Friday, July 7.

FIRST DIVISION.

BARON DE MAULEY AND ANOTHER (LADY KINNAIRD'S TRUSTEES) *v.* OGILVY.

Succession—"Heirs, Executors, and Successors whomsoever."

A testatrix directed her trustees to pay and make over the residue of her estate, which consisted of moveables, to "the eldest son of . . . my late daughter, whom failing to and in favour of such eldest son's heirs, executors, and successors whomsoever." The testatrix was predeceased by her grandson, the primary legatee.

Held, in a special case, that the residue of the testatrix's estate fell to be divided equally between a son and daughter of the said grandson, being his next-of-kin and *heirs in mobilibus*, and did not fall to be paid to the grandson's executrix to be administered under his will.

A Special Case was presented for the opinion and judgment of the Court by the Right Honourable William Ashley Webb Ponsonby, Baron de Mauley, and another, the trustees and executors acting under the trust-disposition and settlement, dated 28th May 1894, of Frances Anne Georgina Kinnaird, Lady Kinnaird, *first parties;* Mrs Isobel Louisa Nevill or Ogilvy, widow of Major Angus Howard Reginald Ogilvy, the executrix acting under his last will and testament, dated 26th August 1895, as such executrix and for her interest as a beneficiary under the will, and Sir Gilchrist Nevill Ogilvy of Inverquharity, Baronet, with the consent and concurrence of his mother, his curator, chosen by him, and decerned by the Lords of Council and Session by Act of Curatory, dated 26th May 1910, *second parties;* and Miss Olivia Frances Isobel Ogilvy, daughter of the said Major Ogilvy, *third party*, to determine the disposal of the residue of the trust estate.

Frances Anne Georgina Kinnaird, Lady Kinnaird, relict of the Right Honourable George William Fox Kinnaird, Baron Kinnaird of Rossie, died on 20th March 1910, leaving a trust-disposition and settlement, dated 28th May 1894, whereby she gave, assigned and disponed to and in favour of trustees her whole estate, heritable and moveable.

The said trust-disposition and settlement directed her trustees, after carrying out the provisions and purposes contained in the prior clauses thereof, to dispose of the residue and remainder of the trust estate in terms of the following direction—"And lastly, my trustees shall wind up my trust affairs under these presents with all convenient speed, and make up and subscribe a statement thereof, which, when subscribed, shall be taken and held by all concerned as absolute and conclusive evidence of the just and true amount of the free residue and remainder of my said trust estate, and thereupon, on receiving a sufficient discharge, shall pay and make over such residue and remainder to and in favour of the eldest son of the said Sir Reginald Howard Alexander Ogilvy, Baronet, and my late daughter, the Honourable Olivia Barbara Kinnaird or Ogilvy, whom failing to and in favour of such eldest son's heirs, executors, and successors whomsoever."

The trust estate consisted entirely of moveable property, and the free residue and remainder of the trust estate falling to be disposed of under the residuary clause above quoted amounted to £32,000 or thereby.

The eldest son of the said Sir Reginald Howard Alexander Ogilvy, Baronet, and the Honourable Olivia Barbara Kinnaird or Ogilvy was Major Angus Howard Reginald Ogilvy, who died on 4th July 1906, and thus predeceased Frances Lady Kinnaird. Major Ogilvy was survived by his wife, Mrs Isobel Louisa Nevill or Ogilvy, and by two children, Sir Gilchrist Nevill Ogilvy, Baronet, of Inverquharity, and Olivia Frances Isobel Ogilvy. The said two children of Major Ogilvy were his whole next-of-kin and heirs *in mobilibus ab intestato*. They were both, at the date of this Special Case, in minority.

Major Ogilvy left a last will and testament dated 26th August 1895, with codicil thereto dated 24th December 1901, whereby he, *inter alia*, left and bequeathed to his son, the said Sir Gilchrist Nevill Ogilvy, four-fifths of his whole means, estate, and effects of every description, except furniture, plate, carriages or jewellery, the remaining one-fifth to be equally divided amongst his (Major Ogilvy's) other children under the provision therein contained that the income of the means and estate should be at the disposal of his wife until in the case of a son he should be twenty-two years of age, and in the case of a daughter until she should marry. The said Major Ogilvy by his said last will and testament appointed as his executors his said wife and the holder of the Inverquharity baronetcy, who at the time of his death was his father, the said Sir Reginald Howard Alexander Ogilvy, since deceased.

The second parties *maintained* that on a sound construction of the residuary clause contained in the said trust-disposition and settlement the said Mrs Isobel Louisa Nevill or Ogilvy, as executrix under the said last will and testament of the said Major Ogilvy, was entitled to have the said residue paid over to her, to be applied by her as part of the testamentary estate of the said Major Ogilvy under and in terms of his said last will and testament. The third party maintained that on a sound construction of the said residuary clause she and her brother, the said Sir Gilchrist Nevill Ogilvy, were entitled to the said residue in equal shares as next-of-kin and heirs *in mobilibus ab intestato* of the said Major Ogilvy.

The *questions of law* for the opinion and judgment of the Court were—"(1) Is the

said Mrs Isobel Louisa Nevill or Ogilvy, as executrix of the said Major Ogilvy, under his said last will and testament, entitled to have paid over to her as such executrix the residue of the trust estate of the said Frances Lady Kinnaird, to be applied by her as part of the testamentary estate of the said Major Ogilvy under and in terms of his said last will and testament? or (2) Are the third party and the said Sir Gilchrist Nevill Ogilvy, Baronet, entitled to the said residue equally between them as the next-of-kin and heirs *in mobilibus ab intestato* of the said Major Ogilvy?"

Argued for the second parties—By "heirs" the testatrix meant to provide for the contingency of her grandson predeceasing her intestate. By "executors and successors whomsoever" she meant to provide for his predeceasing her leaving a will. To interpret the phrase according to the contention of the third parties would give no meaning to the words "executors and successors" and make them entirely superfluous. A bequest in favour of the person's "executors" had been held good in *Scott's Executors* v. *Methven's Executors*, January 30, 1890, 17 R. 389, 27 S.L.R. 314 (which had been referred to with approval by Lord M'Laren in *Montgomery's Trustees* v. *Montgomery*, June 27, 1895, 22 R. 824, 32 S.L.R. 628), and this case should be followed rather than the earlier cases relied on by the third party. Reference was also made to *Barr* v. *Parnie*, November 14, 1903, 11 S.L.T. 426, and *Haldane's Trustees* v. *Sharp's Trustees*, January 30, 1890, 17 R. 385, 27 S.L.R. 303.

Argued for the third party—The *prima facie* and natural meaning of such a destination as here was that, failing the primary legatee, his heirs *ab intestato* benefited—*Inglis* v. *Miller*, July 16, 1760, M. 8084 ("Heirs, executors, or assignees"); *Bell* v. *Cheape*, May 21, 1845, 7 D. 614 ("Heirs, executors, or assignees"); *Blair* v. *Blair*, November 16, 1849, 12 D. 97 ("Heirs or successors"); Lord M'Laren on Wills, 3rd ed., pp. 757 and 767. In *Scott's Executors* (*cit. sup.*) ("Executors and representatives") the word "heir" was not under construction at all, but as in *Manson* v. *Hutcheon*, January 16, 1874, 1 R. 371, 11 S.L.R. 190, the word under construction was "representatives."

LORD PRESIDENT—I think the general state of the law on this question has been fairly expressed by Mr Blackburn. Expressions of this class are flexible, and where you find in a will distinct matter which enables you to draw the inference that the testator intended to use the expression in one sense or in the other, you are entitled to interpret accordingly. In this will there is no such matter. The bequest is to the lady's grandson, and failing him by death to his "heirs, executors, and successors whomsoever." There is nothing in all the rest of the will to throw any light upon the subject.

Now the competition is between the executor-nominate of this grandson, who died before the testatrix, and those who are entitled to succeed according to the law of intestate succession in moveables, the fund in question being a moveable fund. In this state of matters I am of opinion that what I think to be the general rule must prevail, viz., that when an heir or executor is designated in this way it is intended to design the heir-at-law or the person entitled to succeed as heir in moveables according to the law of intestacy. It is at least antecedently improbable that the testatrix should prefer that the will should be made for her by the grandson whom she favoured rather than that in the event of that grandson failing by predeceasing her she should make a will for herself.

I am therefore of opinion that the first question must be answered in the negative and the second in the affirmative.

LORD JOHNSTON—I agree with your Lordship. I think that the passage we have to interpret, "heirs, executors, and successors whomsoever," must be taken as one complete sentence, and that its words must be interpreted in the collocation in which we have them. We cannot consider what they might mean in another collocation. Taking them as they stand, I have little doubt that the intention of this lady was to give to her grandson, and failing him to his heirs and executors at law. I should not easily be convinced that the intention of this or of any similar expression was, instead of keeping the bequest in the family of the beneficiary, to give the beneficiary the faculty of testing and disposing of it outside the family or in any direction he chose.

LORD MACKENZIE—I agree. I think that the general rule of law is that a destination such as we have here operates in favour of legal heirs and not in favour of *heredes facti*, and that there is nothing in this will which discloses on the part of the testatrix an intention that the destination should receive any other construction than that which would be given to it under the general rule of law.

LORD KINNEAR was absent.

The Court answered the first question in the negative and the second in the affirmative.

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