Friday, December 15.

FIRST DIVISION.

ANDERSON'S TRUSTEES *v.* MILLER.

Succession—Testament—Liferent and Fee—Survivorship—Failure to Provide for Destination of Fee of Provisions except by Residue Clause—Destination-over to Issue subject to Liferent.

A testator directed his trustees to lay out the following sums—"For behoof of each of my daughters, viz., £2000 to and for behoof of M in liferent, but for her liferent use allenarly, and to the lawful child or children of the said M, share and share alike if more than one, in fee." There were similar provisions in favour of the testator's other three daughters, and a declaration that the provisions were purely alimentary and not subject to *jus mariti.* There followed this provision—"And further declaring that should either of my said daughters die without being married or without leaving lawful issue the sum liferented by such deceased daughter shall fall and belong to her surviving brothers and sisters, share and share alike, the said shares falling to the brothers in fee and the shares falling to the sisters in liferent for their or her liferent use allenarly . . . and in the event of all my said daughters dying without leaving lawful issue the said principal sums liferented by them shall fall and belong to my said sons."

By the residue clause the testator divided the residue of his estate, "to and among my whole lawful daughters, share and share alike, declaring that should either of them have died before the said division leaving lawful issue, the share falling to such deceased parent shall fall and belong to such issue."

M died unmarried, predeceased by all her brothers and sisters except one sister. All the predeceasing brothers and sisters died unmarried except C, also a sister who left two children. *Held* that the income of the sum liferented by M fell to be paid to the surviving sister, and that on her death one-half of the capital fell to be paid to her children, the other half to the children of the predeceasing sister.

Mr James Anderson died on 24th June 1858 leaving a trust disposition and settlement dated 4th April 1849. He was predeceased by his wife and survived by the following children, Miss Mary Anderson, George Anderson, Miss Margaret Anderson, Mrs Miller, David Dickson Anderson, and Mrs Cleghorn.

By the sixth purpose of the trust disposition Mr Anderson provided—"I direct and appoint my said trustees or trustee, as soon after my death as they may find convenient and proper securities can be obtained, to lay out and invest in bank or on heritable or good personal security in their or his name, the following sums to and for behoof of each of my daughters, viz., the sum of £2000 sterling to and for behoof of the said Mary Anderson in liferent, but for her liferent use allenarly and to the lawful child or children of the said Mary Anderson, share and share alike if more than one, in fee; The like sum of £2000 sterling to and for behoof of the said Margaret Anderson in liferent, but for her liferent use allenarly, and to her lawful child or children if more than one, share and share alike, in fee; The sum of £1500 sterling to and for behoof of Ann Anderson or Miller, wife of the said William Miller (the said William Miller having previously received from me the sum of £500 sterling to account of his wife's provision), in liferent, but for her liferent use allenarly, and to the lawful child or children of the said Ann Anderson or Miller, share and share alike if more than one, in fee; And the sum of £2000 sterling to the said Elizabeth Anderson in liferent, but for her liferent use allenarly, and to the lawful child or children of the said Elizabeth Anderson, share and share alike if more than one, in fee, beginning the first term's payment of said several sums of interest or revenue to my said daughters at the first term of Whitsunday or Martinmas making six months after my death; but declaring always, as it is hereby specially provided and declared, that the interest or annual revenue of the said several sums provided to each of my said daughters as aforesaid is intended by me and shall be considered as purely alimentary, and shall not be assignable by them or either of them, nor liable for their or her debts or deeds, nor attachable by the diligence of creditors, nor subject to the *jus mariti* of the said Ann Anderson or Miller's present husband or of any husband whom she may marry, or of any husband whom either of my said other daughters may marry, all which rights are hereby expressly excluded and debarred; And further declaring, that should either of my daughters die without being married or without leaving lawful issue, the sum liferented by such deceased daughter shall fall and belong to her surviving sisters and brothers, share and share alike, the said shares falling to the brothers in fee and the shares falling to the sisters in liferent for their or her liferent use allenarly, and subject to the whole conditions and provisions which such deceased sister held and enjoyed the interest or annual revenue of said sum, and no otherwise, and in the event of all my said daughters dying without leaving lawful issue the several principal sums above mentioned liferented by them shall fall and belong to my said sons, share and share alike, in fee; And further declaring, that my said trustees or trustee shall have full power to uplift and re-invest the said principal sums as often as they or he may deem proper, and that without the consent or approbation of the party entitled to the interest or annual revenue of such principal sums."

By the seventh purpose it was provided,—"With regard to the residue of my said estate, I hereby direct and appoint my said trustees or trustee, after all the purposes of this trust shall have been fully fulfilled, to pay and divide the free residue to and amongst my whole lawful daughters, share

and share alike; Declaring that should either of them have died before the said division leaving issue of her body, the share falling to such deceased parent shall fall and belong to such issue, share and share alike if more than one."

Miss Mary Anderson died in 1898, having been predeceased by all her brothers and sisters except Mrs Miller; of the predeceasers all died unmarried except Mrs Cleghorn, who left two children.

A special case was presented by (1) the trustees under Mr Anderson's - trust disposition, (2) Mrs Miller with consent and concurrence of her husband, (3) the children of Mrs Miller, and (4) the children of Mrs Cleghorn.

There was no residue remaining of the truster's estate. The sum involved in the case consisted of £2400, made up of the original sum of £2000 directed to be liferented by Miss Mary Anderson, together with her share, amounting to £400, of the capital sum liferented by Miss Margaret Anderson.

The contentions of the parties as set out in the case were—"In the circumstances set forth, the second and third parties contend that the said Mrs Anne Anderson or Miller is entitled to the liferent use of the foresaid sum of £2400, and that on her death the capital sum falls, on a sound construction of the testator's settlement, to be divided equally among her children (the third parties), share and share alike, to the exclusion of the fourth parties. The fourth parties contend that, upon a sound construction of said trust-settlement of Mr Anderson, they, as representing their mother the said Mrs Elizabeth Anderson or Cleghorn, are entitled to payment of the capital sum of £1200, being one-half of the said sum of £2400 liferented by their aunt the said Mary Anderson, leaving the said Mrs Anne Anderson or Miller and her children to enjoy the liferent and fee respectively of the balance of said sum of £2400."

The questions submitted for the judgment of the Court were—"(1) Is the said Mrs Anne Anderson or Miller entitled to the liferent use of the said sum of £2400, being the capital sum which was liferented by the said Mary Anderson? or (2) Is the said Mrs Anne Anderson or Miller entitled to the liferent use of only one-half of the said sum of £2400? (3) Are the fourth parties, as coming in room of their mother Mrs Elizabeth Anderson or Cleghorn, now, or on the death of Mrs Miller, entitled to payment of the sum of £1200, being one-half of the said sum of £2400? or (4) Are the children of Mrs Anne Anderson or Miller entitled in fee to the whole of said sum of £2400 payable at the expiration of their said mother's liferent?"

The second and third parties referred to the following cases in support of their contentions—*Monteith* v. *Belfrage*, March 7, 1894, 21 R. 615; *Ward* v. *Lang*, July 13, 1891, 18 R. 949; *Hairsten's Judicial Factor* v. *Duncan*, July 14, 1889, 18 R. 1158; *Forrest's Trustees* v. *Rae*, December 20, 1884, 12 R. 389.

The fourth parties referred to the cases of *Paterson's Trustees* v. *Brand*, December 9, 1893, 21 R. 253; *Ramsay's Trustees* v. *Ramsay*, December 21, 1876, 4 R. 243.

LORD PRESIDENT—The terms of the testator's settlement are by no means clear, but upon the whole I think that the first question, which relates to the liferent, should be answered in the affirmative; and the second in the negative

The third and fourth questions relate to the fee; and it appears to me that the proper answer to the third would be that the fourth parties are entitled to one-half of the £2400, not now, but on the death of Mrs Miller; and that the fourth question should be answered in the negative.

The condition of the family is that only one of the immediate children, Mrs Miller, now survives; and that only one of the five deceased children, Mrs Cleghorn, is represented by children.

The provision upon which the controversy has mainly turned is, "Should either" (which here, as in other parts of the settlement, plainly means "any") "of my said daughters die without being married, or without leaving lawful issue, the sum liferented by such deceased daughter shall fall and belong to her surviving sisters and brothers, share and share alike, the said shares falling to the brothers in fee, and the shares falling to the sisters in liferent for their or her liferent use allenarly, and subject to the whole conditions and provisions which such deceased sister held and enjoyed the interest or annual revenue of said sum, and no otherwise." There is here no express disposal of the fee of the shares liferented by daughters, and the question is, whether there is ground for implying a gift of the fee in favour of their children. It seems to be clear that the *conditio si sine liberis decesserit* will not avail Mrs Cleghorn's children, because she was not instituted.

The seventh purpose of the settlement, however, which deals with the residue, is of importance in this question. It is in the following terms—"With regard to the residue of my said estate, I hereby direct and appoint my said trustees or trustee, after all the purposes of this trust shall have been fully fulfilled, to pay and divide the free residue to and amongst my whole lawful daughters, share and share alike: declaring that should either" (which here again means "any") "of them have died before the said division leaving lawful issue of her body, the share falling to such deceased parent shall fall and belong to such issue, share and share alike if more than one." The word "falling" is not quite correctly used here, because a share cannot "fall" to a predeceasing child, and therefore the word "falling" must mean "provided," or "which would have fallen" to such deceased parent if she had survived, failing which it is to go over to her children. If that be so, survivorship on the part of the parent is not essential to give the children right to a share of the fee; and it appears to me that under this clause Mrs Cleghorn's children

are entitled to one-half of it.

But then, if what I have already said as to the liferent which accrued to Mrs Miller is correct, the gift of the fee to Mrs Cleghorn's children must be subject to that liferent, and it is not "now," as put in the third question, but only on the death of Mrs Miller that Mrs Cleghorn's children will be entitled to half the fee.

LORD M'LAREN — While this question arises on the construction of Mr Anderson's will, our judgment is only asked upon one provision of the will, a legacy to a daughter Mary Anderson, who died unmarried.

Each of the four daughters of the testator received a pecuniary provision, and the sons, I think, got nothing except what they might take by survivance of their sisters. It is stated in the case that there is no residue except what may fall into it in consequence of the decision which your Lordships are to give. Now, the question arises in consequence of the death of Mary Anderson, who had only a liferent, and it seems to me to be absolutely clear that Mrs Millar, who is the only surviving sister of the four, takes under the will a life interest in succession to her sister Mary. I can see no grounds for restricting her liferent to one-half of Mary's share in order that the issue of the predeceasing sister might have their shares anticipated, because the liferent is in express words to the surviving sisters, and this lady is the sole survivor. But the difficulty in the case, I think, arises with regard to the destination of the fee. Now, if this had been a case of an ordinary share which the testator had given in liferent, or as an income in life to the daughter, and then had gone on to say, "And in case of the death of my daughter without issue the share shall be divided amongst the survivors," I should not have had much difficulty in holding that there was a gift to the issue by implication, because the expression is obviously elliptical, and there is no way of supplying the ellipsis except by reading a gift to issue into the clause. There could be no reason to contemplate the particular case of the death of the liferenter without issue, except that if there are issue they were intended to take, and no further provision would then be necessary. But then this is a case of accretion amongst the liferenters, and the only provision for the fee is that in the event of all the daughters dying without leaving issue, the division is to be amongst the sons. Now, it is plain that there are various contingencies that might arise besides that of the death of all the daughters without issue. There might be some of them dying with issue and some dying without issue, and we have no means of knowing what the testator would have done if he had made a complete appropriation of the fee applicable to all these events. I think it is perfectly impossible, on any sound principle of construction, to supply what is defective in this clause. Fortunately we have a residue clause which answers the same purpose, for it is a well-settled rule that when contingencies as to legacies are not provided for the subject of the bequest will fall under the residuary clause. I am therefore of opinion that the fee vests in the children of the two ladies subject to the liferent interest of one of them.

LORD KINNEAR—I agree.

LORD ADAM was absent.

The Court pronounced this interlocutor—

"Answer the first question in the case in the affirmative, and answer the second question in the negative: And in answer to the third question, Find that the fourth parties to the case, as coming in room of their mother Mrs Elizabeth Anderson or Cleghorn, are entitled to payment of the sum of £1200 on the death of Mrs Anne Anderson or Miller: And answer the fourth question in the negative," &c.

Counsel for the First Parties — N. J. Kennedy. Agents — Strathern & Blair, W.S.

Counsel for the Second and Third Parties —Macfarlane—Constable. Agents — Carment, Wedderburn, & Watson, W.S.

Counsel for the Fourth Parties—Guthrie, Q.C.—M'Clure. Agent—P. Adair, S.S.C.

Saturday, December 16.

FIRST DIVISION.

DICK AND OTHERS, PETITIONERS.

Trust—Petition for Removal of Trustee—Appointment by Court of New Trustee—Nobile Officium.

The two surviving trustees under a postnuptial contract of marriage and trust-settlement having failed to agree as to the management of the trust-estate, a petition was presented to the Court by one of them, with the concurrence of all the beneficiaries under the trust, for the removal of the other trustee, or alternatively for the appointment of a new trustee named by the petitioners to act upon the trust. The ground upon which the petitioners supported their petition was, that owing to the refusal of the respondent to sign the discharge of a bond the affairs of the trust were at a deadlock.

After the petition had been presented the discharge in question was signed by the respondent. The respondent, in answers lodged by him, objected to the appointment of the trustee named by the petitioners, but in the course of the debate he intimated that he had no objection to him personally, and that he would assent to his being assumed as an additional trustee.

The Court *refused* the prayer for removal, but *appointed* the new trustee named by the petitioners.

A petition was presented by Mr John Dick, trustee acting under the postnuptial contract of marriage and trust-settlement of