Wednesday, November 29.

SECOND DIVISION.

WILKIE'S TRUSTEES *v.* WIGHT'S TRUSTEES.

Succession—Trust—Discretionary Powers of Trustees—Direction to Trustees to Retain—Fee in Beneficiaries—Repugnancy.

In her trust-disposition and settlement a truster directed her trustees by the second purpose to give certain effects to her two married daughters, and by the third purpose to convey to them certain heritable property in equal shares. By the fourth purpose she directed them to pay to each daughter one-third of the residue of her estate.

By a codicil the truster revoked the second and third purposes of her settlement, and directed the trustees to sell the subjects which were dealt with in them, and to hold the proceeds, and also the shares of the residue appointed to be paid to her two daughters under the fourth purpose of the settlement, in their own hands for the alimentary use of her two daughters, equally between them, and to lay out the same in their behoof in such manner as the trustees thought proper, and to pay them the capital or interest at such times, and in such manner and sums as to her trustees should seem expedient, the most ample powers and discretion being given to them without control or interference on the part of her daughters or their husbands, and the said provisions being declared to be alimentary and not subject to the *jus mariti* and right of administration of her daughter's husbands; and the truster further declared that it should not be in the power of her daughters or their husbands to burden with debt or alienate these provisions or any part thereof, either absolutely or in security, or to anticipate payment thereof, and that the same should not be subject to the legal diligence of their creditors.

After the death of the truster—*held* (1) that no distinction could be made between the rights of the daughters in the proceeds of the subjects mentioned in the second and third purposes of the settlement and in the residue; (2) that the shares of each daughter vested in her in fee *a morte testatoris;* and (3) following the case of *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, that each daughter was entitled to immediate payment of her share—*diss.* Lord Trayner to finding (3), he being of opinion that the present case was an exception to the rule established by the case of *Miller*, as there were here trust purposes which could not be secured without the retention of the vested estate or interest of the beneficiaries in the trustees.

Mrs Henrietta Christie or Wilkie died at Rosslyn Crescent, Edinburgh, on 26th September 1884, leaving a trust-disposition and settlement dated 24th January 1883, and with two relative codicils thereto, dated 24th October 1883 and 8th January 1884. By the said trust-disposition and settlement Mrs Wilkie assigned and disponed, to and in favour of trustees for executing the trust thereby created, all heritable and moveable estate which should belong to her at the time of her death. The first purpose of the trust provided for payment of the truster's debts, obligations, and funeral expenses, and the expenses of the trust. By the second purpose of the trust Mrs Wilkie directed her trustees, immediately on her death, to give and deliver over to her two daughters Mrs Henrietta Wilkie or Wight and Mrs Susan Wilkie or Macleod, equally between them, share and share alike, her whole household furniture and other effects in her dwelling-house at the time of her death, under the declaration that her trustees should be the sole judges of the articles to be delivered to each of her daughters in the event of the latter having any difference between themselves as to the division, and should any such difference arise; and she also gave them power to sell the whole of the said effects and pay the proceeds to her said daughters, equally between them, and she directed her trustees, in the event of either of her daughters predeceasing her, to deliver to the survivor of them the whole of the said furniture and effects, to be used and enjoyed as her own absolute property. By the third purpose of the trust Mrs Wilkie directed her trustees, immediately after her death, to convey and make over to and in favour of her said two daughters, equally between them, share and share alike, and to the survivor of them and the heirs and assignees whomsoever of such survivor, any dwelling-house or heritable property whatsoever which might belong to her at the time of her death, but exclusive of the *jus mariti* and right of management and administration and every other legal right of their respective husbands. By the fourth purpose of the trust, Mrs Wilkie directed her trustees, at the first term of Whitsunday or Martinmas six months after her death, and after the provisions in favour of her said daughters Mrs Wight and Mrs Macleod, made by her in the second and third purposes of the trust, had been implemented, to divide the residue of her estate into three equal shares, and to pay one-third share to each of her said daughters, and the remaining one-third share to her sons George Wilkie, William Wilkie, and Robert Wilkie; and it was thereby declared that if any of her children should die before the period of payment leaving lawful issue of their bodies, such issue should equally among them be entitled to their deceased parents' share, and that the shares of any of her children thereby named who might die before said period of payment without leaving lawful issue, should go, accresce, and belong equally to the survivors of the said children before named, and the

issue of such of them as might have predeceased *per stirpes* and not *per capita.*

By the first codicil Mrs Wilkie revoked the second and third purposes of the said trust-disposition and settlement — "In place thereof I direct my trustees, immediately after my death, or as soon thereafter as they can conveniently do so, to sell the whole of my furniture and effects mentioned in the said second purpose, and also my heritable property mentioned in the said third purpose, and to hold the proceeds thereof, and also the shares of the residue appointed to be paid to my two daughters Mrs Henrietta Wilkie or Wight and Mrs Susan Wilkie or Macleod, under the fourth purpose of the said trust-disposition and settlement, in their own hands, for the benefit and alimentary use of my said two daughters, equally between them, share and share alike, and shall pay, apply, or lay out the same for their behoof respectively in such way and manner as my trustees may consider proper and expedient, and to pay them the capital and interest, or only the interest, at such times or terms, and in such way and manner, and in such sums or proportions, and through such channels as to my trustees shall seem proper and expedient, as to all which I give them the most ample powers and discretion without control or interference on the part of my said daughters or their husbands, or any party or parties acting for them or in their right, the said provisions being purely alimentary, and not subject to the *jus mariti* or right of management or administration of their respective husbands; and I declare that it shall not be in the power of my daughters or their husbands to sell, burden with debt, alienate, or assign the said provisions or any part thereof, either absolutely or in security, nor to anticipate the payment thereof, nor shall the same be arrestable for or affectable by their debts or deeds of any description whatever, nor be subject to the legal diligence of their creditors, all such debts and diligence being hereby expressly excluded and debarred, and in all other respects I confirm my said trust-disposition and settlement."

By the second codicil Mrs Wilkie directed her trustees, after implementing the first purpose of her said settlement, to make payment to her daughter Mrs Wight at the first term of Whitsunday or Martinmas six months after her death of a legacy of £300 sterling in recognition of her attention to her mother during her illness, and she also directed her trustees, in the event of her daughter Mrs Wight residing with her mother at the time of her death, to give her and her husband the free use of her dwelling-house and of the furniture therein until the first term of Whitsunday six months after her death, and it was thereby declared that these provisions were over and above those made to her daughter in her said settlement and preceding codicil, and in all other respects she confirmed her said trust-disposition and settlement.

Mrs Wilkie was survived by her said three sons and two daughters. Immediately after her death the trustees accepted of the trust, and entered on the duties of the office, realised the estate, implemented and fulfilled the primary purposes of the trust, and divided and paid the one-third part or share of the residue to and among her said three sons. The other two-thirds of said residue, along with the proceeds of the furniture and heritable property mentioned in said codicil of 24th October 1883, they retained in their own hands in terms of the said codicil for behoof of the two daughters of the truster, and duly paid them the interest thereof. In addition to the interest the trustees also, in virtue of the powers given them, paid certain sums of the capital, to the amount of £600, to the said two daughters in equal proportions. A sum of £1825 still remained in the hands of the trustees, the interest being paid equally to the two daughters.

Mrs Wight died on 13th August 1892 survived by her husband, and without leaving any child or children of the marriage.

By antenuptial contract of marriage entered into between John Wight and Henrietta Emlay Wilkie, afterwards Wight, dated 22nd July, Henrietta Emlay Wilkie, afterwards Wight, conveyed and made over to trustees, for the purposes therein mentioned, all heritable and moveable estate then belonging to her, or that she might acquire during the subsistence of the marriage.

At the death of Mrs Wilkie her next-of-kin were her three sons and her two daughters Mrs Wight and Mrs Macleod.

After Mrs Wight's death her marriage-contract trustees claimed payment of £912, 10s., the one-half of the said sum of £1825 still in the hands of Mrs Wilkie's trustees, on the ground that that sum vested in Mrs Wight *stante matrimonio*, and that it formed part of the estate conveyed to them under her contract of marriage.

On the other hand, Mrs Macleod maintained that on a sound construction of the trust-disposition and settlement of Mrs Wilkie, and of said codicil thereto, dated 24th October 1883, Mrs Wight had no vested right to the said sum of £912, 10s., the same not having been paid over to her during her lifetime; that there was no direction as to the disposal of said sum contained in Mrs Wilkie's settlement and codicils, and that it was therefore intestate estate of Mrs Wilkie falling to be divided among her next-of-kin, viz., into five equal shares—one share to each son, one to Mrs Wight's marriage-contract trustees, and the remaining share to Mrs Macleod.

Alternatively Mrs Macleod maintained that if the shares provided by Mrs Wilkie to her daughters by her trust-disposition and settlement and codicils vested in them as from the date of Mrs Wilkie's death, she (Mrs Macleod) was now entitled to demand from Mrs Wilkie's trustees payment of the sum of £912, 10s. On the other hand, it was maintained by Mrs Wilkie's trustees, with reference to the alternative, that even if it should be held

that Mrs Wight's trustees were entitled to the said sum of £912, 10s. claimed by them, the corresponding sum held for behoof of Mrs Macleod would remain during her life under the control of Mrs Wilkie's trustees.

For the decision of these points a special case was presented to the Court by (1) Mrs Wilkie's trustees; (2) Mrs Wight's trustees; and (3) Mrs Macleod.

The questions of law were—"(1) Did the said sum of £912, 10s. vest in Mrs Wight and form part of the personal estate assigned by her to her trustees for the purposes mentioned in her antenuptial contract of marriage and supplementary deeds? or (2) Has the said sum fallen into intestacy as part of the estate of the late Mrs Wilkie, and are her next-of-kin entitled thereto in the foresaid shares? (3) In the event of the first question being answered in the affirmative, Is the third party entitled to immediate payment of the corresponding sum of £912, 10s. held for her behoof?"

Argued for the first and second parties—After the truster's death each daughter had a vested fee in their shares of the trust-estate, and the first parties were now willing to pay over to the second parties the share that had vested in Mrs Wight. But the first parties were entitled to retain the third party's share in their own hands for her behoof during her life in terms of the truster's codicil—*Christie's Trustees* v. *Murray's Trustees*, July 3, 1889, 16 R. 913; *Campbell's Trustees* v. *Campbell*, July 17, 1889, 16 R. 1007. Neither the case of *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, nor *Mackinnon's Trustees* v. *Official Receiver in Bankruptcy in England*, July 19, 1892, 19 R. 1051, applied, because the clause in this case did not import into the trust useless mechanism, which the Court were entitled to disregard, but created a trust in order that the daughters might have a sufficient maintenance all their lives, and was not inconsistent with the daughters getting their shares in fee.

Argued for third party—(1) No fee of a share in the trust-estate had ever vested in Mrs Wight, the trustees having full discretion to pay or not to pay to her either capital or income—*Burnside* v. *Smith*, June 10, 1829, 7 S. 735; *Weller* v. *Ker*, March 2, 1866, 4 Macph. (H. of L.) 8; *Chambers' Trustees*, April 15, 1878, 5 R. (H. of L.) 151. (2) If a fee had vested in the daughters, the third party was entitled to immediate payment of her share of the trust-estate, the cases of *Miller* and *Mackinnon's Trustees* being in point.

At advising—

LORD RUTHERFURD CLARK—By the second purpose of her settlement the truster directed her trustees to give certain effects to her daughters Mrs Wight and Mrs Macleod, equally; and by the third, to convey to them certain heritable property in equal shares. By the fourth she directed them to pay to each daughter an equal third of the residue. There can be no doubt that under these clauses the daughters took a right of fee.

By her codicil she revoked the second and third purposes of the settlement, and directed the trustees to sell the subjects which were dealt with in these clauses, and "to hold the proceeds thereof, and also the shares of the residue appointed to be paid to my two daughters Mrs Henrietta Wilkie or Wight and Mrs Susan Wilkie or Macleod under the fourth purpose of the said trust-disposition and settlement in their own hands, for the benefit and alimentary use of my said two daughters, equally between them, share and share alike, and shall pay, apply, or lay out the same for their behoof respectively in such way and manner as my trustees may consider proper and expedient, and to pay them the capital and interest, or only the interest, at such times or terms, and in such way and manner, and in such sums or proportions, and through such channels, as to my trustees shall seem proper and expedient." She further declared "that it shall not be in the power of my daughters or their husbands to sell, burden with debt, alienate or assign the said provisions or any part thereof, either absolutely or in security, nor to anticipate the payment thereof, nor shall the same be arrestable for or affectable by their debts or deeds of any description whatever, nor be subject to the legal diligence of their creditors, all such debts, deeds, and diligence being hereby expressly excluded and debarred."

It is to be observed that the truster does not revoke the fourth purpose, and I think that the effect of the revocation of the second and third purposes, taken in connection with the directions in the codicil, is merely to make a money addition to the interest which the daughters took under the residuary clause. For the money produced by the sale of the property, failing these clauses, is to be dealt with in the same way as the share of residue, and it is, in my opinion, impossible to make any distinction between the rights of the daughters in the residue and in this money.

As the fourth clause is not revoked, the right of fee given to the daughters remains. There is an attempt to limit the daughters in the use of it, but nothing more. There is neither a declaration that their right should be limited to a liferent nor is there a destination to any other person. I am of opinion therefore that the share of Mrs Wight vested in her in fee, and passed to her marriage-contract trustees.

It is a more difficult question whether Mrs Macleod is entitled to immediate payment of her share. But I am of opinion that she is. I hold her to be fiar, and I do not think that the rights of a fiar can be restricted by the limitations contained in this deed. These limitations do not reduce the right of the legatees to anything less than a fee. They are mere attempts to restrain the rights of the fiar in the use of her own property. It cannot, I think, be doubted that creditors would not be excluded, and though a liferent may be declared alimentary, such a declaration has no effect

on a right of fee. Following the case of *Miller*, I think that there is a repugnancy between these limitations and the right of fee, and that the rights of the fiar must prevail.

Mrs Macleod being fiar was, in my opinion, entitled to sell her interest under the settlement, and there could be no possible benefit in keeping up the trust against the buyer. It is, I think, a well-settled principle that the Court will allow a legatee to do directly what may be done indirectly.

LORD TRAYNER—I have no difficulty in arriving at the conclusion that the shares of residue destined under the testamentary writing before us to Mrs Wight and Mrs Macleod vested in them *a morte testatoris*. But then the testatrix has directed her trustees to hold these shares of residue in their own hands "for the benefit and alimentary use" of the beneficiaries named, and to pay them the capital and interest, or only the interest, at such time and in such manner and proportion as to them (the trustees) shall seem proper and expedient. The testatrix has made her intention quite plain that the benefit conferred by her on Mrs Wight and Mrs Macleod should not be paid over to them, but should be so secured to them during their respective lives that no act or deed of theirs should deprive them of it. It may be that the testatrix has not effectually secured the shares of residue in question against the creditors of the beneficiaries, a point on which I give no opinion, but in judging of a claim made by a beneficiary under a testamentary writing, I am not disposed to dissever the right itself from the condition annexed to the right by the giver of it, nor concede to the beneficiary something which the testator has in express terms forbidden or refused. It is maintained, on the authority of the case of *Miller's Trustees*, that the conditions referred to are ineffectual, and cannot be enforced. I am bound to follow the decision in that case if applicable, whatever my own opinion may be. But I think the present case falls within the exception to the rule given effect to in that case—an exception stated by the Lord President in these words—"When there are trust purposes to be secured which cannot be secured without the retention of the vested estate or interest of the beneficiary in the hands of the trustees, the rule cannot be applied, and the right of the beneficiary must be subordinated to the will of the testator." These words, in my opinion, express the law applicable here.

Mrs Wight being dead, and the will of the testatrix having been fulfilled in regard to Mrs Wight's share, I think her representatives are now entitled to payment, and accordingly I would answer the first question in the affirmative. But I think Mrs Macleod is not entitled to claim payment of her share of the residue, and I would therefore answer the third question in the negative.

The LORD JUSTICE-CLERK concurred with Lord Rutherfurd Clark.

LORD YOUNG was absent.

The Court answered the first and third questions in the affirmative, and found it unnecessary to answer the second question.

Counsel for the First and Second Parties—Strachan—Sandeman. Agents—Mack & Grant, S.S.C.

Counsel for the Third Party—W. Thomson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, November 29.

SECOND DIVISION.

[Sheriff of Aberdeen.

ALLAN, BUCKLEY ALLAN, & MILNE *v.* PATTISON.

Cautioner — Discharge of Cautioner by Change on Obligation—Trust-Deed for Creditors Substituted for Composition Arrangement without Cautioner's Consent.

Under a composition arrangement a cautioner guaranteed to a certain extent the due payment of the last instalment of the composition. The first instalment was not paid, and the creditors obtained from the debtor a trust-deed conveying to them his whole estate. No intimation was sent to the cautioner, but after the execution of the trust-deed a meeting of the creditors was called by circular, a copy of which was sent to the cautioner without objection by him. The debtor's estate was realised, and the amount guaranteed was claimed from the cautioner.

Held that the creditors, by taking from the bankrupt the trust-deed without the cautioner's consent, liberated him from the conclusions of the summons.

The affairs of James Chalmers M'Kay, printer, Aberdeen, became embarrassed in the beginning of 1891, and upon 12th February he granted a trust-deed in favour of William James Middleton and John Thomson, Aberdeen, as trustees for behoof of his just and lawful creditors as at the date thereof. After several meetings of creditors they agreed to supersede this trust-deed, and to accept a composition of 7s. 6d. per pound, payable by instalments of 2s. 6d., 2s., and 3s. at four, eight, and twelve months respectively, with security for the last instalment, which amounted in all to about £250. James Y. Pattison, Aberdeen, became one of the sureties for this instalment to the extent of £100, and granted a holograph letter of guarantee, dated 21st February 1891, to Messrs Allan, Buckley Allan, & Milne, advocates, Aberdeen, who acted for the creditors. On the composition contract being concluded M'Kay was reinvested in his estate. The debtor was unable to pay the first instal-