Friday, March 20.

FIRST DIVISION.

GRAHAM *v.* GRAHAM AND OTHERS.

Trust—Survivor—Right to test. Terms of trust-deed on which *held* (1) that beneficiaries under a trust had right to test on their shares in the trust-estate, and (2) that the representative of a child who died in 1849 had no right of succession to the share of a child dying in 1851.

The fund *in medio* in this multiplepoinding consisted of the trust-estate arising under the mutual settlement of the deceased Lieutenant-Colonel Humphrey Graham and his wife, dated 12th January 1815. By that deed Lieutenant-Colonel Graham conveyed to his wife in liferent, and to their eldest, second, and fourth sons in trust, his whole estate, heritable and moveable, under burden of debts, &c., and with various powers of administration. The deed then proceeded:—"As it is our wish and intention that our whole means and estate, before conveyed, should be equally divided amongst our children, the said Humphrey, Frederick, and Henry Graham, our sons; and Isabella, Margaret, and Amelia Graham, our daughters, and any other child or children that may be hereafter born of the marriage betwixt us, excepting always expressly from any share or portion whatever of our said means and estate George Farquhar Graham, our second son, as he is already amply provided for by his grandfather; we do hereby appoint and direct our said trustees, at the expiration of the liferents before mentioned, to each of us, or as soon thereafter as may be practicable and prudent, to divide the whole of our means and estate before conveyed, then free of such liferent, equally amongst themselves, the said Humphrey, Frederick, and Henry Graham, and our said daughters, Isabella, Margaret, and Amelia Graham, one-sixth part to each, if no other child or children shall be hereafter born of the marriage between us; but the shares of our daughters, instead of being paid to them, we hereby appoint to be vested as after-mentioned.

"And in case of the decease of any of the said Humphrey, Frederick, or Henry Graham before such division, (as it is our wish and intention, for the reason aforesaid, that the said George Farquhar Graham, our second son, should in no case succeed to any of our means and estate aforesaid, unless in the event of all his said brothers and sisters, and any others that may hereafter be born to us, predeceasing him without leaving lawful issue or descendants of their bodies, and without leaving any writing regulating their succession,) we appoint and direct our said trustees, if the person or persons so deceasing shall have left lawful heirs of their bodies, or any deed or writing regulating the succession of their property, to pay over and convey to such heirs, or to the person or persons appointed to succeed by such deed or writing, such portion or share of our said means and estate as our said son so predeceasing would have been entitled to had he survived, whether the one-sixth part as aforesaid, or such addition as may belong to him through the decease of any of his brothers or sisters, as before and after mentioned."

The trustees were then appointed to vest the foresaid shares destined to Isabella, Margaret, and Amelia, "whether one-sixth part as aforesaid, or such shares of our said means and estate as may fall to them by the death of any of themselves, or of any or all of their said brothers, as before or after mentioned, in trustees, with full powers to them to uplift, receive, discharge, and invest the principal sums belonging to the said Isabella, Margaret, and Amelia Graham, and to manage the same for their benefit as they shall think best, the provisions to be vested in them for the following purposes:—1*st*, The said trustees shall pay to the said Isabella, Margaret, and Amelia Graham respectively, half-yearly, or at such terms as shall be thought best, the free produce of the shares vested in them for their behoof, such produce to be at their free disposal. 2*dly*, In case any of our said daughters, or all of them, should marry, then the said trustees should pay over the said free annual produce of such daughter's share to *such* daughter during her life, and to her husband during his life, in case of his surviving her; and the principal sum provided to each daughter respectively shall belong and be payable to the lawful heirs of the body of that daughter, provided such heirs, or any of them, shall attain majority, and in such proportions as that daughter shall think proper; and if none of the said lawful heirs of the body of each daughter respectively shall attain majority, then the share of such daughter shall revert and belong and be payable by said trustees to our children before named, and that may be hereafter born to us, as aforesaid, then surviving (always excluding the said George Farquhar Graham, except in the event foresaid), equally amongst them and their heirs, disponees, and assignees, any shares so reverting to our daughters to be always vested in the persons of the said trustees, and for the purposes aforesaid. And we do hereby expressly declare, that if any of our said children shall happen to die, leaving no lawful descendants of their bodies as aforesaid, and no deed or writing regulating their succession, nevertheless the share of such child so deceasing shall in no case fall to our said second son, George Farquhar Graham, except in the event aforesaid of all his brothers and sisters predeceasing him as aforesaid, without leaving lawful heirs of their bodies (or any deed or writing regulating their succession), but shall accresce and belong equally to all the surviving brothers and sisters, excepting the said George Farquhar Graham."

The testator died in June 1830, survived by his wife and by all the children named in the deed. Mrs Graham died in 1853. Henry Graham died in 1849, leaving one child, William Henry Graham. Isabella was married to Dr Burlin, but survived him and died intestate and without issue in 1851. Amelia died unmarried in 1863, and Margaret died unmarried in 1865.

In a multiplepoinding brought to determine the right of succession in Colonel Graham's estate, two questions were discussed:—(1) Whether Amelia Graham and Margaret Graham had power to convey their shares of the estate by dispositions *mortis causa?* (2) Whether William Henry Graham was entitled, as in right of his father, who predeceased Mrs Burlin, to any share in Mrs Burlin's sixth-part of the trust-estate?

The Lord Ordinary (Kinloch) pronounced this interlocutor:—"Finds that according to the sound legal construction of the mutual disposition and settlement executed by the deceased Lieutenant-Colonel Humphrey Graham and Mrs Isabella Graham, his wife, on 12th January 1815, their daughters, Margaret and Amelia, who both died unmarried, had power, by deed executed *mortis causa*, to dispone the share of the succession arising under

the said deed, to the produce and proceeds of which they, the said Margaret and Amelia Graham, had right during their respective lifetimes, and that to this effect the deeds executed *mortis causa* by the said Margaret and Amelia Graham are valid and effectual deeds, and entitle those having right under them to be ranked accordingly in the present competition. Finds, further, that according to the sound legal construction of the said disposition and settlement of 12th January 1815, the claimant, William Henry Graham, was and is entitled, as the only child of the deceased Henry Graham, and in his stead, to participate equally with the brothers and sisters of his said deceased father in the share originally belonging to Mrs Isabella Graham or Burlin, which devolved under the said deed on surviving brothers and sisters; and that the said claimant falls to be ranked accordingly in the present competition; and appoints the case to be enrolled in order to be proceeded with, and the fund *in medio* apportioned agreeably to the before-written findings."

Reclaiming notes were presented and argued.

Solicitor-General and Kinnear for trustee.

Clark and Webster for W. H. Graham.

Shand and Macdonald for Executors of Amelia and Margaret.

Lee for Frederick's trustees.

At advising—

Lord Curriehill—The trusts created by the joint settlement of the late Colonel and Mrs Graham took effect on the death of the last survivor of them on 5th February 1853. According to the directions contained in that settlement, the residue of the estates left by the trustees was then divisible into six equal shares. The trustees were directed then to pay one of these sixth shares to each of the three sons of the trusters, Humphrey, Frederick, and Henry Graham. And if any of them should have predeceased that event, leaving lawful heirs of his body, or any deed or writing regulating his succession, the trustees were directed to pay or convey the sixth share provided to such son to the heir of his body, or to the person appointed by him to succeed thereto by any such writing. At that date (5th February 1853) two of the sons, Humphrey and Frederick, were alive, and right to one-sixth part of the residue then vested in each of them under this destination. The other son, Henry, had predeceased that event. He had died intestate on 1st November 1849; but he had left an only child, William Henry Graham, and the right to the sixth share to which his father, if he had survived, would have had right, vested in his son William Henry in virtue of the destination thereof to the heir of the body of the predeceasor. There is thus no question as to the rights to the three sixth shares which were directed to be paid or made over on the death of both of the trusters to their then surviving sons, and to the heir of the body of the one who had predeceased that event.

As to the remaining three sixth shares of the residue of the trust-estate, the trusters directed, that, on the same event (the death of the survivor of them), these three shares should then be *divided among* their three daughters, Isabella, Margaret, and Amelia; but that the same, instead of being paid or conveyed to themselves, should be invested as after mentioned; that they should enjoy the revenue arising therefrom during their lifetimes; and that at their deaths the succession to the capital sums should depend upon certain contingencies. In order to secure effect being given to such contingent destinations of sums of money, it is advisable to vest the funds in trustees in order to meet such contingencies. And, accordingly, Colonel and Mrs Graham directed that these three shares should be invested in Mr David Thomson, W.S., and others as trustees. The purposes of that subsidiary trust were, that the free annual produce of these three sixth shares should be at the free disposal of the daughters during their lifetimes, and of any husband they might marry, after their deaths; that the principal sum provided to each daughter should, on her death, be paid to the heirs of her body attaining majority; and that failing them *then the share of such daughter* should revert and belong and be payable by the trustees *to the children of the testators "then surviving"* equally amongst them, and the heirs, disponees, and assignees of such survivors. It does not appear that the *original* trustees ever denuded themselves in favour of the subsidiary trustees of these three sixth shares of the residue, which were so destined to the daughters; but of course the rights of the parties interested in the funds are the same as they would have been if what the testators directed to be done had actually been done. And, according to the directions of the testators as to the funds of this secondary trust, the share of each daughter dying without issue, and unmarried, was subjected to a *destination* in favour of such of the other children of the testators as *might be surviving at the time of such daughter's death*; and the heirs, disponees, or assignees *of such survivors*. The *survivance* of such substituted children was thus made an express condition of the succession of either themselves or their heirs or assignees.

Nor was the survivance of these children the only condition under which such substitution was to take effect. The settlement contained the following clause (which was applicable to the provisions in favour of all the children, whether sons or daughters), viz., that the substitutions should take effect only in case the children should not leave testamentary settlements regulating the succession. The concluding provision was, that it was only *if any of the children* should die without leaving issue, *or without leaving any writing regulating their succession*, the share of such child should accresce and belong equally to all the *surviving brothers* and sisters, except another brother, George, who was excluded from succeeding to any part of these trust funds.

Let us, then, see how the three-sixth shares which were so destined to the three daughters ought now to be disposed of in conformity with these directions. In order to ascertain this it is necessary to keep in view the following facts:—(1) On 1st November 1849, *Henry Graham*, as already mentioned, had died intestate, but leaving an only child, William Henry Graham. (2) On 31st January 1851, *Isabella* had died intestate, and without being survived by any issue. Both of these deaths had taken place prior to 5th February 1853, when Mrs Graham, one of the testators, died, and the residue of the trust-estate became divisible. At that date the other two daughters still survived. (3) Subsequently, however, both of them also died without leaving issue, and unmarried, but each of them left a *mortis causa* settlement regulating the succession to her share.

In that state of facts there is no doubt as to the parties who have right to the two sixth shares, which were destined directly to Margaret and Amelia themselves. Each of them had acquired a vested right to a sixth share at the date of the

period of division. That right was made subject to the *destination* or *substitution* already mentioned, in favour of the other children *who then survived.* That destination was effectual notwithstanding the subject of it being a sum of money—it being established law that by means of trusts even *nomina delitorum* may be subjected to such substitutions, provided these are not inconsistent with the enactments in the Entail Amendment Act. But these two ladies were empowered to evacuate these substitutions by executing *mortis causa* settlements. Margaret and Amelia did exercise that power. Both of them left such settlements regulating the succession to their respective shares, and consequently the right to these shares now belongs to the parties upon whom they were so settled. To that extent I concur in the Lord Ordinary's interlocutor.

But what is to become of the remaining sixth share which was provided to the other daughter, Isabella? She, on the one hand, *survived* her brother Henry, but, on the other hand, *predeceased* her mother, and the period of division of the trust funds; and she was *survived* by her two brothers, Humphrey and Frederick, and her two sisters, Margaret and Amelia. And although she had been married, and had had a child, she had been predeceased both by her husband and by her child. To whom then does the sixth share, which had been conditionally destined to her, belong? That destination operated not as a substitution—no right having ever vested in herself—but only as a conditional institution. And who were the conditional institutes? This question must be regulated by the directions which were given to the *second* set of trustees, in whom the three shares destined to the daughters were directed to be invested for the purposes of that trust; and the directions by which the succession to these shares is regulated are those which were given to that set of trustees. And as she had died without issue, and without her having left any *mortis causa* settlement, the sixth share which had been provided to her was, according to these directions, payable to such of her brothers and sisters as *were surviving at the time of her death.* Their survivance of her was made an express condition of the substitution of her brothers and sisters, and their heirs. Such survivance was made a condition of the substitution, not only by the special directions to the subsidiary set of trustees, but also by the additional provision which was added as to the succession of all the children, whether sons or daughters. The result, therefore, in my opinion, as to the succession to the sixth share which was the subject of the conditional provision in favour of Isabella, is that *one-fourth part thereof* belongs to Humphrey Graham, her surviving brother; and that the Lord Ordinary's interlocutor is erroneous in so far as it does not sustain *his claim* to that extent. Whether or not another fourth of that sixth share does not belong to the parties who are now in right of the provisions to Frederick, Margaret, and Amelia, all of whom also survived Isabella, and also the term of division, is a matter upon which we are not called upon or warranted to pronounce any decision at present, because no such question is raised by any of the Reclaiming Notes now before us. I therefore abstain from expressing my opinion upon that matter.

William Henry Graham, the son of Henry, by his Reclaiming Note does claim a share of this sixth. But I think his claim cannot be sustained. Even had the succession to this sixth share of the trust-fund not been limited by express terms of the destination to those children of the testators who survived Isabella herself, I would have held, in conformity with the decision of the House of Lords in the case of *Young*, 4 Macq., p. 337, and several prior decisions to the same effect, that William Henry Graham, as in place of his father, who had predeceased Isabella, would not have been entitled to participate in this sixth share. But the succession to the share which had been conditionally destined to Isabella, having been limited in express terms to such of the other children *as should survive her*, and to the heirs and disponees and assignees of such survivors; and Henry Graham not having survived her, and not having been alive even at the time when the right to the trust-estate vested by the death of survivors of Mr Graham, the truster, no right has accrued to his son to participate in this share of the fund. And on this part of the case, also, I differ from the Lord Ordinary.

The LORD PRESIDENT and LORD ARDMILLAN concurred.

LORD DEAS agreed with the Lord Ordinary.

Agents for Trustee—A. & A. Campbell, W.S.

Agents for W. H. Graham—Gibson-Craig, Dalziel, & Brodies, W.S.

Agents for Executors of Amelia and Margaret—Thomson, Dickson, & Shaw, W.S.

Agents for Frederick's Trustees—Maconochie & Hare W.S.

Friday, March 20.

SECOND DIVISION.

ALEXANDER M'ALLISTER *v.* STEVENSON, M'KEELAR & CO.

Sale—Pre-emption—Delivery of Ice—Construction of Written Agreement—Alleged subsequent Parole Agreement—Period of commencement of Winter. Where a party purchased by written agreement for ten years 300 tons of ice *per annum*, and exercised his right of pre-emption as to all the surplus ice of that year, viz., 200 tons, *held*, on a sound construction of the agreement, that he was bound to take delivery of the whole surplus of one year within that year, and proof of an alleged verbal agreement subsequent to the written contract refused.

This was an advocation from the Sheriff Court of Lanarkshire. The parties had in September 1865 entered into a written agreement by which the respondents became bound to deliver, and the advocator to take, 300 tons of ice annually (if that quantity could be obtained from Hogganfield Loch, near Glasgow), "for a period of ten years, from and after and inclusive of the winter of 1865." The ice was to be delivered at the advocator's premises whenever he required it, and in quantities of not less than a ton at a time. The agreement also contained a right of pre-emption to the advocator to take the whole ice should it exceed 300 tons. The advocator exercised that right, and purchased the whole ice gathered in 1866. But at the end of October 1867 there remained in the respondent's icehouse about 200 tons of surplus ice undelivered, of the whole of which the advocator was asked to take delivery, but refused to do so, otherwise than when he asked it, and in such quantities as he chose, being not less at any time than a ton. Ac-