Wednesday, June 5.

SECOND DIVISION.

SPECIAL CASE—DUTHIE'S TRUSTEES AND OTHERS.

Succession—Legacy — Continuing Trust — Fee and Liferent.

A testator by will directed that all legacies "shall vest in the legatees at the time of my death, and I further direct that the legacies to females who are married at the time of my death shall be invested by the said trustees for their behoof exclusive of the *jus mariti* of their then or any other husbands they may afterwards marry, and the annual proceeds thereof paid to such legatees during their respective lives, and thereafter divided among their children." *Held* that upon a construction of the testator's intention the trustees must hold these funds for the married ladies in liferent and their issue in fee.

Observations on the cases of *Gibson's Trustees* v *Ross*, July 12, 1877, 4 R. 1038; and *Massy* v. *Scott's Trustees*, Dec. 5, 1872, 11 Macph, 173.

Succession—Alimentary Annuity—Bequest of Residue —Implied Revocation in a Subsequent Codicil.

A testator by his trust-disposition and settlement provided for his sister an alimentary annuity of £600, to be secured over his heritable estate, and he also made a bequest of the residue, subject to his sister's liferent, to certain relatives. Subsequently he executed a codicil making his sister sole residuary legatee. *Held* (*dub.* Lord Justice-Clerk) that the bequest of the residue in the codicil did not by implication revoke the direction as to an alimentary annuity, and that the trustees were bound, before paying over the residue to secure that annuity over the heritable estate as directed.

Mr Duthie died on 24th June 1877 leaving a trust-disposition and settlement. He was never married, and his sister Miss Duthie, the party of the fourth part, was his next-of-kin. His personal estate amounted to about £71,500, and his heritable estate was valued at about £54,910. Certain questions arose upon the meaning of the trust-disposition, which resulted in this Special Case, to which the parties were (1) the testator's trustees; (2) female legatees married at the date of the testator's death; (3) children of the parties of the second part; and (4) Miss Duthie, sister of the testator.

The first question arose upon the third purpose of the deed, which was as follows:—"In the third place, I leave and bequeath and direct the said trustees to make payment at the first term of Whitsunday or Martinmas happening six months after my death—(*here followed the names of the legatees, amongst whom were several ladies who were married at the date of the testator's death*) — which annuity — (*this was an annuity bequeathed to the testator's sister, and afterwards referred to*)—and legacies hereby bequeathed are to be paid free of legacy or other duty, and shall vest in the legatees at the time of my death; and I further direct that the legacies to females who are married at the time of my death shall be invested by the said trustees for their behoof, exclusive of the *jus mariti* of their then or any other husbands they may afterwards marry, and the annual proceeds thereof paid to such legatees during their respective lives, and thereafter divided amongst their children."

Upon this purpose the following questions of law were stated—"(1) Are the parties of the first part bound or entitled to make payment in cash to the parties of the second part of the sums of money bequeathed in favour of them respectively under the third purpose of the said trust-disposition and settlement? (2) Are the parties of the first part bound or entitled to hold the capital of each of the sums bequeathed in favour of the parties of the second part until the death of the female married legatee interested, paying to her the annual proceeds, and upon her death to divide the said capital sum amongst her children? or (3) Are the parties of the first part bound or entitled to invest the capital sums bequeathed in favour of the second parties and their children, the titles being taken in the terms of the clause of the said third purpose of the trust-disposition and settlement?"

They argued that the legacies to married females imported an absolute right of fee becoming vested in them (exclusive of the *jus mariti* of their husbands) as at the death of the testator, and that they were consequently entitled to have the capital sums of those legacies at once paid over to them in cash. On the other hand, it was maintained on behalf of the children of the married females, and others who were not married at the time of the testator's death, all parties of the third part, that the right of each of those ladies was merely to the annual proceeds during her life, and that the trustees (the parties of the first part) were bound to hold the capital of each of those legacies until the death of the female married legatee, and at that time it fell to be divided among the children. This was also the contention of the trustees, but they further argued that if they were not so bound to hold the capital sums of the legacies they ought to protect the interest of the children by placing the moneys in investments in the name of the ladies in terms of the trust provisions applicable thereto.

The authorities quoted are stated below at the conclusion of the argument upon the second question. The Court delivered their opinions on each point separately, but for convenience they are reported together.

In the second purpose of his settlement Mr Duthie left an annuity of £600 per annum to his sister. It was declared to be purely alimentary, and exclusive of the *jus mariti* of any husband she might marry. There was this further direction—"And I direct the said trustees to provide full and ample security to my said sister for payment of said annuity on my heritable estate, or otherways as they may think proper, other than by purchasing an annuity, which they are hereby expressly prohibited from doing, and the security to be granted for said annuity shall be taken in the names of the said trustees in trust for the payment thereof; further, it is my will and I direct that my said sister shall have the liferent use of the house, garden, offices and pertinents at Broadford Place, Aberdeen &c., . . . free of rent," &c. In a subsequent part of the deed disposing of the residue there was this provision—"And with regard to the residue and remainder of my

means and estate, heritable and moveable, including, after the death of my sister, that portion of it to be set aside in security for the payment of her annuity and the property to be liferented by her, I direct and appoint the said trustees to pay over, assign, and dispone the whole of the said residue of my means and estate to my heirs, successors, and representatives by my mother's side in terms of the directions contained in the disposition and deed of settlement of my late uncle Walter Duthie; but expressly with this exception, that I hereby exclude from this destination of said residue my said sister and any party or parties claiming through her, none of which parties are to be entitled to said residue or any part or portion thereof." Some years thereafter Mr Duthie executed a codicil, in which occurred the following clause—"And further, I do hereby revoke, recall, and declare to be of none effect the direction and appointment to my trustees contained in the foregoing settlement as regards the disposal of the residue of my means and estate; and I hereby give, grant, assign, and make over the whole residue of my property of every description to my dear sister, whom I hereby appoint my sole residuary legatee."

Upon these purposes the following questions of law were submitted—"(4) Are the parties of the first part bound or entitled to provide out of the trust-estate for payment of an annuity to the party of the fourth part in terms of the second purpose of the trust-disposition and settlement? Or (5), Is the party of the fourth part entitled to payment of the residue without any sum being retained or provided for the said annuity?"

It was maintained by Miss Duthie, the party of the fourth part, that the bequest of residue in her favour contained in the codicil had superseded the provision of an annuity contained in the second purpose of the trust-disposition and settlement, and that she was entitled to have the residue paid over to her without any sum being applied in provision of an annuity. The contrary was maintained by the parties of the first part.

Authorities—*Gibson's Trustees* v. *Ross and Others*, July 12, 1877, 4 R. 1038; *Massy* v. *Scott's Trustees*, December 5, 1872, 11 Macph. 173; *Allan* v. *Allan's Trustees*, December 12, 1872, 11 Macph. 216; *White* v. *White*, June 1, 1877, 4 R. 786; *Houston* v. *Mitchell*, November 17, 1877, 5 R. 154.

At advising—

Lord Justice-Clerk—(*Upon the first question*)—If this were a case falling within the category of such decisions as that of *Lady Massy* or of *Gibson's Trustees*, I should have felt no difficulty. This, however, is not so, for there is the broad distinction, that the principle of these two cases has application only where the testator may have failed to supply adequate machinery for carrying out his expressed intention. To such circumstances only can the principle be applied. The absence of machinery—such, for example, as a trust—is in itself very strong evidence for assuming that the testator did not intend his bequest to be entirely tied up, or the immediate beneficiary to be absolutely restricted in his enjoyment. In *Lady Massy's* case there was no continuing trust, and in *Gibson's Trustees* the truster provided for the termination of the trust upon a contingent event, which occurred, namely, the birth of a child.

If we examine this settlement it is found that a number of legacies have been under the third purpose bequeathed to various persons and to charities, and then after the enumeration of the beneficiaries we have a provision that "the legacies hereby bequeathed . . . shall vest in the legatees at the time of my death." That is to be the general rule of the settlement, and then the testator qualifies it in regard to certain individuals, thus—[*reads as above.*] If the intention thus expressed be carried out as directed, there is no want of the necessary machinery. Each of the ladies who is married has to be provided by the trustees with £3000 secured as directed. There is not any inconsistency in the settlement as I read it. To give a legacy to A, B, and C, and subsequently to add restrictions to C's legacy, but declaring it to be in liferent only, and in fee to issue, is not an inconsistency.

On the whole, I have little doubt as to the intention, and without trenching on those cases where there is a failure to provide machinery, we must hold that these trustees must hold the legacies for these ladies in liferent and for their issue in fee. We shall therefore negative the first question and affirm the second.

(*Upon the second question, on which Lord Ormidale and Lord Gifford delivered the first opinions*) I am not disposed formally to dissent from the conclusion to which your Lordships have come. Miss Duthie has by this succession received upwards of £100,000, and the fact of £600 per annum being heritably secured by the trustees for alimentary purposes cannot be a hardship.

I will, however, shortly explain the views which might have led me to an opposite conclusion had your Lordships taken a different opinion. If both these bequests had been in the same deed, I quite agree that both would have been perfectly competent and capable of subsisting together. But the question comes to be, Whether, when the residue is bequeathed by the codicil, that does not mean simply the whole estate of the testator under deduction of debts and of legacies, and not the residue as intended by that word in the principal settlement? I think it evident that the term "residue" in the codicil and settlement has a different meaning in each, because in the settlement there is included the liferent of the house and garden which is bequeathed to Miss Duthie, and that of course falls when the fee is given to her likewise. Whatever was the testator's motive in the settlement for limiting his sister's right to a liferent, that motive in the codicil has entirely vanished. The case, however, is very narrow and difficult, and I am not prepared to dissent.

Lord Ormidale—(*Upon the first question*)—I am of the same opinion, and really on the same grounds. The real question is—What was the intention of the testator? In ascertaining this we generally find considerable difficulty, more especially where, as in the present case, the testator has written his own will. Certainly Mr Duthie was a lawyer, but that does not necessarily simplify the matter.

In the present case I am free to admit that there is an apparent inconsistency in the different parts of this third purpose of the settlement. If the directions had stopped short at the words "vest in the legatees at my death," the matter would have been clear enough. I am inclined to think Mr Duthie meant to refer to the

case of all the female legatees being unmarried at the time of his death. And then he goes on to make provision for any of them that should be at that date married. I think it is impossible not to see that the married females are only to enjoy the annual produce, not to possess the fee of the capital.

In construing such a deed as this I am not disposed to expunge any words or part, but to take the whole deed, and try and give it a meaning as it stands.

(*Upon the second question*)—This question is one in itself of some difficulty, and that difficulty has been rendered as great as possible by the ingenuity of Mr Kinnear's argument. The question really is this—What is the residue dealt with by Mr Duthie in his codicil? I take it that the testator means to deal with a certain portion of his estate so far as free from restrictions otherwise imposed—[*His Lordship read the clause of the codicil*]. It is clear that the residue left by the principal settlement is to be calculated after the annuity of £600 has been deducted, and the codicil is evidently dealing with the same residue. I can quite understand that the testator while leaving this £100,000 free to his sister, yet was at the same time anxious that she should be secured at anyrate and in all events in a reasonable sum. I think this object has been sufficiently well carried out.

Lord Gifford—(*Upon the first question*)—The only difficulty I have in this case arises from the somewhat arbitrary rule introduced by some recent cases—such, for example, as those decisions regarding the use of the word "allenarly," or again such cases as *Gibson's Trustees*, where from want of machinery provided by the testator the Court were not able to give effect to what was his undoubted intention.

I do not, however, think that the intention of the testator should be ever defeated unless such a result cannot by any possibility be avoided. The difficulty here arises from the testator not having said in whose name the investments were to be made. I think, however, that it can be seen that there is no doubt he meant that the sums named were to be invested by the trustees, and that exactly in the terms of the deed.

(*Upon the second question*) —As to the annuity, I am of the same opinion as Lord Ormidale. There does not appear to me to be any inconsistency in giving an alimentary annuity to the person the testator is most interested in, and in also giving all the residue of his estate besides, because the one bequest does not destroy the other. The real difficulty, and the only difficulty, is, whether the codicil has changed the whole nature of the principal deed. But Mr Duthie does not say I have changed my views as to my sister; he only says I have changed them as to the residue of my estate.

The Court therefore found — (1) That the parties of the first part were bound to invest the capital sums bequeathed in favour of the second parties and their children, in their own names, for behoof of the second parties and their children, in terms of the third purpose of the trust, and to pay the annual proceeds to the second parties respectively, and on their death to divide the fee equally among their children; (2) that the parties of the first part were bound to provide out of the trust-estate for payment of an annuity to the party of the fourth part, in terms of the second purpose of the trust; and (3) that the party of the fourth part was not entitled to payment of the residue without a sum being retained or provided for the said annuity, &c.

Counsel for the First, Third, and Fourth Parties — Robertson — Maconochie. Agents — Tods, Murray, & Jamieson, W.S.

Counsel for the Second Parties — Kinnear. Agents—Dundas & Wilson, W.S.

Wednesday, June 5.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

DALRYMPLE AND OTHERS *v.* HERDMAN AND OTHERS.

Superior and Vassal—Feu-Contract—Power of Superior and Vassal to Discharge Feu-Charter Restrictions in a Question with other Feuars Holding under the same Title.

A superior disponed certain parts of his lands for building purposes. There were various restrictive conditions in the feu-contract, with a stipulation that on a contravention of any of them the superior might either irritate the feu or demand double feu-duty for each year during which the contravention should continue. Sub-infeudation was prohibited, and alienations, except those with an *a me* holding. The original disponee sold parts of the lands to various parties, in each case under the whole conditions, provisions, and stipulations of the feu-charter as above stated. To one of these conveyances the superior was a party, and granted therein a discharge of the restrictive conditions above referred to. In a suspension and interdict brought by other feuars against the disponee under that conveyance upon his proceeding to contravene the provisions of the original deed, the Court [*reversing* the Lord Ordinary (Curriehill)] *held* that the terms of the feu-contract entitled the complainers, as disponees of the original feuars, to enforce observance of the conditions and restrictions therein mentioned, and that that right was not reserved to the superior alone by the clause allowing the option of a payment of the double feu-duty in lieu of an irritancy of the feu.

This was a note of suspension and interdict at the instance of Miss Dalrymple, John Bertram Stephenson, and others, feuars in Belford Terrace, Edinburgh, against Messrs Herdman, Haymarket Mills, Edinburgh, to have the latter prohibited from erecting or proceeding with the erection of a shed and office, or other buildings in connection with a sculptor-work, on a piece of ground in Belford Terrace, and from