

Thursday, March 1.

SECOND DIVISION.

[Lord Blackburn, Ordinary.

MACKENZIE'S TRUSTEES v.

GEORGESON.

Succession—Vesting—Destination to A in Liferent and his Children in Fee, and in event of A not Leaving Issue to B and C “and their respective Heirs and Executors”—Conditional Institution—Vesting subject to Defeasance—Meaning of Words “and their respective Heirs and Executors”—Legal Heirs or Executrix—nominate.

A testator directed his trustees to hold certain moneys for the following purpose, namely, to pay the annual produce thereof to his nephew A during A's life and the fee to A's children after A's death, and in the event of A leaving no issue, then “the said capital sum . . . shall at his death be payable in two equal shares to his (A's) brother B and his (A's) sister C . . . and their respective heirs and executors.” The testator died in 1870. B died in 1904 leaving a will. A died in 1921 without having had any children.

In a competition between B's executrix and B's heirs *in mobilibus* for the share payable to B's “heirs and executors” the Court (*rev. judgment of Lord Blackburn, Ordinary*) preferred the claim of B's heirs *in mobilibus*, holding (1) that the share destined to B did not vest in B *a morte testatoris* subject to defeasance in the event of A's being survived by issue, but vested in B's “heirs and executors” as conditional institutes, and (2) that the words “heirs and executors” were intended to designate legal heirs and not *heredes facti*.

George Gibson Soote and another, testamentary trustees of James Mackenzie, Writer to the Signet, Edinburgh, who died on 7th January 1870, *pursuers and real raisers*, brought an action of multiplepounding and exoneration against Mrs Elizabeth Sarah Mackenzie or Georgeson, Edinburgh, and others, and also against Mrs Emma Whyte, sometime widow of Henry Somerset Mackenzie, *defenders*.

The pursuers and real raisers averred—“(Cond. 2) The testator by his said trust-disposition and deed of settlement conveyed his whole estate, heritable and moveable, to and in favour of his brother the Right Honourable Holt Mackenzie, John Ord Mackenzie of Dolphinton, Writer to the Signet, Captain Francis Grove of the Royal Navy, John Brown Innes, and John Logan, Writers to the Signet, and the survivors and acceptors of them, as trustees for the purposes therein set forth. In particular, he directed his trustees to apply his trust estate in payment of all his just and lawful debts and of the expenses of executing the trust, and in fulfilment of such uses, ends, and purposes as he might thereafter direct and appoint by any deed, codicil, memorandum, or other writing under his hand at any time of his life, declaring that any such writing, however

informal or defective in legal solemnities, if the same should be in the opinion of his said trustees sufficiently expressive of his intentions (as to which they were to be the exclusive judges), should be equally valid and effectual as if the same had been executed in due form of law. (Cond. 3) By the said memorandum of directions, dated 31st March 1866, the testator after providing for the payment of certain legacies gave to his trustees directions as to the disposal of the residue and remainder of his estate in the following terms, viz.—‘And with regard to the residue and remainder of my estate after fulfilling the purposes expressed in my said deed of settlement and payment of the above legacies, and any other legacies which I may hereafter leave and bequeath to any person or persons, I hereby will, direct, and appoint that after the same shall have been fully realised and the amount thereof ascertained, my said trustees and executors shall dispose of the residue in manner following—that is to say, they shall first of all deduct from the amount of the free residue the sum of £5000, and after such deduction the remaining residue shall be divided into two equal halves or shares, and the trustees shall then transfer and pay over the one-half of the said remaining residue or the rights and securities thereof to my nephew Henry Somerset Mackenzie, eldest son of my deceased brother Colonel William Gordon Mackenzie, to whom for his own use and benefit I leave and bequeath the said one-half of the said residue and remainder of my means and estate. In the next place, I direct and appoint that the said sum of £5000 deducted from the entire residue shall be added to the other half of the remaining residue, and such other half shall, together with the said £5000, be divided into two equal parts or shares, one of which parts or shares I leave and bequeath to and for behoof of my nephew Alfred Robert Davidson Mackenzie, the second surviving son of my said late brother William in manner following—that is to say, I direct and appoint my said trustees and executors to transfer and pay over to or invest in the persons of the said Henry Somerset Mackenzie and Charles Bowman Logan, Writer to the Signet, and the survivor of them, the said portion of my estate, being one-fourth part of the free residue, and one-half of the said sum of £5000 in addition thereto, to be held by them in trust for the uses and purposes following, namely, to pay and apply the free interest, dividends, or other annual produce thereof to and for behoof of the said Alfred Robert Davidson Mackenzie during all the days of his life, and that half-yearly or quarterly as the said trustees may think fit, declaring that the same shall be payable to himself alone, and shall not be subject or liable to his debts or deeds or the claims or diligence of his creditors, nor be assignable by him to any person or persons under any pretext or for any purpose whatever, but shall be held to be purely and strictly an alimentary allowance for his benefit; and in the event of the death of the said Alfred Robert Davidson Mackenzie and

of his leaving a widow, the said trustees shall pay and apply the one-half of the said free interest, dividends, and annual produce to such widow during her life, but so long only as she shall remain a widow, and that expressly for an alimentary allowance, declaring that the same shall not be subject or liable to her debts nor attachable by her creditors, nor assignable by her under any pretext or for any purpose whatever, and that such payment shall cease upon and in the event of her entering into another marriage: And declaring that the capital sum of the said portion of my estate shall be held by the said Henry Somerset Mackenzie and Charles Bowman Logan, trustees foresaid in trust for behoof of the lawful child or children of the said Alfred Robert Davidson Mackenzie, and be payable to or settled upon such child or children after the death of their father, at such time or times and in such manner as they, the said trustees, may think expedient, subject always to the above liferent in favour of his widow: And in case there shall be no such lawful child or children alive at the death of the said Alfred Robert Davidson Mackenzie nor issue of any such child, then the said capital sum, or such part thereof as shall not have been advanced to him under the power hereinafter conferred on the said trustees, shall at his death be payable in two equal shares to his brother, the said Henry Somerset Mackenzie, and his sister Mrs Eliza Mackenzie or Savile, hereinafter named, and their respective heirs and executors, subject to the payment of the interest or dividends of one-half thereof to his wife if she shall survive him during her widowhood as aforesaid; but notwithstanding the above directions I hereby give full power to the said trustees, if they shall see good cause and be satisfied that it would be for the benefit of the said Alfred Robert Davidson Mackenzie, to advance and pay to him or for his behoof a portion or portions of the said capital sum equal to but not exceeding in all the one-half thereof, at such time or times and upon such conditions as they may think fit, but in this matter they shall be allowed to exercise their own discretion without being under the control or direction of the said Alfred Robert Davidson Mackenzie or of anyone else.' (Cond. 4) The trustees acting under the testator's trust-disposition and deed of settlement duly implemented the provisions thereof, and in terms thereof and of said memorandum of directions paid over to the said Henry Somerset Mackenzie and Charles Bowman Logan (afterwards Sir Charles Bowman Logan), the trustees under the said second purpose of the said memorandum of directions, the one-fourth of the free residue of the testator's estate and the one-half of the said sum of £5000 falling to be administered thereunder. On 29th April 1908 the said Henry Somerset Mackenzie and Sir Charles Bowman Logan having died, the now deceased the Honourable James William Moncrieff and the pursuers were appointed to be trustees under the said second purpose of the said memorandum of directions by decree of the Court of Session, extracted 12th May

1908. The annual proceeds of the trust funds were duly paid over to the liferenter Colonel Sir Alfred Robert Davidson Mackenzie until his death on 7th May 1921. In virtue of the powers contained in the said memorandum of directions advances to the amount of £3747, 10s. were also made to the liferenter out of the capital of the trust funds. (Cond. 6) The said Colonel Sir Alfred Robert Davidson Mackenzie was predeceased by his wife and left no issue. The testator's nephew, the said Henry Somerset Mackenzie, predeceased the liferenter, having died on 29th February 1904 leaving a will dated 29th November 1899 under which his widow Mrs Emma Whyte is the sole accepting executrix. By the said will he bequeathed all the residue of the real and personal estate which he might die possessed of or to which he might become entitled under the trusts of the will of the testator and of his late aunt Hope Marion Mackenzie or otherwise to his wife the defender Mrs Emma Whyte and to her children by him. The said Henry Somerset Mackenzie was married three times. The defender Mrs Georgeson is the only issue of his first marriage. The defender Mrs van Millingen and Henry Holt William Mackenzie are the surviving issue of his second marriage, another daughter of that marriage having died unmarried on or about 1900. The said Henry Holt William Mackenzie is *incapax* and the defender Henry Grant Madan Conybeare is the receiver of his estate. Three children were born of the third marriage of the said Henry Somerset Mackenzie with the defender Mrs Whyte, viz., Adrian Ian Storr Somerset Mackenzie, who was killed in the war on 1st April 1917 and died unmarried, Miss Marion Emma Suzanna Mackenzie, who died unmarried on 13th February 1919, and the defender Mrs Warwick Evans. (Cond. 7) Questions of difficulty have arisen as to the parties entitled to receive payment of the fund *in medio* set free for division on the death of the liferenter the said Colonel Sir Alfred Robert Davidson Mackenzie. The defender Mrs Emma Whyte as executrix of the said Henry Somerset Mackenzie claims to be entitled to receive payment of the whole fund *in medio* as being carried to her as her husband's executrix by his said will of 29th November 1899, while for other defenders it is contended that the said funds did not vest in the said Henry Somerset Mackenzie and did not pass under his said will but are payable to his heirs *in mobilibus* as at the death of the liferenter."

A claim was lodged by the defenders (1) Mrs Elizabeth Sarah Mackenzie or Georgeson, (2) Mrs Hope Mackenzie or Van Millingen, and (3) Henry Grant Madan Conybeare, in which they pleaded—"On a sound construction of the testamentary writings of the testator James Mackenzie, the said Henry Somerset Mackenzie had no power to test on the fund *in medio*, and said fund falls to be divided among the heirs *in mobilibus* of the said Henry Somerset Mackenzie ascertained as at 7th May 1921."

A claim was lodged also by the defender Mrs Emma Whyte as executrix of Henry

Somerset Mackenzie, in which she pleaded—
“1. The fund *in medio* having, on a sound construction of the testator's testamentary writings in the events which happened, vested in the said Henry Somerset Mackenzie, and the said Henry Somerset Mackenzie having validly and effectually tested upon the same, the claimant as the sole executrix of the said Henry Somerset Mackenzie's will is entitled to be ranked and preferred in terms of her claim. 2. Alternatively, vesting having been suspended until the death of the liferenter, and the claimant being on a sound construction of the destination-over the party called thereunder, she is entitled to be ranked and preferred in terms of her claim.”

On 21st November 1922 the Lord Ordinary (BLACKBURN) pronounced an interlocutor in which he repelled the claim for Mrs Elizabeth Sarah Mackenzie or Georgeson and others and sustained the claim for Mrs Emma Whyte, and ranked and preferred the said claimant to the whole fund *in medio* in terms of the said claim.

Opinion.—“The question in this case arises under the will of a well-known Writer to the Signet in Edinburgh who died in 1870. The only clause which I have to consider is the residue clause in terms of which a portion of the residue was left to the testator's nephew Alfred Robert Davidson Mackenzie for himself in liferent, which was to be strictly alimentary, and on his death the fee to his issue, if any, subject to a liferent of one-half of the share in favour of his widow if she survived him. There is a destination-over in the event of Alfred leaving no issue to Alfred's elder brother Henry Somerset Mackenzie, and his sister, now Mrs Savile, and their respective heirs and executors. The question in the case has arisen owing to the death of Alfred, who never had any issue, predeceased by his wife and predeceased by his elder brother Henry Somerset, and the question is whether the part of the share which was destined over to Henry Somerset vested in him *a morte testatoris* subject to defeasance, or vested in his heirs and executors on the death of Alfred the liferenter. There is no question about the other part of the share which goes to Mrs Savile, as she survived her brother Alfred. I cannot say that the question appears to me to be one of difficulty, because it is apparently just the typical illustration of a case of vesting subject to defeasance—a liferent to A with the fee to his issue *nascituris*, whom failing the fee to B, and in such a case vesting takes place in B subject to defeasance in the event of A being survived by issue. It was argued for the claimants who had an interest to dispute this view of the meaning of the destination, that is to say, by the heirs of Henry Somerset, who are his issue by three different marriages, that that whole law, as I understood the argument, of vesting subject to defeasance has been displaced and set aside by the decision of the Whole Court in *Wylie's Trustees* in 1919 S.C. 211—a case in which I myself took part. I can say for myself that I had no conception at the time that I was engaged in such a devastating

operation which would have involved among other things the overruling of several very familiar decisions in the House of Lords. But I think it is perfectly clear that the case of *Wylie's Trustees* had nothing to do with the present question. There the testator left a liferent of his property to his wife, and then disposed of the fee on the death of the longest liver of himself and his wife to his cousin A B 'or his heirs in heritage,' and the only questions which were before the Court and which were decided by the Court was the general one, whether a destination to a person's heirs was a good destination, and if so, the special one, whether the heirs in that particular case were to be ascertained as at the disponent's own death or at the date when the succession opened. It was held unanimously that a destination to the heirs of somebody else was a perfectly good destination, and that under the circumstances of the case the heirs of the disponent fell to be ascertained when the succession opened. I cannot think that the decision in that case has anything whatever to do with a simple case of vesting subject to defeasance such as in my opinion we find in this case, and it appears to me that Lord Dundas, with whom most of the consulted Judges expressly concurred, was careful to avoid the possibility of his opinion committing him to any such view when he says (page 224)—‘The cases show that in a destination to issue ‘there may be room for the doctrine of vesting subject to defeasance.’ Accordingly I shall find that there was vesting in Henry Somerset Mackenzie *a morte testatoris*, and that the claimant his widow as his executrix falls to have her claim sustained.”

Mrs Hope Mackenzie or Van Millingen reclaimed, and argued—(1) The Lord Ordinary was wrong in treating as negligible the words “and their respective heirs and executors.” The expression was equivalent to “or (*i.e.*, whom failing) their respective heirs and executors,” and it constituted a destination-over and prevented vesting subject to defeasance—*Montgomerie-Fleming's Trustees v. Carre*, 1922 S.C. 688, 59 S.L.R. 492, *per* Lord Ormisdale at 1922 S.C. 692, 59 S.L.R. 495, and Lord Hunter at 1922 S.C. 694, 59 S.L.R. 496; *Wylie's Trustees v. Bruce*, 1919 S.C. 211, 56 S.L.R. 156, *per* Lord President (Strathclyde) at 1919 S.C. 234, 56 S.L.R. 167; *Macleod v. Wilson*, (1903) 6 F. 213, 41 S.L.R. 130; *White's Trustees v. Chrystal's Trustees*, (1893) 20 R. 460, 30 S.L.R. 463, *per* Lord Trayner at 20 R. 466, 30 S.L.R. 466; *Cumming's Trustees v. White*, (1893), 20 R. 454, 30 S.L.R. 459; *Steel's Trustees v. Steel*, (1888) 16 R. 204, 26 S.L.R. 146. (2) The expression “heirs and executors” when used in a will might be intended to mean either legal heirs or *haeredes facti*, but the presumption was that the expression meant legal heirs unless there was a clear indication to the contrary. In the present will there was no such indication and accordingly the expression must be held to mean the heirs *in mobilibus*—*Lady Kinnaird's Trustees v. Ogilvy*, 1911 S.C. 1136, 48 S.L.R. 917, *per* Lord President (Dunedin) at 1911 S.C. 1138, 48 S.L.R. 917; *Stodart's Trustees, &c.*, (1870) 8 Macph. 667;

Maxwell v. Maxwell, (1864) 3 Macph. 318; *Blair v. Blair*, (1849) 12 D. 97, per Lord Moncreiff at 110; *Bell v. Cheape*, (1845) 7 D. 614, per Lord Ivory at 622, Lord Fullarton at 633, and Lord Jeffrey at 636 and 637; *M'Laren, Wills and Succession* (3rd ed.), pp. 766 and 767.

Argued for the respondent (the claimant Mrs Emma Whyte)—(1) It was admitted that if there was a true ulterior destination there could not be vesting subject to defeasance, but there was not a true ulterior destination because the destination was not to "their respective heirs" but to "their respective heirs and executors"—*Montgomery-Fleming's Trustees v. Carre*, per Lord Hunter (*cit.*); *Marshall's Trustee v. Campbell*, 1914 S.C. 443, 51 S.L.R. 397; *Thompson's Trustees v. Jamieson*, (1900) 2 F. 470, 37 S.L.R. 346, per Lord Stormonth Darling at 2 F. 491, 37 S.L.R. 358, and Lord Low at 2 F. 494, 37 S.L.R. 360; *Cumming's Trustees v. White* (*cit.*); *Douglas v. Douglas*, (1864) 2 Macph. 1008, per Lord Curriehill at 1013. The case of *Halliburton, &c.*, (1884) 11 R. 979, 21 S.L.R. 686, was also referred to. (2) Alternatively if vesting was postponed to the death of the liferenter the expression "heirs and executors" must be held to mean the executor-nominate—*Lady Kinnaird's Trustees v. Ogilvie* (*cit.*); *Scott's Executors v. Methven's Executors*, (1890) 17 R. 389, 27 S.L.R. 314. The case of *Lawsons v. Stewarts and Others*, (1827) 2 W. & S. 625, was also referred to.

At advising—

LORD ORMDALE—The questions in this case arise under the trust-disposition and settlement of James Mackenzie, W.S., who died on 7th January 1870. In regard to the disposal of the residue of his estate, he directed his trustees to pay over to or invest in the persons of two individuals named certain moneys to be held by them in trust for the following purpose, namely, to pay the annual produce thereof to his nephew Alfred Mackenzie and the fee to Alfred's children. In the event of Alfred leaving no issue, then "the said capital sum . . . shall at his death be payable in two equal shares to his brother . . . Henry Somerset Mackenzie and his sister Mrs Eliza Mackenzie or Saville . . . and their respective heirs and executors." Alfred died, without having had any children, on 7th May 1921, predeceased by his brother Henry, who died in 1904. Henry left a will under which his widow is the sole executrix.

The fund *in medio* in the present action represents the share of the truster's residue payable to Henry and his heirs and executors. The fund is claimed by the widow and executrix of Henry on the ground that it vested in Henry *a morte testatoris*, subject to defeasance only in the event (which did not happen) of the liferenter being survived by issue; and alternatively she claims that if it did not so vest she is entitled to it as conditional institute called under the destination to "heirs and executors." On the other hand, it is claimed by the heirs *in mobilitibus ab intestato* of Henry at the date of Alfred's death, on the ground that

there was no vesting in Henry *a morte testatoris*, vesting being postponed until the death of the liferenter, and that under the destination to "heirs and executors" it is carried to them. There are two questions therefore presented for decision—first, whether the words "and their respective heirs and executors" import a conditional institution or destination-over, and, if they do, second, what is the meaning and effect of that destination.

First. It was not disputed that if these words do import a destination-over, then vesting was postponed to the death of the liferenter, and that there is no room for the application of the doctrine of vesting subject to defeasance. The Lord Ordinary has not examined this question, but apparently treating the words as of no effect and assuming rather than deciding that there was no destination-over, has regarded the clause as equivalent to a simple bequest of "a liferent to A with the fee to his issue *nascituris*, whom failing the fee to B," and declining to accept the contention to the effect, as he understood it, that the law of vesting subject to defeasance had been annihilated by the decision in the whole Court case of *Wylie's Trustees* (1919 S.C. 211), held that there was vesting in Henry *a morte testatoris* subject to defeasance only in the event of Alfred leaving issue. No such argument was presented at our bar. It was recognised that *Wylie's Trustees* did no more than decide, following certain dicta in *Bowman's Trustees* (1 F. (H.L.) 69), that the rule of construction enunciated in *Hay's Trustees* (17 R. 961) could no longer be regarded as authoritative, and that a gift-over in favour of persons unnamed but described as heirs, issue, and the like of the first legatee called should as a general rule receive the same effect as a destination in favour of a person *nominatim*, or, as Lord Blackburn puts it (*Wylie's Trustees*, at p. 233), that "since the judgment of the House of Lords in *Bowman's Trustees* it must be taken to be the settled law of Scotland that a destination to heirs is as good a conditional institution as one in favour of a named person."

Following *Wylie's Trustees* this Division in the case of *Montgomery Fleming's Trustees* (1922 S.C. 688) held that a destination to J. B. M. "and his heirs and assignees" imported a proper conditional institution. On the first question I can see no solid ground for distinguishing the present case from *Montgomery Fleming's Trustees*. In the latter case the trustees were directed on the occurrence of certain events to convey to the truster's son "and his heirs and assignees" certain subjects. The son predeceased the occurrence of these events, leaving a trust-disposition and settlement habile to dispose of the subjects, and they were accordingly claimed by his trustees. This claim was rejected on the ground that vesting was postponed till after the occurrence of the events. No doubt the destination here is not to "heirs and assignees" but to "heirs and executors." That appears to me to be a quite immaterial difference.

It is not now, whatever it may have been before *Hay's Trustees* was overruled, a sufficient explanation of their presence to say that they were introduced merely to make emphatic the gift of the fee to the legatee first named, expressing as they do no more than the natural law of inheritance.

It was further argued that the words were put in to provide for the event of Henry Mackenzie predeceasing the testator. What Lord Kyllachy said as to this contention in *Thompson's Trustees* (1900, 2 F. 470) appears to be equally applicable to the destination here, and I venture to quote his opinion—"It is perhaps also true—at least it has been sometimes said—that a conditional institution in favour of a legatee's heirs ought if possible to be read as referring to the contingency of predecease of the testator. But supposing this to be so, the terms of the bequest here seem to forbid that construction. There is here no gift except in the shape of a direction to pay on the death of the liferentrix, nor is there here, as in the case of *Bowman*, anything in the scheme of the settlement to displace the ordinary construction."

It was also noted by Mr Mackintosh, though he did not attach much importance to the point, that the destination was introduced by the word "and" and not by the word "or." In my opinion there is no substance in the distinction. In *Montgomerie-Fleming's Trustees* the word was also "and."

I come to the conclusion that the words "and their heirs and executors" constitute a true conditional institution, that vesting did not therefore take place in Henry Mackenzie a *morte testatoris*, and that the fund was not effectively tested upon by him.

Second. The alternative contention of the executrix of Henry Mackenzie—that on a sound construction of the destination over she is the party called thereunder—must in my opinion also fail. I am unable to read the word "executors" as meaning the executors-nominate—in other words, the testamentary assignees of Henry Mackenzie. In effect I think this contention is concluded against the executrix by the judgment in *Montgomerie-Fleming's Trustees*, although I do not recollect that the precise point was argued in that case. The words "heirs and executors" are familiar terms, and when used in conjunction are intended—in the absence of any context which may give them a different and special signification—to designate generally the parties entitled to take in intestacy according to the nature and quality of the subject of succession, heritable or moveable. That was the effect given to them by the Court in the case of *Bell v. Cheape* (7 D. 614), in construing a destination to A, "his heirs, executors, and assignees." I refer to two of the cases cited by Mr Mackintosh. In *Douglas* (2 Macph. 1008, at p. 1014) Lord Curriehill, in construing the words "heirs, executors, and successors," appears to have given the word "executors" the meaning of testamentary successors. The case is hardly in point, for his Lordship was dealing with words which he regarded as not importing a conditional institution but merely as emphasising an already vested gift of fee.

In *Scott's Executors v. Methven's Executors* (17 R. 389), however, a gift to executors was held to carry the subject to executors-nominate. A legacy was given to R. M., whom failing, by his predecease of the testator, to his "executors and representatives whomsoever . . . whom I do hereby appoint to be my residuary legatees." But here the destination was expressly applicable to the event of R. M. predeceasing the testator—the word "executors" was not used in conjunction with heirs—and it was held, therefore, that the intention of the testator being clear, the testamentary assignees were entitled to take.

But the general rule of construction is clearly enunciated in *Lady Kinnaird's Trustees v. Ogilvy* (1911 S.C. 1136), in which the case of *Scott's Executors* was before the Court. The terms of the destination-over were "heirs, executors, and successors whomsoever." The primary legatee, a grandson, predeceased the testatrix. The competition was between his executor-nominate and his heirs *in mobilibus*. The Court repelled the claim of the executor-nominate. The Lord President said (at p. 1139)—"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 an executor is designated in this way, it is intended to designate the heir-at-law or the person entitled to succeed as heir in moveables according to the law of intestacy." Lord Mackenzie in concurring said (p. 1139)—"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*."

In the present case also the general rule must, in my opinion, prevail, for I can read no intention to favour executors-nominate from the terms of the destination itself, and there is nothing in the settlement from which any such intention can be inferred.

Accordingly, in my opinion, we should recal the interlocutor of the Lord Ordinary, repel the claim for Mrs Emma Whyte, sustain the claim for Mrs Elizabeth Sarah Mackenzie or Georgeson and others, and rank and prefer these claimants in terms of their claim.

LORD JUSTICE-CLERK—I concur.

LORD ANDERSON—I concur.

LORD HUNTER did not hear the case.

The Court recalled the interlocutor of the Lord Ordinary, repelled the claim for Mrs Emma Whyte, sustained the claim for Mrs Elizabeth Sarah Mackenzie or Georgeson and others, and ranked and preferred these claimants to the extent of their claim on the fund *in medio*.

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