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.

Held (*rev.* judgment of Lord Stormonth Darling) that the husband had acted as he did with the intention and purpose of putting an end to conjugal cohabitation with his wife, and decree of divorce *granted*.

Gibson v. *Gibson*, February 1, 1894, 31 S.L.R. 409, *distinguished*.

Upon 3rd March 1893 Elizabeth Murray brought an action for divorce against her husband William Murray on the ground of desertion.

The husband did not defend the action, but upon 4th May 1893 he wrote a letter to the pursuer in which he said—"You plead desertion and cruelty. I deny it; you deserted me, not me you; the night you left, with one hand holding your little daughter, with the other grasping yours, begging you not to leave us, but you did."

Proof was allowed. It appeared that the parties had been married in 1861. From an early period their married life was an unhappy one, owing to the drunken habits of the husband and his cruelty to his wife. On several occasions prior to 1875 his violent conduct obliged her to leave him and reside with her own relatives, but she rejoined him. His conduct, however, did not improve, and in 1875 he was convicted of assaulting her. In the same year he allowed the furniture in their house in Clerk Street, Edinburgh, to be sold off, and he failed in his duty of maintaining her and her children, then four in number, to such an extent that they had to receive parochial relief. The parochial authorities proceeded against him for desertion, and the proceedings were only stopped by a relative of his coming forward and paying the amount of the relief which had been granted. At Martinmas of the same year the pursuer took a house of her own in Leith, where she lived with and supported her children. While she was living in this house her husband, according to her account, came to the house on the night of 1st February 1876 and turned her out of doors.

With regard to this occurrence and her subsequent actions the pursuer deponed—"On the 1st February 1876 my husband came to the house without warning at nine o'clock at night. When he came in that night there was a young lad, a clerk, there, and my husband said that he had come to take the children and the house. He was afraid of being pulled up again by the parochial board, and when he did take them he took me by the back of the neck, and put me to the door without a bonnet or anything. He swore when he turned me out. I went to old Mrs Wilson's for the night, and next morning at eight o'clock I went to my sister's house in Broughton Place. . . . I did not leave of my own accord on that occasion; I was put out, and I was asked neither one thing nor another. My sister, Mrs Gordon, to whose house I went at that time, is now dead. My husband was quite well aware of where Mrs Gordon lived, and he knew that I was going there. I remained for two years with my sister helping her as nurse to her children. . . . During these two years while I was in Edinburgh my husband never made any offer to take me back or to make any provision for my support. I afterwards went to Elgin, and was in service there for a year. I was then for several years travelling companion to an old lady, and I was abroad with her a good deal. During the last six years I have been in Edinburgh maintaining myself by nursing. I have had a good deal of employment in that way. I have never seen my husband since February 1876, and he has never communicated with me. I never knew where he was during that time. About the time I raised this action I ascertained that for the past ten or twelve years he has been in Newcastle-on-Tyne. During the time I was in service the family were with my husband. . . . *By the Court.*—(Q) Your husband in the letter of 4th May last charges you with deserting him; have you told us all the circumstances under which you left the house?—(A) Yes. There was no one present except him and me at the time he turned me out. There was no quarrel, and I have just told what happened after he received the house and the children. I had taken the house myself, but I gave my home for my family as they were young, and giving the home my husband took charge of the children in the home. That was in 1876, and immediately after that I went to be nurse in my sister's house. I have had no communication, direct or indirect, with my husband until I got the letter of 4th May last from him. After my husband and I parted in the way that I have just described, I was willing to have gone back to him if he had invited me. I expected him to renew communications with me. The reason I did not communicate with him myself was that I did not know whether I would be knocked down or what would be done with me, and I thought that if my husband wanted me to come as his wife, he would have come for me. I say that if he had come I was willing to go. . . . *Recalled.*—I remember the occasion in February 1876 when my husband turned me out of the house. I took refuge with my sister Mrs Gordon at that time and stayed there for two years. When I was turned out of the house there were only two of my children at home, a third being in the hospital and a fourth with his grandfather in the country. The two children who were at home came to see me in Mrs Gordon's at least three times, and they played with her children in the back grounds. My children stopped coming to see me, and I believe they were prevented by their father. I do not know how long the children remained with my husband, but when I went down to the house in George Street, Newhaven, within six weeks after I was turned out, I found that there was nobody in the house and that the house was closed up. *By the Court.*—(Q) Did you make any inquiries after that as to where your husband and children were?—(A) I did not know where they resided after that. *Examination continued.*—My reason for going down to

the house on the occasion I have mentioned was that I heard that one of the children was ill. I went down to make inquiries, expecting to find them there, and I found the house shut up. After that I went repeatedly to the school to see the children but they were not allowed to speak to me. I saw the children up till about a year after February 1876, and then I did not know where they were. I was never allowed to speak to the children after six weeks after February 1876. *By the Court.*—I lost all trace of the children about a year after February 1876, and I was in very bad health after that."

On the question whether the pursuer had left her husband voluntarily or had been put away, Mrs Barbara Murray, a sister of the pursuer, deponed—"*By the Court.*—When I saw the pursuer in Mrs Gordon's she spoke to me about her husband's cruelty and desertion and not providing for her. (Q) Did she speak as if she had left her husband voluntarily, or as if she had been put away?—(A) He did turn her out; he sold everything she had in the house, and she had nowhere to stay and my sister was obliged to take her in. The defender did not remain in the house. (Q) I am referring to the time when she went to your sister as nurse; how did she speak of that?—(A) Still in the same strain as I have just described; she had to leave him for his bad behaviour, and also because he sold the things in the house and turned her completely out. (Q) As I understand, the defender did not sell the things in the house because he remained there with the children?—(A) She had to leave him for his cruelty. (Q) Did she speak as if she had left voluntarily or as if she had been put away against her will?—(A) She was put away decidedly against her will as she would not leave the children; it was the children that kept her so long with him. (Q) Did she speak as if she would be willing to go back if he invited her?—(A) Well, she was afraid to go back, he was so cruel and so wicked to her. She had gone back several times at my father and mother's request."

Upon 18th July 1893 the Lord Ordinary (STORMONTH DARLING) pronounced this interlocutor:—"Finds that it has not been proved to his satisfaction that there has been wilful and malicious desertion on the part of the defender: Therefore dismisses the action, &c.

"*Opinion.*—I am of opinion that the pursuer has not made out a case for divorce on the ground of desertion. The circumstances are somewhat peculiar. The spouses were married in 1861, and for many years they appear to have lived an exceedingly unhappy life, the cause of which, so far as I can judge, was the drunkenness and violence of the husband. On several occasions the pursuer had to leave him and reside for a time with her own relations. But she rejoined him, and unfortunately his former course of conduct was on each occasion renewed and continued, till on one occasion he was convicted of assaulting her. I do not doubt, therefore, that she had very good reason to complain of his conduct, and that he proved a cruel and even brutal husband.

"In the year 1875 he allowed the furniture in their house to be sold off, and he neglected his duty of maintenance to such an extent that the pursuer and her children, then four in number, had to be relieved by the parochial authorities. They proceeded against him for desertion, and their proceedings were only stopped by a relative of his coming forward and assisting him to make arrangements whereby an allowance was to be made in future. Sometime after that the wife took up her residence in Leith, and was living there with her two younger children, the second child being in Heriot's Hospital, and the eldest with friends in the country. While she was so placed the defender suddenly, as she says, appeared at the house on the night of 1st February 1876, and turned her out of the house. She sought refuge for the night in the house of a friend, and next day she went to her sister's in Edinburgh, where she remained as a nurse for two years. During that period she had no communication with her husband of any kind, and she only saw her younger children, who were aged respectively about eight and nine years, at very rare intervals. Her own account of the matter is that they at first came twice or thrice to the house where she was living, but that the defender objected to this, and that thereafter she had no opportunity of seeing them even at the school, because they were not allowed to speak to her there. It is certain that within a year of 1st February 1876 she lost all trace both of husband and children. After the expiry of her two years' service with her sister she took a place as a domestic servant in the north. She then became companion to a lady for some years, and travelled abroad, and ultimately she settled as a nurse in Edinburgh, where she has been employed for the last six years. The husband has lately been discovered in Newcastle, but there is no evidence to show where he was during the intermediate years.

"*Prima facie* these facts do not disclose a case of desertion by the husband, but rather a case of the wife forsaking the conjugal residence, and it would require clear and satisfactory evidence to convert that into desertion by the husband. I am of opinion that the evidence here is not sufficient for that purpose, because there is really nothing except the testimony of the wife herself to show that her departure from her husband's house was other than voluntary. If it was voluntary, it may have been justified by the husband's long-continued cruelty, but such a state of facts could never, in my opinion, found an action for divorce at the wife's instance, on the ground of desertion.

"On the other hand, it may be the pursuer's misfortune, and not her fault, that she is unable to bring any corroboration of her own testimony; but the fact remains that neither the children, who were in the house at the time, and who are still alive,

nor any neighbour, nor anybody at all, is adduced to corroborate this material part of her story.

"That, I think, is sufficient for the decision of the case. But I must observe that, in my view, the case also fails because of the entire want of any evidence to show that the pursuer really desired to renew cohabitation.

"When I say that there is an entire want of such evidence, I do not lay out of view that she herself said in answer to a question of mine that she would have been willing to go back to her husband if he had asked her. But I must test that answer by her conduct, and where a woman leaves her husband's house, for whatever cause, and remains away for a number of years without making any inquiries for either her husband or her young children I cannot accept her own unsupported statement that she was willing and anxious to go back. On this matter I think the opinions of the majority of the Judges in the whole Court case of *Watson* v. *Watson* 17 R. 736 are conclusive. They are probably most compendiously stated in the opinion of Lord Shand (p. 743), where his Lordship says that 'desertion must be wilful; it must be obstinately persisted in; it must be without lawful excuse; and it must clearly appear that the pursuer of the action throughout the period of four years of alleged desertion was desirous of cohabitation and ready to renew it.' Now, if that be the law, as I think it is (and as I must take it to be whether I agreed with it or not), I cannot say that it 'clearly appears' in the present case that this pursuer throughout the period of four years was 'desirous of cohabitation and ready to renew it.' She may have had very good reason for not being ready to renew it; it may even be that her husband treated her so badly as to make her afraid to renew it. But the remedy for such a state of matters is not divorce for desertion, but judicial separation on the ground of cruelty; and therefore upon that ground, as well as upon the ground that desertion itself is not to my mind conclusively or satisfactorily proved, I must refuse the remedy which the pursuer here asks."

The pursuer reclaimed, and argued—The Lord Ordinary was wrong in holding that the desertion began in 1876; it had really begun in 1875, when the defender allowed the furniture of the house they were living in to be sold, and neglected the maintenance of his family. The fact that the husband came to the house where the pursuer was maintaining her family was a mere incident in the desertion; it was not the beginning of it, and therefore it could not be said that the act by which the wife was separated from the husband was a mere drunken freak on his part. It was clearly proved, and stated to be so by the Lord Ordinary, that the defender's conduct towards his wife had been extremely brutal, and if she had not made any effort to go back to him for fear of being again ill-treated, that was not a bar to her obtaining divorce—*Gow* v. *Gow*, 29th January 1887, 14 R. 443; *Winchcombe* v. *Winchcombe*, 26th May 1881, 8 R. 726. These cases were not inconsistent with the case of *Watson* v. *Watson*, 20th March, 1890, 17 R. 736, Lord Pres., p. 740. The pursuer also deponed to her willingness to go back if her husband had shown any desire to have her back. This case was distinguishable from the recently decided case of *Gibson* v. *Gibson*, February 1, 1894, 31 S.L.R. 409, for here the defender had deliberately turned the pursuer out of the house by neglecting to maintain her and her family in 1875, and had shown it was his desire not to live with her by again turning her out of the house in 1876.

At advising—

LORD JUSTICE-CLERK — This case was heard some time ago and delayed until the result of another case which had been sent for hearing before Seven Judges was known, and now falls to be decided.

The case is a peculiar one in several respects, and there is one peculiarity which renders the decision of it more difficult than it might have been in other circumstances, because the spouses who are the parties to the case have not cohabited since 1876, and as the action was brought only in 1893 there has necessarily been much evidence lost which would have been available had the date of the alleged desertion and bringing of the action been nearer each other. I have considered the case carefully, and after giving full effect to the case of *Watson*, 20th March 1890, 17 R. 736, which decided that it was not an essential prerequisite to obtaining divorce for desertion that the spouse who alleged desertion should use efforts to resume cohabitation, but that it was a question of circumstances depending upon the merits of the particular case, but that no general rule could be laid down, I have come to the conclusion that in this case, although no doubt it is a narrow one, the pursuer has established her case.

It is quite true that in this case the defender had treated his wife with great cruelty, and that that had some effect upon the pursuer's mind in regard to her desire to resume cohabitation. I do not find, however, in the evidence here any distinct indications that she was not inclined to resume cohabitation with the husband if he was willing to take her back after he had turned her out of doors. It is plain from the evidence that he used great violence towards her, that he took away the children from her, refused to let them speak to her, made no effort to communicate with her himself, and in fact his whole conduct was not that of a man desirous of resuming cohabitation with his wife. It is entirely a matter of circumstances and in this case I think the pursuer is entitled to decree.

LORD RUTHERFURD CLARK—I also am of opinion that the pursuer is entitled to decree of divorce. The evidence is slender, but I think that we may hold it to be sufficient. It shows that the husband was cruel to his wife in order to produce and

maintain a separation, that he withdrew himself and her children from her society, and concealed from her his place of residence. The case differs in very material respects from that of *Gibson*.

LORD TRAYNER — The Lord Ordinary thinks that this is a case of a wife leaving or forsaking the conjugal residence on account of her husband's cruelty. If I thought that that was the proper or necessary view of the facts proved, I should agree with the Lord Ordinary in refusing a decree of divorce. But I think the fact is quite otherwise. The pursuer did not leave the conjugal residence. She was extruded from it. The defender put his wife out of the house, sold off the furniture, and took away the children, having previously forbidden them to speak to their mother the pursuer. The defender's conduct leaves no doubt on my mind that what he so did was done with the intention and purpose of putting an end to conjugal cohabitation with the pursuer. He has since lived away from the pursuer for about eight years, has never communicated with her, and done nothing towards her support. That, I think, is desertion, and entitles the pursuer to the decree concluded for. This case is distinguished from the recent case of *Gibson* in respect that there the facts were regarded by the majority of the Court as warranting the conclusion that the wife acquiesced in the husband's conduct, which (however cruel and unjustifiable in itself) did not necessarily lead to the view that he desired or intended to put an end to conjugal cohabitation. The Court thought that the parties living separate was a matter as to which both spouses were agreed. Such a view is, I think, excluded by the evidence in this case. I am therefore for recalling the Lord Ordinary's interlocutor and giving decree. I differ from the Lord Ordinary's opinion that a deserted wife, before being entitled to decree of divorce, must satisfy the Court that during the whole or any part of the statutory period of desertion, she was desirous of returning to conjugal cohabitation.

LORD YOUNG was absent.

The Court recalled the Lord Ordinary's interlocutor reclaimed against and gave decree in terms of the summons.

Counsel for Reclaimer—W. Campbell—Mackintosh. Agents — Snody & Asher, S.S.C.

Friday, March 16.

FIRST DIVISION.

[Lord Low, Ordinary.

BUNTINE *v.* BUNTINE'S MARRIAGE-CONTRACT TRUSTEES.

Succession—Husband and Wife—Married Women's Property (Scotland) Act 1881, *sec.* 8—*Marriage Prior to Act—Jus Relicti —Marriage-Contract.*

A husband and wife, married in 1874, by antenuptial contract of marriage contracted that in the event of the husband surviving the wife, and there being no children of the marriage, he should enjoy the liferent of all his wife's estate, the fee remaining at the absolute disposal of the wife or her heirs or assignees. The husband renounced his *jus mariti*, right of courtesy, and right of administration. The wife died in 1883 intestate, leaving no children but survived by her husband, who after enjoying the liferent of his wife's whole estate after her death, in 1893 claimed a half of said estate, so far as moveable, in fee, under the Married Women's Property Act 1881. That Act confers a *jus relicti* upon widowers, whether married before or after the passing of the Act, similar to the *jus relictæ* enjoyed by widows, but provides that it "shall not affect any contracts made or to be made between married persons before or during marriage."

Held (*rev.* Lord Low) that the claim was inconsistent with the provisions of the marriage-contract, and fell to be rejected.

James Robertson Buntine, advocate, Sheriff-Substitute of Stirlingshire, was married to Miss Jane Sandeman in 1874. By antenuptial contract of marriage dated 12th October and recorded 22nd December 1874 Miss Sandeman (afterwards Mrs Buntine) conveyed to trustees her whole estate, heritable and moveable, belonging or which should belong to her during the subsistence of the marriage, except legacies of £500 or under, revenue falling to her from estate separately settled on her, and revenue due to her from the trust-estate prior to the last date of the contract, and that in trust for the following purposes:—(1) To pay the expenses of the trust; (2) for behoof of Mrs Buntine in liferent; (3) in the event of her husband surviving her, for his behoof in liferent for his liferent alimentary use allenarly; (4) to hold the fee of the trust-estate for behoof of the children of the marriage; and (5) failing children, for behoof and at the absolute disposal of Mrs Buntine or her heirs and assignees. By it Mr Buntine renounced his *jus mariti* and rights of courtesy and administration in, of, and in relation to the whole estate presently and in future belonging to Miss Jane Sandeman.

Mrs Jane Sandeman or Buntine died in 1883 intestate, and no children were born of the marriage.