Tuesday, December 4.

FIRST DIVISION.

GREENLEES' TRUSTEES *v.* GREENLEES AND OTHERS.

Succession — Vesting — Fee or Liferent — Direction to Trustees to Retain—Repugnancy.

A testator provided that his trustees should "divide, apply, pay, or convey or hold" the residue of his means and estate "to and equally among, or for the behoof of," all his children; that the shares of residue falling to his sons should be paid to them at the date of the first annual balance of his business books occurring after his death, but that the trustees should hold the shares of residue falling to his daughters for behoof of the daughters or their children, and should pay the annual proceeds to them, but subject always to full powers of disposal on the part of the daughters by any deed to be executed by them in the way of family settlements. It was further provided that the trustees should have power to make advances to the daughters on their marriage, or on other proper occasion, as they might think requisite, and that should any of the children die before the period of division leaving children, these children should take the share which would have fallen to their parent, or should any of them die without issue, that the share of such deceaser should be divided equally among the survivors. There was no further disposal of the daughters' shares.

In a special case presented some years after the testator's death—*held* (1) that the fee of the daughters' shares vested in them *a morte testatoris*, and (2) that they were entitled to immediate payment of their shares, the direction to the trustees to retain being ineffectual.

Samuel Greenlees died on 12th May 1886, survived by his wife and eight children, two sons and six daughters. He left a trust-disposition and settlement dated 4th October 1882, by which he conveyed to trustees his whole estate heritable and moveable. After providing for an annuity to his wife, and certain legacies, the truster by the last purpose of the trust-disposition provided as follows—"In the last place, my said trustees and their foresaids shall divide, apply, pay, or convey or hold, as after mentioned, the whole rest and remainder of my means and estate, and the interest and other annual produce thereof, including the principal sum or sums which may be set apart to meet the annuities hereinbefore provided, when and as the same or any part thereof may be set free by the death of my wife, the said Mrs Isabella Ralston or Greenlees, and my daughter, the said Agnes Greenlees, to and equally among or for behoof of all the children of me, the said Samuel Greenlees, viz., Agnes Greenlees, James, Samuel, Margaret, Martha, Isabella, Jessie, and Catherine. The share of said residue falling to my two sons shall be paid over to them by my said trustees at the date of the annual balance of the books of my business occurring first after my decease, or as near to that time as may be convenient; but in the case of the share of said residue falling to each of my daughters, I desire and direct my trustees either to hold in their own names in trust for behoof of my said daughters or their children, or by deed or conveyance to hold in the names of other trustees whom they may appoint, the shares of said residue falling to each of my said daughters respectively, and to pay and apply the interest, rent, or other annual proceeds thereof to them, but subject always to full powers of disposal on the part of our daughters of the said shares by any deed to be executed by them in the way of family settlements. Providing that my trustees have power, should they deem it expedient in the case of any of my daughters, to advance such sum out of the capital to any of my daughters on their marriage or other proper occasion as they may think requisite; and should any of my said children die before the period of division of said residue, leaving lawful children, these children shall take the share that would have fallen to their parent, or should any of them die without leaving issue, the share of such deceaser shall be equally divided among my surviving children (of both marriages) equally share and share alike."

Miss Agnes Greenlees died on 27th December 1893 leaving a will dated 7th April 1891, by which she bequeathed her estate to James Greenlees, Samuel Greenlees, and Mrs Catherine Greenlees or Wilson. Questions having arisen as to whether this will was a "family settlement" in accordance with the terms of the last purpose of Mr Samuel Greenlees' trust-disposition, and generally with reference to the effect of that clause, a special case was presented by the said Samuel Greenlees' trustees and three of his daughters of the first part, Miss Agnes Greenlees' executors of the second part, and the two other daughters of Samuel Greenlees of the third part, to have it determined, *inter alia*, "(1) Did the testator's daughters, upon his death, acquire a vested right to the fee of their shares of residue?" (3) "If the first question is answered in the affirmative, are said daughters, and the second parties as representing Agnes, entitled to immediate payment of their said shares, under deduction of the sum necessary to secure the widow's annuity?"

The first parties maintained that the interest of the daughters was restricted to a right of liferent in their respective shares, with a power of disposal at their death, and that only in favour of their children; that no share of the fee had

vested in them; and that Miss Agnes Greenlees' will did not fall under the term "family settlement."

The second and third parties maintained that the daughters' shares of residue vested and became divisible at the date of the truster's death, subject only to a postponement in the division of such part of the capital as had to be retained to meet the annuity to his widow, and that the trustees were bound on demand to hand over their shares to the surviving daughters and to Miss Agnes Greenlees' representatives.

Argued for the first parties — There was no gift of fee to the daughters contained in the terms of the deed. It was not directly contained in the words used by the truster, nor could it be implied from the general tenor of the trust. The fact that the truster gave his daughters a limited power of disposal, and empowered his trustees to make advances at their discretion, was inconsistent with an intention on his part of making a direct gift of fee to them—*Sanderson's Executors* v. *Kerr*, December 21, 1860, 23 D. 227. In the cases relied on by the other parties there was a more direct gift of fee, followed by words of restriction. The term "family settlement" applied strictly to a settlement in favour of children by a married person, and could not be applied to a will in favour of selected brothers and sisters.

Argued for the second and third parties—There was no disposal of the fee unless it were to the daughters. The words "divide, apply, pay, or convey or hold . . . for behoof of," did constitute such a gift. In the cases of *Brown* v. *Brown's Trustees*, February 27, 1890, 17 R. 517, and *Lawson's Trustees* v. *Lawson*, July 17, 1890, 17 R. 1167, the words of disposal were similar to these, and were held to constitute a gift. If there were any repugnancy between the gift and the restrictions that followed, these would fly off, and would not be allowed to curtail the free gift assumed by law. The beneficiaries' power of disposal was inconsistent with the idea that they were mere liferenters. They were therefore entitled to be paid at once, and to get rid of the machinery of a trust which had merely been set up for administrative purposes—*Brown* v. *Brown's Trustees, supra; Wilkie's Trustees* v. *Wight*, November 30, 1893, 21 R. 199. In any view, Miss Agnes Greenlees' will was a "family settlement," which was a wide expression, including even a marriage-contract by which she might have settled her share on herself. The possession of such a wide power was an additional argument in favour of a free gift of fee.

At advising—

LORD ADAM—The questions in this case arise upon the construction of the trust-disposition and settlement of the late Mr Greenlees, who died in 1886, and particularly of the residuary clause of that settlement. [*His Lordship then narrated the circumstances in which the questions arose, and referred to the terms of the residuary clause.*]

Now, it appears to me from these provisions of the settlement that the period of division of the residue contemplated by the truster was the date of his death, and that thereafter the trustees were to pay to, or to hold for behoof of, each of the children the shares falling to them respectively. Thus the trustees are directed to pay the shares falling to the two sons at the date of the first annual balance of the business books occurring after the truster's death. But before this could be done, it is obvious that there must be a division of the residue into equal shares. It appears to me to be difficult to say that this is anything but the postponed payment of a share already vested.

Then, again, the trustees are directed to hold for behoof of his daughters the shares falling to each of them respectively subject to certain directions, but there is no further or other disposal of the fee of these shares. But it appears to me that a direction to pay to or to hold for behoof of a person is equivalent to a gift to that person, and that therefore the beneficial fee of these shares was all along in the daughters. I am therefore of opinion that a right to a fee in the residue of the truster's estate vested *a morte testatoris*, and that the first question ought to be answered in the affirmative.

If that be so, then the third question in the case arises, whether the surviving daughters and the representatives of the deceased daughter Agnes are entitled to immediate payment of their shares.

The facts which give rise to this question are that the trustees are directed to hold the shares, and to pay the annual proceeds only to the daughters, subject to a power to the daughters to dispone thereof by family settlements, and to the trustees to make advances to them out of capital. It appears to me that these directions amount to limitations on the full right of fee, which, as I have already said, I think is vested in the daughters, and therefore cannot receive effect. I think the case is ruled by the recent cases of *Brown*, *Lawson's Trustees*, and *Wilkie's Trustees*, to which we were referred, and which must be considered as settling the law in this respect. I am therefore of opinion that this question also should be answered in the affirmative, and that disposes of the whole questions in the case.

LORD M'LAREN—I am of the same opinion. I think the case involves a rule or principle of which there have been frequent examples in recent decisions. If a testator, in dividing his property amongst his family, or amongst a number of objects, begins by giving a share to each in unqualified terms, and then proceeds to give directions to trustees to hold certain of those shares for a time, and pay over the income to the objects of the trust, but gives no direction in regard to the disposal of the capital or reversion, then, according to the decisions, and upon, I think, very well-settled principles of construction, the direction to the trustees to hold the property and pay the income does not derogate from

the generality of the proposed gift, and therefore the trust, so far as these interests are concerned, is really nothing more than the constitution of a system of administration of the shares for the benefit of the person who is truly the fiar. But, of course, a testator may begin by dividing his estate into shares, giving one to each member of his family, and may go on to limit that gift and to make it clear that he intends that a daughter, for example, shall take no more than a life interest, the fee being given over to her children. But in order that we should prefer such a limitation it is necessary that the fee should be given to someone, because, unless it is given to another person, there is nothing inconsistent with the original gift, if, as in the present case, it is an absolute gift. On these grounds I concur with Lord Adam on both points raised in this case.

LORD KINNEAR and the LORD PRESIDENT concurred.

The Court answered the first and third questions in the affirmative.

Counsel for the First Parties—H. Johnston—Greenlees. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Second Parties—C. S. Dickson — M'Clure. Agents — Ronald & Ritchie, S.S.C.

Friday, December 7.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

COMMISSIONERS OF CALEDONIAN CANAL *v.* COUNTY COUNCIL OF ARGYLL AND OTHERS.

(*Ante*, vol. xxxi. p. 830.)

Valuation Acts — Canal — Whether Two Canals One Undertaking—Valuation of Lands (Scotland) Act 1854 (17 *and* 18 *Vict. c.* 54). *sec.* 21.

The Caledonian and Crinan Canals were constructed at different dates—the former by a body of public commissioners, the latter by a company of private undertakers. To enable the Crinan Company to complete their canal considerable sums were advanced by the Treasury. In 1848 an Act of Parliament was passed, whereby the Crinan Canal was transferred to and vested in the Commissioners of the Caledonian Canal, but a right of redemption (which was not exercised) was reserved to the company on payment of their debt within twenty years. In 1860 another Act was passed which, among a number of provisions applicable to both canals indiscriminately, authorised the commissioners to expend all rates and rents levied from, or money borrowed upon the security of the two canals, upon both or either of them. In practice, separate accounts continued to be kept for the two canals.

Held (*aff.* judgment of Lord Stormonth Darling) that, for the purpose of fixing the yearly value of the canals under the 21st section of the Valuation Act 1854, the two canals were to be treated as one undertaking, the profits upon one being set against the losses upon the other.

The Caledonian and Crinan Canals, which are situated at a distance of sixty miles from one another, were constructed at different dates, and by different sets of persons—the Caledonian Canal by a body of public commissioners, and the Crinan Canal by a company of private undertakers.

In order to enable the proprietors of the Crinan Canal to complete its construction large sums were advanced to it by the Treasury prior to 1848. In that year an Act was passed (11 and 12 Vict. c. 54), which, proceeding upon the narrative, *inter alia*, that it appeared to the Commissioners of Her Majesty's Treasury "to be essential that the Crinan Canal and works connected therewith should be vested in the Commissioners of the Caledonian Canal in order that both navigations may be united under the same management," enacted by section 5 "That from and after the passing of this Act, the tolls and rates arising from the Crinan Canal, and also the canal itself, and all the estate, right, and title and interest in and to the same . . . shall be and become the property of, and the same are hereby transferred to and vested in the commissioners, . . . and the commissioners shall henceforth have and enjoy all the rights, powers, and authorities for levying, taking, altering, and managing the tolls, rates, and duties leviable on the Crinan Canal, and all other rights, powers, and authorities, . . . and shall and may henceforth undertake and exercise the management and administration of the Crinan Canal, and of everything connected with it in as full and ample a manner as now appertains to them with regard to the Caledonian Canal." . . . By section 6 the Crinan Canal Company were given a power of redemption on payment within twenty years of the debt due to the Treasury, and any sum that might have been expended by the Commissioners upon the canal, over and above the rates received from it, but this power was never exercised. By the Act 23 and 24 Vict. cap. 46, the powers and provisions of the Acts relating to the Caledonian and Crinan Canals were amended and enlarged. The powers of rating and borrowing conferred by the Act were made applicable to the two canals indiscriminately. By sec. 25 it was provided that "All rates levied and all rents received, and all moneys borrowed under the authority of this Act, shall be applied and expended on or in connection with the canals, or either of them, and in providing additional accommodation for the traffic thereon, or in making any docks, basins, or slips as aforesaid as shall from time to time