Tuesday, May 28.

SECOND DIVISION.

JAMIESON AND OTHERS *v.* LESSLIE'S TRUSTEES.

Succession—Trust—Direction to Divide and to See to the Investment of the Residue.

A testatrix by her settlement directed her trustees to divide the residue of her estate equally between her two daughters, "and to their respective heirs and assignees, but declaring that the provision hereby made . . . is an alimentary provision for their own separate use and behoof, and shall not be subject to the *jus mariti* or right of administration or management of their husbands, . . . but my trustees shall be bound to see to the investment of the said residue for my said daughters in such way and manner as shall to them appear best to secure and give effect to the foresaid declarations and conditions."

Held that the daughters were fiars, and were entitled to have the residue paid over to them upon their own receipts, but, following the case of *Allan* v. *Allan's Trustees*, December 12, 1872, 11 Macph. 216, that the receipts should bear exclusion of the *jus mariti* and right of administration.

Mrs Jane Lesslie, widow of the late James Lesslie, shipowner, North Shields, died at Bonnytoun, Linlithgow, on 9th January 1881, leaving a trust-disposition and settlement, and codicil thereto, whereby she assigned to certain trustees her whole estate.

The third purpose of the settlement was as follows—"I direct my trustees, at the first term of Whitsunday or Martinmas six months after my death, or as soon after such term as my trustees shall be able to realise my estate, to divide the whole rest and residue of my said estates and effects equally between my two daughters Mrs Agnes Lesslie or Jamieson, wife of William Henry Jamieson, farmer, residing at Mayshade aforesaid, and Mrs Jane Lesslie or Dawson, wife of Adam Dawson, residing at Bonnytoun, Linlithgow, share and share alike, and to their respective heirs and assignees; but declaring that the provision hereby made to my said two daughters is an alimentary provision for their own separate use and behoof, and shall not be subject to the *jus mariti* or right of administration or management of their present husbands, or any future husbands they may marry, nor shall the same be assignable by them or by their said husbands, nor be liable to the deeds or subject to the legal diligence of the creditors, either of themselves or of their said husbands, for payment or in security of debts contracted by them; but my trustees shall be bound to see to the investment of the said residue for my said daughters in such way and manner as shall to them appear best to secure and give effect to the foresaid declarations and conditions, *with power to my trustees, notwithstanding what is hereinbefore written, and provided they be required so to do by my said daughters, or either of them, to pay to my said daughters, or either of them, the whole or such part of their respective provisions foresaid as they may request so to be paid to them, leaving my said daughters themselves to see to the application, use, or investment thereof, and without my trustees incurring any responsibility therefor;* and I declare that the receipts and all other writings with reference to the said provision, or to the interest or produce thereof, to be granted by my said daughters, shall be granted by themselves alone, and shall be good, valid, and sufficient to the receivers thereof, though the consent of their husband be not given thereto." By codicil Jane Lesslie revoked that part of the third purpose of the settlement which is printed above in italics.

The trust-estate was realised by the trustees, and the primary purposes of the trust implemented. Mrs Agnes Lesslie or Jamieson and Mrs Jane Lesslie or Dawson, the residuary legatees under the settlement, both had children, who were all in minority.

Questions having arisen as to the rights and interest of the residuary legatees in the residue under the third purpose of the trust-disposition and codicil, a special case was presented by (1) Mrs Jamieson and Mrs Dawson, and (2) the trustees of the late Mrs Lesslie, submitting the following questions of law—"(1) Whether the fee of the residue of the said estate is vested in the said Mrs Agnes Lesslie or Jamieson and Mrs Jane Lesslie or Dawson? (2) Whether they are entitled to have the capital of the said residue conveyed and made over to them, or any, and if so, what part thereof? Or (3) whether the trustees are bound to retain the capital invested in their own names during the lifetime of the said legatees?"

Argued for the first parties—A right in the fee of the residue vested in them as at the date of the death of the testatrix, and they were now entitled to have the same conveyed and made over to them in such a way as to give effect to the declaration and condition of its being for separate use and behoof. They were willing to grant a receipt to the trustees in similar terms to that suggested by the Court in the case of *Allan's Trustees* v. *Allan and Others*, December 12, 1872, 11 Macph. 216, which ruled the present case.

Argued for the second parties—They were willing to pay over the residue to the first parties, who probably had the fee, if they could do so with safety, but there was here no direction to pay as in *Allan's* case, and the conditional power "to pay" had been cancelled by the codicil. In order "to divide" and "to see to the investment" of the residue, so as to protect it for the first parties as the testatrix desired it to be protected, it was necessary to keep up the trust during their lifetime, and only pay to "their respective heirs and assignees"—*Balderston* v. *Fulton*, January 23, 1857, 19 D. 293; *Lady Massy* v. *Scott's Trustees*, December 5, 1872, 11 Macph. 173; *Whyte's Trustees* v. *Whyte*, June 1, 1877, 4 R. 786.

At advising—

LORD JUSTICE-CLERK—The testatrix in this case, Mrs Jane Lesslie, by her will left the residue of her estate to her two daughters by a destination in these terms—"I direct my trustees, at the first term of Whitsunday or Martinmas six months after my death, or as soon after such term as my trustees shall be able to realise my estate, to divide the whole rest and residue of my said estates and effects equally between my two

daughters Mrs Agnes Lesslie or Jamieson, wife of William Henry Jamieson, farmer, residing at Mayshade aforesaid, and Mrs Jane Lesslie or Dawson, wife of Adam Dawson, residing at Bonnytoun, Linlithgow, share and share alike, and to their respective heirs and assignees." But she qualified these general words by a clause of declaration to the effect that what she thus gave to her daughters was an alimentary provision, and that the *jus mariti* and right of administration of their husbands were to be excluded, and that they should not be liable for the deeds or subject to the legal diligence of their own or their husband's creditors, and the trustees were directed "to see to the investment of the said residue for my said daughters in such way and manner as shall to them appear best to secure and give effect to the foresaid declarations and conditions" so as to carry out these intentions of the testatrix. I think there can be no doubt that by the first provision which I have quoted the daughters of the testatrix became entitled each to one-half of the fee of the estate. The trustees are directed to divide it between them, and although there is no direction in words to pay their halves over to them, there is no other way in which a division between them of the fee could be made, and unless the deed has that meaning there is no disposal of the estate of Mrs Jane Lesslie by it. But while it is thus certain that the testatrix disposed of her estate in favour of her daughters she had evidently a desire that it should as much as possible be protected for them, and accordingly she gave the special direction which I have quoted as to the investment of the funds. I am unable to see how that direction can be carried out. To invest the funds in such a way as to make them alimentary only would be practically the creation of a new trust, and the restriction of the rights of the daughters to a liferent. For unless they were restricted to a liferent, it would be impossible to protect the property given to them by the will from the claims of creditors or the deeds of the ladies themselves. But there is no power to create a new trust of this description, and even if it could be created, power could not be given to it to turn the gift to these ladies into a mere alimentary provision, protected from attack for the beneficiaries' liabilities and from the acts of the ladies themselves.

I am therefore of opinion that the questions put to us must be answered, the first and second in the affirmative generally, and the third in the negative. As regards the testatrix's exclusion of the husbands' *jus mariti* and right of administration, it appears to me that the precedent set by the decision in the case of *Allan* should be followed, and that the receipts for the shares of the ladies who take the fee should bear that the *jus mariti* and right of administration of their husbands are excluded.

Lord Young concurred.

Lord Lee—I was anxious to look into the case of *Balderston* v. *Fulton* and the other cases of that class before coming to a decision, but having now had the opportunity of examining them I have no doubt that the opinion expressed by your Lordship is the correct one.

There is no question now about the fee. The only question is, whether payment is to be postponed, whether in fact the trust is to be kept up.

The peculiarity of this case is that there is no ulterior destination beyond the two ladies. There is therefore nothing to be protected by keeping up the trust. The direction is that the money is to be divided between the daughters of the testatrix. In these circumstances *Balderston* v. *Fulton* cannot be founded upon as an authority for keeping up the trust. The cases of *Smith* v. *Campbell*, May 30, 1873, 11 Macph. 639, and *Rennie* v. *Ritchie*, April 25, 1845, 4 Bell's App. 221, are quite distinct and distinguishable, because they are cases of annuity. I therefore concur with your Lordship's opinion.

Lord Rutherfurd Clark was absent when the case was heard.

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

Counsel for the First Parties—Strachan. Agent—J. Logan Mack, S.S.C.

Counsel for the Second Parties (Trustees)—Adam. Agents—Mack & Grant, S.S.C.

Wednesday, May 29.

SECOND DIVISION.

RAMSAY *v.* ROBIN, M'MILLAN, & COMPANY.

Reparation—Master and Servant—Fault—Known Risk—New Trial.

An employer who supplies his men with the usual appliances necessary for their work will not be liable in damages if in a place not belonging to the employer where these appliances are unsuitable the workmen adopt a recognised method of manual labour without making any complaint or requesting other appliances.

A cellarman was injured while storing barrels along with three other skilled workmen in a cellar, which was too small for the use of "skeggs," and in which consequently the barrels were tiered by hand labour. The cellar did not belong to the employers. In an action of damages against his employers, on the ground that they had not provided the necessary appliances, it appeared that hand labour was a recognised method of tiering where skeggs could not be used, although a block-and-tackle was sometimes used, and that the pursuer had never complained or asked for further appliances. The pursuer obtained a verdict. On a motion for a new trial, the Court set aside the verdict, *holding* that there was no evidence of fault.

Simon Ramsay, 333 High Street, Edinburgh, brought an action against Messrs Robin, M'Millan, & Company, brewers, Summerhall, Causewayside, Edinburgh, for £800 as damages for an accident sustained by him upon 28th July 1886 while in their employment as a cellarman.

The pursuer averred that "the accident occurred through the fault of the defenders. The cellar in question was of very small dimensions, and there