preference in a question with the trustee, whose title to the lands in question was completed after his.

*Service of Heirs—Effect of Decree of Special Service—Titles to Lands Consolidation Act 1868, sec. 46.*

*Held* by Lord Low (Ordinary), and acquiesced in, that section 46 of the Titles to Land Act 1868, while giving to an extract of a duly recorded decree of special service the effect of a disposition by the ancestor in favour of the heir, does not give the same effect to the decree unextracted, and therefore that a title made up by a notarial instrument proceeding on an unextracted decree was inept.

In 1880 the Master of Napier, who was then heir-apparent to the entailed estate of Thirlestane, granted, in security of a loan of £1500 made to him by Lord de Saumarez, a bond and disposition in security, by which he conveyed the said estate of Thirlestane subject to the entail. The bond contained an assignation of writs in the ordinary form. It was duly recorded in the Register of Sasines on 16th January 1889.

In 1894 the estates of the Master of Napier were sequestrated, and Robert Cockburn Millar, C.A., was appointed trustee. In December 1898 the late Lord Napier and Ettrick died and the Master of Napier