Friday, March 16.

SECOND DIVISION.

CUTHBERT AND ANOTHER (RITCHIE'S TRUSTEES).

Succession—Trust—Direction by Truster to Hold the Estate for Behoof of the Beneficiary—Repugnancy.

A truster, after providing for payment of an alimentary liferent of the residue of his estate to his brother Joseph and his wife, directed his trustees, on the death of the survivor of them, to hold and apply the residue "to and for the uses and behoof" of the only son of his brother Joseph and any other children of the marriage there might be, "and if only one child should be left, then for the sole use and behoof of such child, and that in such sums, at such times, and in such manner as my trustees shall think best, and of which they shall be the sole judges."

The truster further provided that, in the event of his brother John returning to this country, the trustees should hold one-half of the residue for his behoof, the provision to Joseph and his family being in that case restricted to the other half.

The truster was survived by his brother Joseph and his wife and one son. On the death of the survivor the son claimed that half of his uncle's estate should be handed to him.

Held that the claimant was fiar of the half of the residue of the truster's estate, either under the settlement or *ab intestato*, and was therefore entitled to full enjoyment of the fee without any limitation—*Miller's Trustees* v. *Miller*, 19 December 1890, 18 R. 301, and prior cases, *followed.*

James Ritchie, residing at Newton-on-Ayr, died there upon 27th May 1871. He left a trust-disposition and settlement dated 26th May of that year, wherein, after providing for the payment of certain legacies and of an alimentary liferent of the residue of his estate to his brother Joseph Ritchie, and his wife Mrs Margaret Boyd or Ritchie, he directed the trustees therein named as follows—"In the third place, on the death of the survivor of the said Joseph Ritchie and Margaret Boyd or Ritchie, my trustees shall hold and apply the residue of my means and estate to and for the uses and behoof of Alexander Ritchie, son of the said Joseph Ritchie and of any other child or children that may yet be procreated of his marriage, equally among them if more than one, and if only one child should be left, then for the sole use and behoof of such child, and that in such sums, at such times, and in such manner as my trustees shall think best and of which they shall be the sole judges." He further provided that in the event of his brother John Ritchie, who had not been heard of for many years, returning to this country, the trustees were to "hold and apply" the one-half of the residue for his use and behoof, and in that case the provision to his brother Joseph Ritchie, his wife and family, was to be restricted to the other half of the residue. At the time of James Ritchie's death his next-of-kin were his brothers Joseph and John if he was then alive.

Joseph Ritchie died upon 13th May 1876 survived by his wife and one son, Alexander Ritchie, residing at Ayr. He left a general disposition and settlement dated 28th December 1875, whereby he disponed and conveyed his whole estate, heritable and moveable, real and personal, to his widow in liferent for her liferent use only, and to his son Alexander Ritchie, his heirs and assignees whomsoever in fee.

The widow Mrs Ritchie died on 17th September 1893. Alexander Ritchie then called upon the trustees to denude in his favour to the extent of one-half of the residue of James Ritchie's estate.

A special case was presented to which the parties were (1) the trustees under James Ritchie's settlement, (2) Alexander Ritchie. It was stated in the case that the second party had presented a petition to the Court under "The Presumption of Life Limitation (Scotland) Act 1891," to have it found that his uncle John Ritchie had disappeared and was last known to be alive on or about 31st December 1846, and to have it found that he was presumed to have died on 31st December 1853, and that intimation of the petition had been ordered.

The questions for the opinion and judgment of the Court were—(1) Are the first parties bound to denude in favour of the second party, and to convey to him one-half of the residue of the said trust-estate? or (2) are the first parties entitled to retain the said residue for the purpose of applying the same for the use and behoof of the second party, in such sums, at such times, and in such manner as the first parties, as trustees aforesaid, shall think best?

The first parties argued—In this case the trustees were to "hold and apply the residue" of the truster's estate for behoof of the second party, on the death of the survivor of his parents. That was an absolute direction with which they were bound to comply, as it was a lawful direction for the truster to give, so that the residue never vested in the second party—*Smith's Trustees* v. *Smith, &c.*, July 11, 1883, 10 R. 1144; *Paterson's Trustees* v. *Paterson*, January 29, 1870, 8 Macph. 449; *Chambers' Trustees* v. *Smiths*, April 15, 1878, 5 R. (H. of L.) 151. This case was not ruled by *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, and *Wilkie's Trustees* v. *Wight's Trustees*, November 29, 1893, 31 S.L.R. 135, because there was a direction in these cases to the trustees to pay over the residue to the beneficiaries, while here the sole direction to the trustees was to hold and apply the funds. At the same time, it was admitted that if the case of *Christie's Trustees* v. *Murray's Trustees*, July 3, 1889, 16 R. 913, was overruled by the case of *Miller's Trustees*, cited *supra*, this

direction could not receive effect. If the residue did not vest in the second party under the terms of his uncle's will, then it did not concern this question whether it vested in him as heir *ab intestato*, because that question did not arise until the time of payment after his death.

The second party argued—The direction was void from repugnancy. The residue had vested in the second party either by the will or by the law of intestacy. The view that it had vested in him through the will was preferred. It was the same direction as in *M'Elmail* v. *Lundie Trustees*, October 31, 1888, 16 R. 47. There was nothing in the words used to show that the trustees could restrict the fee given to a liferent as in the case of *Chambers' Trustees*, cited *supra*, and as there was no gift of the residue to anyone else than the second party, it would fall into intestacy, and he was the heir. The second party would be entitled to sell his share in his uncle's residue; the purchaser could come and demand it from the trustees, and as they could not pay the revenue to him after he had sold the residue, nor keep up the benefit of the trust for the purchaser, they would be bound to hand it over, and what the second party could thus effect by a sale he was entitled to demand directly. All the later cases had been in this direction—*Duthie's Trustees* v. *Forlong*, July 17, 1889, 16 R. 1002; *Mackinnon's Trustees* v. *Official Receiver in Bankruptcy*, July 19, 1892, 19 R. 1051. The second party relied also on the cases of *Wilkie's Trustees* and *Miller's Trustees*, cited *supra*.

At advising—

LORD JUSTICE-CLERK—The only question in this case which raises any doubt after certain decisions by the Court is, whether a fee was given by this deed to Alexander Ritchie. It is not necessary to decide that question, because it is certain that either under the deed or *ab intestato* Alexander Ritchie is fiar of this estate, and that being so, it is impossible for us to distinguish this from several other cases, notably the case of *Miller's Trustees*, in which it was held that when a fee has been given to any person, its enjoyment cannot be restricted by any limitation, and we must hold in the meantime that Ritchie is entitled to have the one-half of the estate he claims handed over to him by the trustees.

LORD YOUNG—The question here regards the residue of the estate of the testator. Now, unless otherwise disposed of by this will the fee belongs to the claimant Alexander Ritchie. He is the fiar of the whole residue, the fee of which is not otherwise disposed of. Now, there may be a question whether the residue is by this settlement given to Ritchie or not. If it was given, then he is fiar under the will; if it was not given, then he takes it under the law of intestacy, at least the residue is not given to anyone else as fiar. That being so, I think we must decide this case in accordance with the previous decisions, especially *Wilkie's Trustees* and *M'Kinnon's Trustees*. We must, therefore, hold that such a trust direction as this with respect to the fee of the residue of his estate is ineffectual as regards the fiar, and therefore he is entitled to have the fee given to him without being embarrassed by any limitation.

My own view is that it would be expedient that an owner of property, even with respect to property left to his heir, should be at liberty to protect him from wasting it by a trust, and that being so, that such a trust as we have here ought to be effectual, and ought not to be defeated by any technical view arising out of the law of repugnancy. But my views have been overruled, and they are contrary to the law as now established by decisions.

LORD RUTHERFURD CLARK—I agree.

LORD TRAYNER—I think the question is settled by the authorities cited to us.

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

Counsel for the First Party—Ure—Galbraith Miller. Agent—David Turnbull, W.S.

Counsel for the Second Party—H. Johnston—Hunter. Agent—John Macmillan, S.S.C.

Saturday, March 17.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MURRAY *v.* MURRAY.

Husband and Wife—Divorce—Desertion—Cruelty—Intention to Resume Cohabitation.

In 1875 a husband who had previously treated his wife with great cruelty allowed the furniture of the house in which they were living to be sold, and neglected his duty of maintenance to such a degree that his wife and children had to be relieved by the parochial authorities. The wife then took up house for herself, and maintained herself and two young children by her own industry. In the early part of 1876 her husband appeared at her house and turned her out of doors. She took refuge with relatives in the same town, and her husband took no means of communicating with her, and refused to allow the children to speak to her. About a year afterwards he left the town. The wife went out as a domestic servant, and took no steps to trace her husband and children. In 1893 the husband was discovered living in England. The wife then brought an action for divorce against him on the ground of desertion. The husband did not lodge defences.