MAY 19, 1865.

SAMUEL STURGIS (John Meiklam's Assignee), *Appellant, v.* R. D. CAMPBELL and Others (James Meiklam's Trustees), *Respondents.*

Trust Disposition—Residue—Income of Trust Estate—Construction—Revocation—*M. by trust disposition gave all his property, heritable and movable, to trustees, to pay,* inter alia, *the income to his son and heir, J., until J. should attain the age of thirty, and then convey to him the residue. By codicil, M. recalled the above direction to pay the income to J., and directed them, in its stead, to pay to J. thereout the sum of £300 yearly, and he directed them to dispose of "the said residue" as directed by the trust disposition.*

HELD (affirming judgment), *That the surplus income beyond £300 was not undisposed of, but passed under the word "residue."*[1]

This was an appeal as to the construction of the trust disposition of the late James Meiklam of Carnbroe. An action was raised in 1859 by Mr. Sturgis, the official assignee of the Insolvent Debtors' Court in London, against the trustees of the late Mr. Meiklam; and he set forth in his condescendence the grounds of action in substance as follows:—By an order of the Insolvent Debtors' Court in England, dated 16th October 1858, the pursuer, Mr. Sturgis, was legally vested in the whole estate, real and personal, of John Meiklam, describing himself as of 43 Bryanstone Square, London, and then or lately a prisoner in the Queen's Prison, London, and that in trust for the creditors of the said John Meiklam. The said John Meiklam was the only son of the late James Meiklam of Carnbroe, who died in 1854. James Meiklam left a trust disposition and settlement, dated 1853, and two codicils, and a deed of division and apportionment dated in the same year. The accepting and surviving trustees, were Richard Dennistoun Campbell, Esq. of Jura, Alexander Struthers Finlay of Castle Toward, Mungo Campbell, jun., merchant in Glasgow, and Mrs. Meiklam, widow of the truster.

By James Meiklam's trust disposition the trustees were directed thus—"To hold the whole residue and remainder of my said trust estate and effects hereby conveyed, and to pay over the free annual proceeds and profits thereof to John Meiklam, Esq., my only son, during all the days of his life, as an alimentary provision," &c., "and with special power to my said trustees, if the said John Meiklam have conducted himself to their satisfaction, and if they shall, in the exercise of their discretion, deem it advisable so to do for his benefit, to pay and assign, dispone, and make over the said residue and remainder of my estate to the said John Meiklam on his attaining the age of thirty years, subject to and under the burden always of the foresaid annuity and additional annuity to the said Mrs. Meiklam," &c.; "and in the event of the said trustees finding it not expedient to make over the said residue to the said John Meiklam under the power above given, I direct and appoint them, on his death, to pay and assign, dispone, and make over the same equally among the lawful issue of his body, and failing such issue, to the said Isabella Meiklam, (only daughter of James Meiklam,) and the lawful issue of her body, whom failing, her heirs and assignees whomsoever."

By the first codicil, reciting the above disposition of the residue, he recalled the direction in the said trust disposition to "my said trustees to pay to my said son, John Meiklam, the whole annual proceeds and profits of the residue and remainder of my means and estate during his life; and I direct and appoint them to pay to him in its stead the sum of £300 yearly out of the proceeds and profits thereof, by equal half yearly payments in advance, as an alimentary provision, declaring, that the same shall not be assignable by him, nor arrestable or attachable by the diligence of his creditors, nor affectable by or for his debts in any manner or way; and on my said son arriving at the age of thirty years, but not sooner, or at any time thereafter, they shall, in the exercise of a sound discretion, if they see fit, and if his conduct previously shall have been such as to lead them to believe, that he is competent to manage his affairs, and that it would be for his benefit and advantage, I hereby authorize and empower my said trustees to pay, assign, dispone, and make over the said residue and remainder of my estate to the said John Meiklam, subject to the annuity to Mrs. Meiklam," &c.; "and if my said trustees shall not see fit to exercise the power before written, then, on the death of the said John Meiklam, I direct them to

[1] See previous reports 23 D. 1128: 33 Sc. Jur. 578. S. C. 3 Macph. H. L. 70: 37 Sc. Jur. 464.

dispose of the residue in manner specified in my said trust disposition and settlement, which I hereby confirm and corroborate in all points, so far as not altered by these presents."

In consequence of the codicil revoking the gift of the residue, and cutting down John Meiklam's bequest to £300, the pursuer, Mr. Sturgis, contended, that the income and proceeds of the estate of James Meiklam, during John Meiklam's life, were undisposed of, and that James Meiklam died intestate as to that part of his estate. Consequently that he, the pursuer, as assignee of the insolvent estate of John Meiklam, was entitled to the accumulated surplus income of James Meiklam's estate.

It further appeared from the condescendence, that in 1857 the trustees of James Meiklam, having doubts as to the construction of the deeds, raised an action of multiplepoinding to have it declared, that the income and proceeds of the residue of the trust estate belonged to the trustees, and that the truster did not die intestate, so far as the income was concerned. John Meiklam was called as a defender in this action, but he was at that time in bankrupt circumstances, residing within the precincts of Holyrood Abbey, and was unable to provide funds to protect his interests. Consequently decree passed against him as a matter of course. In 1859 a supplementary action was raised by the trustees, in which they called the present pursuer and others for their interest, but they made no appearance in the action.

The trustees, in answer to the above condescendence, set forth as follows:—That the late James Meiklam was proprietor of large estates in Scotland. He married in 1831 Miss Christina Campbell, daughter of the late Colin Campbell of Jura, and there was a marriage contract, settling £20,000 on the children of the marriage, divisible by deed in such proportions as the father should appoint. Mr. Meiklam's trust deed and codicils were executed in London in 1853. In 1854 he executed a deed of division and apportionment, whereby he gave £100 to his son, John Meiklam, and the remaining £19,900 to his daughter, Isabella Meiklam. In the codicil to his will, James Meiklam, narrating that he had much reason to be dissatisfied with the conduct of his only son, and to guard against the consequences of such conduct, and notwithstanding his remonstrances and admonitions, the conduct of his son had not improved, he revoked the gift of the whole income, and reduced the amount payable to his son John to £300, which he declared an alimentary provision. That an annuity was given to Mrs. Meiklam of £1200. In a second codicil James Meiklam directed, that if Isabella Meiklam succeeded, the estates were to be conveyed by the trustees to her eldest son. Mr. James Meiklam died in October 1854, leaving heritable property in Scotland of the value of about £8000 a year, besides personalty amounting to £34,000. The trustees had realized the personal estate, and found, that it was insufficient to pay the personal debts of the truster. They paid to Mrs. Meiklam her jointure of £1200, which they had reduced since to £900, owing to the construction of the will being challenged. The trustees had also paid to John Meiklam the annuity of £300. They maintained, that it was left to their discretion, whether they should, on John Meiklam arriving at the age of thirty years, make over to him the residue of the estate. That John Meiklam had in 1860 borrowed large sums of money from persons in London, and assigned his claim on the trust estate as security. In conclusion, the trustees contended, that, according to the true construction of the deed, there was no intestacy of James Meiklam as to the rents; but that he had assigned the whole to the trustees.

Lord Ordinary Mackenzie, in 1861, by his interlocutor, held, that the rents had not been undisposed of, but formed part of the residue, and therefore decided in favour of the trustees. On reclaiming note, the Judges of the First Division adhered, whereupon the pursuer (the official assignee) now appealed to the House of Lords.

The appellant, in his *printed case*, contended, that the interlocutors should be reversed, for the following reason:—Because the testator, James Meiklam, as regards the annual income and proceeds of his estate which have accrued, or may accrue, from the period of his death, to the death of his son John Meiklam, or until the trust estate shall be conveyed, and made over to the said John Meiklam, or other beneficiary, except to the extent of £300 a year directed to be paid to the said John Meiklam, has died intestate; at all events, the said balance of such income and proceeds not having been bequeathed or disposed of by the testator, fell to and became the property of the said John Meiklam, as his father's heir at law, and now belongs to the appellant as provisional assignee of John Meiklam, for behoof of his creditors.

The *Attorney General* (Palmer), and *Anderson*, Q.C., for the appellant.—In the trust disposition, when the testator used the word "residue," he meant all that was not specifically bequeathed, and as the income had been specifically bequeathed, the word "residue" could not include income. The bequest of residue and remainder, that is, *inter alia*, of income, was recalled by the codicil, and no new disposition of income was given, beyond a small sum of £300 a year. It follows, that the surplus income was undisposed of, and results to the heir at law, unless the word "residue" in the codicil includes all income beyond £300. But the codicil uses the word "residue" in the same sense as the trust deed did, for it speaks of "the said residue."

As, therefore, the word "residue" had in the trust deed a fixed meaning, of which income was not one of the ingredients, it must also in the codicil be held not to include income. The

residue was a fixed quantity, and was the same throughout both trust deed and codicil. The word "said" is conclusive on that point.

It is said, that the result of the appellant's construction will be, that the codicil, instead of cutting down the legacy of John Meiklam, will increase it, which was contrary to the testator's intention. But it is not correct to say, that the testator intended what has happened, for in cases of intestacy what happens is not due to intention at all, but to the want of intention. The result is the legal consequence of the testator not having indicated any intention on the subject.

It is also said, that the income goes with the *corpus* as the fruit with the tree. But where the testator has separated from first to last the income from the principal, it is different. He then professes to treat each by itself, and if, after making a distinct bequest of income, he recalls that bequest, without making a fresh disposition, the income does not thereby relapse into the residue.

In *Turnbull* v. *Cowan*, 6 Bell's App. 222, the House construed a will in a similar way to the appellant's construction of the present will, and held, that the income of an estate purchased by the trustees, which accrued until the beneficiary obtained possession, was undisposed of. In that case there had been no separation of income from principal, nor was there any partial disposal of income, so that the present is a much stronger case. The word "residue" has often been held in other cases to have a specific definite meaning given to it—*Simmons* v. *Rudall*, 1 Sim. N. S. 115; *Torrie* v. *Munsie*, 10 S. 597; *Cresswell* v. *Cheslyn*, 2 Eden, 123; *Humble* v. *Shore*, 7 Hare, 247; *Gordon* v. *Atkinson*, 1 De G. & Sm. 478.

Rolt Q.C., and *Sir H. Cairns*, Q.C., for the respondents, were not called upon.

LORD CHANCELLOR WESTBURY.—My Lords, I think your Lordships will be quite satisfied, that notwithstanding the elaborate and very able argument we have heard from the appellant's counsel, there is no reason whatever for finding fault with the decision of the Court below. Some things, however, have been called into doubt, and I will therefore trespass upon your Lordships' attention for a few minutes in explaining the grounds upon which I ask your Lordships to affirm the judgment.

This question arises upon the construction of a trust deed and a codicil of a truster or testator, named Meiklam, in Scotland. The scheme of the trust deed or settlement is this: That the entirety or *corpus* of the real and personal estate is vested in trustees absolutely; the *universitas* of the property is entirely given to the trustees; they are the real owners and absolute disponees of the whole estate; and they hold it for the purposes of certain trusts, which are contained in the settlement. These trusts consist of various directions, partly relating to the income, and partly relating to the *corpus* of the estate. First, there is a direction given to the trustees to pay the debts of the testator. They are then to pay certain jointures and annuities to the widow of the truster. They are then to pay the sum of £20,000, by way of provision for younger children, which had been previously charged upon the estate. And they then are to pay two legacies of £2000 each.

Then after those several directions have been given by the truster, there follows this clause—"And lastly, I hereby direct and appoint my said trustees to hold (which word "hold" in the Scotch language is equivalent in the English language to "stand possessed of") the whole residue and remainder of my said trust estate and effects thereby conveyed."

Now, there can be no possibility of doubt, that the words "residue and remainder" will comprehend the entirety of the property, both the principal and the interest, both the *corpus* and the fruits of that *corpus*. Then what is the meaning of the word "residue" here, according to the obvious intention of the language used by the truster, and the arrangement and scheme of this trust deed and disposition? Why, the word clearly means the entirety of the estate not required for any of the antecedent purposes of the will. And that is in truth the meaning that ought always to be given to the word. It is expressed in one of the cases which has been cited at the bar, that "residue" means all that is not required for the purposes of the trust. It comprises the whole *corpus* and income of the estate not exhausted by any antecedent direction. That is, therefore, the meaning of the word "residue," where it first occurs in this will.

What subsequently follows is a direction to pay over the income of this residue to his only son during his lifetime, with a provision against any alienation thereof. And then a contingent power or authority of this nature, that if the son shall conduct himself to the satisfaction of the trustees, then the trustees may have power "to assign, dispone, and make over the said residue and remainder of my estate to the said John Meiklam." Now, here the word "residue" is capable of still retaining the same meaning, namely, all that remains, not having been required by that time for the antecedent purposes.

The word "residue" in the will must constantly bear a varied meaning according to the directions which from time to time are given. First, the word "residue" (as I have already endeavoured to explain) means the whole *corpus*, and all the income not required by the debts and legacies, and annuities. Then here, secondly, the word "residue" means all that remains after the son has received the income during such time as the trustees shall continue to pay it, and shall withhold from him the actual ownership and enjoyment of the *corpus*.

Now, the whole of the appellant's argument is founded entirely upon the meaning of the word "residue," as used in the second disposition; and inasmuch as the word "residue" in this latter part of the will which I have read would mean, of course, the whole *corpus* of the estate remaining after the antecedent payment of the income to the son, the appellant insists, that that must be taken to be the meaning of the word "residue" throughout the rest of the will. But it is clear, that the meaning of the word "residue," throughout the whole of the will, must be that which it originally bears, and which it must bear everywhere, namely, all that remains after satisfying the antecedent purposes.

When we get to the codicil, we find, that the direction to pay the income of all the residue of the estate to the son is annulled and withdrawn, and in lieu of the direction to pay to the son the income of the estate, there is inserted a direction to pay to the son £300 a year only.

Now the appellant's counsel were pressed at the bar with this observation: Supposing the trust had been originally to this effect, that the trustees were to hold the entire residue of the estate upon trust to pay £300 a year to the son, and then, at a future time, to pay over, assign, and dispone to the son the whole of the residue of the estate, what would the word "residue" in that direction have implied? The answer to that question could only be one, namely, that the word "residue" would then have comprehended all that remained of the principal and income after deducting the £300 a year. But in reality, that was the direction of the will, because the effect of the codicil was to revoke the original direction, to annul it as if it had never been there, and to substitute for it another direction. The argument of the appellant turned completely upon regarding the antecedent direction to pay the income to the son in the same point of view as if the subsequent direction had lapsed, or had not been given; whereas, in point of fact, in the subsequent will, he annulled the former direction and substituted another, and the whole will must be read, therefore, as it would have been if the direction to pay to the son £300 a year only had been written in the original settlement instead of the direction to pay to him the income of the estate.

Now, the rule is precisely the same in Scotland as in England, namely, that if I vest in trustees the whole of the residue of my estate, both real and personal, and then at some future time direct them to transfer that residue in a certain manner, the effect of the direction is to carry the intermediate interest and income, subject, of course, to any restriction that may arise by virtue of the Statute against undue accumulations. Therefore, you have here a trust deed and a codicil which amount to this, that the *universitas* of the estate remains in the trustees, who represent the entirety of the principal and interest. They are directed to pay to the son £300 a year until a certain contingency arises—either the death of the son, or their paying over the entire property—and the effect of that direction is to carry with the trust estate the whole of the intermediate income that is not required for the payment of the £300 a year, and the debts and legacies.

The argument on behalf of the appellant rests wholly (as I have already observed) upon the words found in the second codicil, namely, "I hereby authorize and empower my said trustees to pay, assign, dispone, and make over the said residue and remainder of my estate to the said John Meiklam." The appellant says, (without, however, shewing anything to justify the argument,) that the only meaning that can be given to the word "residue" is that which it bore as it was used in the original settlement, where its application was confined to the *corpus* alone, or that which remained after the income had been taken out. But, in reality, that direction applies to all the residue and remainder which will remain in the trustees undisposed of after the son has received £300 a year, which is provided for by the codicil in which this direction occurs. It would be most unreasonable, and subversive of the intention and object of the codicil, if it were taken as meaning that which would remain after the prior direction to pay the whole of the income to the son, and not to construe it as meaning all the residue which remained after satisfying the direction to pay to the son £300 per annum in lieu of the original direction in the will to pay to him the whole income of the estate. All reason, therefore, would go to shew, that to ascertain the meaning of the words "residue and remainder" here, you must go back to the residue which was originally given to the trustees by the trust disposition, which is equivalent to giving them all that remained of the property after satisfying the directions in the will and codicil. Therefore, the "residue" in the codicil must be taken to mean all that the trustees would have in their chest or in their ownership undisposed of and unapplied after they had followed the directions given by the testator, and exhausted all the other purposes of the trust.

There are various subsidiary arguments to which I might refer. One has been pointed out by my noble and learned friend on my right, who referred to the express terms of the testator's own declarations, shewing what he understood to be the effect of what he had done by his will.

Taking it, therefore, as an established principle, that the "residue" means the entirety of the whole estate, real and personal, after exhausting the previous directions contained in the will, I cannot in this case come to any other conclusion, than that the rents and proceeds follow the principal, and pass to those who, under the trust disposition, are entitled to the principal. Upon

these grounds I move your Lordships to affirm the judgment of the Court below, and to dismiss this appeal, with costs.

LORD CRANWORTH.—My Lords, I have nothing to add to what has fallen from the LORD CHANCELLOR, who has exhausted the subject. The fallacy of the appellant's argument consists in his dividing the gift of the residue into two parts. There is really no such division. The residue is one entire residue, which in the original trust deed is given substantially subject to the large charge of the whole of the rents, and in the subsequent codicil that large charge is diminished to a small one, but the residue remains the same. That is the whole *corpus* of principal and interest, subject only to the reduction of those charges. The word "residue" always includes, (as was pointed out by my noble and learned friend, and as is laid down in the case he cited,) everything that is not charged upon the estate. It is so far of a flexible meaning or interpretation, that as the amount of charges differs, the amount included in the residue will be different; but it always means that which has not previously been given, and, where there is no previous charge, it must mean the whole estate. I quite concur with my noble and learned friend in thinking, that this is a most unnecessary appeal, and that it should be dismissed with costs.

LORD CHELMSFORD.—My Lords, I quite agree with the motion of the LORD CHANCELLOR.

Interlocutor affirmed with costs.

Appellant's Agents, D. Crawford, S.S.C.; J. R. Chidley, London.—*Respondents' Agents*, Maclachlan, Ivory, and Rodger, W.S.; Maitland and Graham, Westminster.

MAY 8, 1865.

Mrs. JESSIE MACLEAN or MORRISON and Others, *Appellants*, *v.* ALLAN MACLEAN and Others (Colonel Maclean's Trustees), *Respondents.*

Trust—Resignation of Trustees during Action—Continuation of Action—Judge's Notes of Trial—*M. by trust disposition, conveyed his whole estate to eight trustees, declaring, that any one desirous of withdrawing should have power to do so at pleasure, by intimating his relinquishment to his co-trustees. After M.'s death his next of kin raised an action against the eight trustees to reduce his settlement on the ground of insanity, and after a verdict for the pursuers, six of the trustees, by letter to the agent of the trust, intimated their withdrawal.*

HELD, *That the two continuing trustees had sufficient title to carry on the action, and apply for and obtain a new trial.*

HELD FURTHER, *That it was no objection to the rule being made absolute for a new trial, that the agent of the trustees revised and filled up some blanks in the Judge's notes of the trial before they were produced in Court.*[1]

In 1859 an action was raised by Mrs. Jessie Maclean or Morrison of Bunessan, in the island of Mull, widow of James Morrison, sometime merchant there, and others, against Dr. Charles Maclean, Inspector General of Her Majesty's Medical Department, Dublin, Major General Allan Maclean, and others, the accepting trustees of the deceased Lieutenant Colonel Alexander Maclean of Millport, in the island of the Greater Cumbrae, seeking to reduce certain pretended trust deeds of settlement purporting to have been executed by the late Alexander Maclean. The condescendence set forth, that Alexander Maclean died in 1859, at the age of eighty or thereby. Some years previous to his death, he went to reside in the Greater Cumbrae. He was unmarried, but for some years before his death cohabited with a young woman of small degree, called Jessie Macdonald, who afterwards married Hugh Crawford, one of the defenders, and who continued to live after her said marriage, as she previously had done, with Alexander Maclean, ostensibly as his housekeeper, at Millport. That during some years previous to his death, Alexander Maclean was insane and subject to fits, and upon his death the pursuers wished to have a *post mortem* examination, with a view to detect a disease of the brain; but the defenders, his pretended trustees, resisted. During his latter years, Alexander Maclean lived secluded from his friends, against whom he had conceived an irrational hatred, which was fostered by the said Jessie Macdonald. Alexander Maclean left a trust deed or settlement and codicils. The trust deed

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[1] See previous reports 24 D. 625: 1 Macph. 304: 33 Sc. Jur. 480: 34 Sc. Jur. 311: 35 Sc. Jur. 205. S. C. 3 Macph. H. L. 42; 37 Sc. Jur. 467.