

the death of the husband without issue, it appears to me that the only purpose of the trust which still remains operative is the payment of an alimentary annuity of £18 to the widow. The capital of the trust fund is not disposed of by the deed, because a direction to trustees to pay on a certain event to the "nearest heirs, executors, and assignees whomsoever" of the truster, is not in itself a disposition of the trust-estate but a mere declaration that the estate is to belong in that event to the persons who may be entitled to it, not under the trust-deed, but by virtue of any extrinsic right which may be found to be effectual when the trust purposes have been served. A direction in these terms creates no right in anybody, because nobody can claim under it, except by virtue of some extrinsic right, which is assumed to be effectual irrespective of the trust-deed, and which would be equally effectual if the trust-deed contained no direction whatever as to the ultimate disposal of the estate.

But if the capital of the trust-estate is not disposed of by the deed of trust, the question is whether it is disposed of by either of the other instruments set forth in the special case. These are, firstly, a deed of directions executed 16th October 1886, by which the husband, in consideration of his wife having consented to return and again reside in family with him, agrees to make provision for payment to her on her own receipt of the whole free income arising upon the trust-funds, and also for payment to her of the capital in the event of his predeceasing her and there being no issue of the marriage, and directs the trustees accordingly; and secondly, a will executed on the 17th of February 1886, which is the earliest in date of all the instruments in question, and by which the husband leaves to his wife his whole means and estate, heritable and moveable, and appoints her to be his sole executrix.

The deed of directions was recalled by a letter dated 4th July 1887, and one of the questions in dispute is whether the recall was effectual, or whether the deed was not onerous, and therefore irrevocable. I do not think it necessary to determine this question, because if the deed of directions has been revoked, the only effect of the revocation will be to bring the will into operation, and the will gives the whole estate belonging to Mr Park at his death, and therefore the whole of the trust-fund, to Mrs Park.

It is said that the will is revoked by the trust-deed. But the trust-deed contains no disposition inconsistent with the will—because, as I have already said, it contains no special disposition of the estate at all, but leaves it to be carried by any testamentary deed that the truster might leave, or to pass *ab intestato* to his next-of-kin. The only remaining question is, whether Mrs Park is entitled to immediate payment of the whole trust-funds, or only of "such part as may not be required to be retained to meet her annuity."

I am of opinion that Mrs Park has no power to discharge her annuity, and therefore that the trustees are entitled for their own safety, and bound by their trust, to retain a sum sufficient to provide for payment to her of £18 a-year. The trustees are directed to pay over term by term a certain sum to Mrs Park on her own receipt for her alimentary use. They cannot, without a breach of trust, pay it otherwise than half-yearly, and I think it a settled law that the annuitant cannot relieve them of that duty or defeat her own right by any renunciation or discharge. The case of *White v. White*, 4 R. 786, is directly in point.

LORD RUTHERFURD CLARK concurred.

LORD JUSTICE-CLERK — That is the opinion of the Court.

The Court answered the second part of the first alternative of the first question in the affirmative.

Counsel for the First Parties—Guthrie.

Counsel for the Second Parties—Jameson. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Third Parties—W. Campbell. Agents—Fraser, Stodart, & Ballingal, W.S.

Saturday, March 15.

SECOND DIVISION.

RITCHIE AND OTHERS v. DAVIDSON'S TRUSTEES.

(*Ante*, Thomson v. Davidson's Trustees, June 9th 1888, vol. xxv. p. 547; 15 R. 719.)

Trust—Charitable Trust—Administration of Trust—Discretion of Trustees.

A truster directed his trustees (3) to pay an annuity of £20 to his half brother, and further (5) to hold his estates, which were heritable, and apply the free yearly revenue "for preserving the aged and infirm among the descendants of my father from want or from the necessity of applying for public relief, and for obtaining for the young among the said descendants, both boys and girls, such a good, sound, plain and useful education as will enable them to earn a livelihood for themselves, with power . . . to maintain the young among the said descendants either in family with their parents or otherwise, while at their education . . . and I hereby declare that my trustees shall not be entitled to apply any sum beyond twenty pounds sterling per annum for the benefit or relief of any one either young or old of said descendants."

The truster directed the surplus revenue to be divided among certain of his relatives and their representatives *per stirpes*.

The trustees with one exception had a direct personal interest in increasing the surplus revenue. The net revenue of the trust for 1889 was £580, and the expenditure under the 5th purpose, £195, 8s. 4d. A granddaughter of the trustor's father, who had five children between the ages of eleven years and four months, and whose husband's earnings averaged 18s. per week, applied to the trustees for help, and they offered to allow her £1, 13s. 4d. per month and to pay for the schoolbooks of the eldest daughter, who had passed the sixth standard and was qualifying for a pupil teacher. At the same time the trustor's half-brother claimed an addition to his annuity, which had proved insufficient for his wants. The trustees refused the application, on the ground that it was excluded by the terms of the trust-deed, but they offered to pay for medical attendance and medicines.

The Court held (1) that the proposals made by the trustees to the first applicant were insufficient, and directed them to make her an allowance of £24 per annum; and (2) that the trustor's half-brother was also a beneficiary under the fifth purpose and entitled to a further allowance of £10 per annum.

The late William Davidson of Newhall died in December 1860 leaving a trust-disposition and settlement dated 21st May 1860, whereby he conveyed certain lands to trustees named therein. The trustor provided, third, that the trustees should "make payment of a free yearly annuity of twenty pounds sterling to each of my two half-brothers, George Davidson, now or lately residing at Oyne, Pitcaple, and James Davidson, Dudwick, Ellon, if alive at the time of my death; declaring these two annuities to be also payable out of the revenue of my said estates, and during the lifetime of the respective annuitants: . . . Fifth, That the trustees should hold the said estates, and apply the free yearly revenue arising from the same, or such portion thereof as may be necessary, as after mentioned, for the benefit of the lawful descendants of my father, the deceased Alexander Davidson, I hereby direct and appoint my said trustees to apply the said revenue for preserving the aged and infirm among the descendants of my said father from want, or from the necessity of applying for public relief, and for obtaining for the young among the said descendants, both boys and girls, such a good, sound, plain, and useful education as will enable them to earn a livelihood for themselves—it being my desire that their religious education shall be carefully attended to, and that they shall be brought up in the principles of the Free Church of Scotland, with power also to my said trustees to maintain the young among the said descendants, either in family with their parents or otherwise, while at their education, and also during such time as they or any of them may be apprenticed by my said trustees to business, which my said trustees are hereby empowered to do; and I hereby declare that my said trustees shall

not be entitled to apply any sum beyond twenty pounds sterling per annum for the benefit or relief of any one, either young or old, of said descendants, and that only while, in the judgment of my said trustees, he or she stands in need of it, in supplement of his or her own exertions." The sixth purpose provided that in the event, which happened, of the free yearly revenue being more than sufficient for the foregoing purposes, the trustees were directed to accumulate and invest the yearly surplus until an opportunity should arise of purchasing land, which they were directed to do as soon as possible. The seventh purpose directed the trustees, after the expiry of the legal period during which the revenue could be accumulated, to divide the free yearly surplus into four equal parts which were to be paid to his brother and three of his sisters and their families *per stirpes*.

The estate had largely increased since 1860. The capital of the trust amounted to about £20,000, and for 1889 yielded a nett annual revenue of £580. For the year ending 30th June 1889 the expenditure under the fifth purpose was £195, 8s. 4d. With the exception of the annuity of £20 per annum to meet the annuity due to George Davidson, the other brother James Davidson having died, the whole of the nett revenue was now available for the fifth and main purpose of the trust-deed.

It was admitted that the trustees with the exception of one of their number had a direct personal interest in the surplus revenue under the seventh purpose of the trust-deed.

Upon the 11th December 1889 a petition was presented by Mrs Davidson or Ritchie and her children, and also by George Davidson, the trustor's half-brother.

The petitioners stated that Mrs Ritchie was a granddaughter of the trustor's father, and that her five children between the ages of 11 years and 4 months belonged to the class for whose benefit, maintenance, and education the trustees were appointed to apply the free revenue. She had no means of her own, and the wages of her husband, who was a cooper by trade, averaged no more than 18s. a-week when he was in employment, but from the nature of his work he was often out of employment for months at a time. He was desirous that his children should obtain an education of the character referred to by the trustor. An application was made to the trustees in August 1888, and after inquiry the trustees agreed to give a sum of £3 to date and an allowance at the rate of £2 per month until further notice. That income was paid up to 15th April 1889, but on 17th July 1889 the trustees intimated that it would be discontinued for the future. After some further correspondence the trustees on 9th October 1889 agreed to a monthly allowance of £1, 13s. 4d., to run as from 12th September preceding. It was averred that this allowance was entirely inadequate to the wants of the children. Ritchie had been out of work for six weeks, and his earnings for the first eight months of the year were only £21.

In reducing the allowance and in refusing to allow anything for the period between 17th July and 12th September 1888 the trustees had not been acting reasonably in the discharge of their powers. The petitioners therefore craved the Court to fix the allowance to be made to the Ritchies at £24 per annum.

The other petitioner, George Davidson, was the half-brother of the truster mentioned in the third purpose of the trust. He now averred that he was seventy-eight years of age, that on account of his increasing age and infirmities he found this sum, which was his only means of support, to be inadequate to supply his necessary wants. He had applied to the trustees for an allowance under the fifth purpose, but they had refused the application. In doing so they were acting contrary to the spirit and directions of the truster in his fifth purpose. He therefore craved the Court to order him a further allowance of £10 per annum.

The trustees lodged answers, in which they stated that they had endeavoured to carry out the purposes of the trust, and had made what they considered adequate allowances in each case. Ritchie was out of work when they agreed to pay £24 per annum, and they had discovered that from 17th July to 12th September, during which the annuity was discontinued, Ritchie was earning wages of from 25s. to 30s. per week. In fixing the reduced allowance they had in view the recent abolition of school fees under the fifth standard, and the allowance was substantially equivalent to that formerly given.

With reference to the petitioner George Davidson, his application was refused upon the ground that he had not shown a necessity for any further allowance than the annuity of £20, and that he was already provided for by the trust-deed. In point of fact £20 a-year was sufficient for his maintenance. It was specially declared in the trust-deed that the trustees should not be entitled to apply any sum beyond £20 per annum for the benefit or relief of any one of the descendants of the truster's father, either old or young. His claim was thus excluded.

When the petition first came before the Court counsel for the petitioners made certain statements as to the circumstances of the cases which were not in the petition, and which the trustees stated had never been put before them. After the adjournment to enable these statements to be specifically put before the trustees for their consideration, counsel for the trustees stated that they were willing to pay the rate of aliment of £1, 13s. 4d. to the Ritchie family, and also to provide school books for the use of the eldest child, who was reported by her masters to be a promising pupil, and who was qualifying for a pupil teacher. With regard to George Davidson, while they could not increase his allowance, they were willing to pay for medicines and medical attendance for him.

Counsel for the petitioners argued—The sum given to the Ritchies ought to be £24 as formerly. The father was often out of

work and extra expenses caused by the children growing up made it as necessary as before, although school fees had been abolished. An education to enable them to earn their livelihood did not mean merely the first five standards. There was a very large surplus yearly, and the trustees ought to exercise a liberal discretion. Although George Davidson got £20 under the third purpose he might still be a legatee under the fifth purpose, as one of the injunctions was to give such allowances as would keep the aged beneficiaries from seeking parochial relief.

The respondents argued—The allowances to be given was a matter entirely within the discretion of the trustees; they had made inquiry into the matter and considered the allowances they gave sufficient, and the Court would not interfere with their discretion. George Davidson had an allowance of £20 under the third purpose. The fifth purpose of the deed expressly stated that no beneficiary could get more than £20, so the trustees were barred from giving any more. Besides, the trustees had satisfied themselves that that sum was sufficient to keep him comfortably.

At advising—

LORD RUTHERFURD CLARK—This is a petition by which certain persons, in the first place, who are beneficiaries under the trust-disposition and settlement of the late William Davidson of Newhall, apply to the Court to order an increase of the allowance at present being made to them by the trustees, and in the second place, another beneficiary applies for a new allowance.

I take the case of the Ritchies first.

It appears that they had formerly applied to the trustees for an allowance out of the trust funds, and the trustees had agreed to give them a sum of £24 per annum. That allowance was afterwards stopped altogether for some months, but after correspondence the trustees agreed to give the Ritchies £1, 13s. 4d. per month, as they considered that, owing to the abolition of fees in the board schools, that would be a sufficient sum to give to the family. That is to say, the trustees reduced the sum they gave to the Ritchies by 6s. 8d. per month. The question now is, whether these beneficiaries are entitled to get £24 per annum restored to them, or whether the trustees are entitled to diminish it.

No doubt the question of the amount to be given to any of the beneficiaries is left greatly to the discretion of the trustees, and I am not prepared to say that the amounts which they have been giving to the petitioners are not fair and reasonable, but having regard to the circumstances which have been brought before us in the course of the case, the position which the trustees after considering these circumstances now take up is this, that they are willing to continue the allowance of £1, 13s. 4d., and also to pay for certain school books and other expenses which must be incurred on behalf of the eldest daughter, who seems to be a very promising girl.

The petition is presented under the fifth clause of the trust-disposition, by which the trustees were to hold the estates and "apply the free yearly revenue arising from the same, or such portions thereof as may be necessary as after mentioned, for the benefit of the lawful descendants of my father, and for obtaining for the young among the said descendants such a good sound, plain, and useful education as will enable them to earn a livelihood for themselves." That purpose, of course, precedes the seventh purpose by which the trustees are directed to divide among themselves, as they also are beneficiaries under the settlement, the free surplus revenue arising from the trust-estate. Now, I think the trustees acted fairly in giving this sum of £24 to the Ritchie family. It is not a large sum, but it is not said to be too small. I do not think that they should withdraw or diminish it. I do not think that the trustees have shown any good reason why it should be diminished, and the trustees almost admit that they are willing to continue it, as they state they are willing to pay for certain expenses which amount to nearly the same sum. I think it would be a better plan if a fixed sum of money was given, and I would propose that the sum of £24 should be paid to the Ritchie family as from 17th July 1889.

The case of the other beneficiary is a different one. The first question that arises is, whether George Davidson is a beneficiary under the fifth clause of the trust-deed at all. It is said that he is not, because he receives a legacy of £20 under the third purpose, and that the trust-deed provides that no relation of the truster is to receive more than £20 altogether. I am satisfied, however, that he remains a beneficiary under the fifth purpose, besides being a legatee under the third purpose. The question then arises, how is this to be managed? The trustees propose to do it by paying for medicines and medical attendance for the old man, but I think that the fairer way would be to order them to pay to him the sum of £10 per annum.

LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court pronounced an interlocutor fixing the allowances to be made by the trustees to the respective petitioners at £24 per annum for the petitioners Elizabeth Taylor Ritchie, Sarah Jane Ritchie, Peter Ritchie, Sylvester Davidson Ritchie, and Mary Scott Ritchie, payable to their said father, and £10 per annum for the petitioner George Davidson.

Counsel for the Petitioners—Kennedy. Agent—J. D. Macaulay, S.S.C.

Counsel for the Respondents—W. Campbell. Agents—Skene, Edwards, & Garson, W.S.

Saturday, March 15.

FIRST DIVISION.

[Lord Wellwood, Ordinary.]

FRASER-TYTLER AND ANOTHER
(FRASER-TYTLER'S TRUSTEES) v.
MILTON AND OTHERS.

Process—Proof or Jury Trial—Declarator of Right-of-Way.

In an action of declarator of the absence of a public right-of-way and of interdict, it appeared from the productions that the roads claimed by the defenders did not terminate within or at the boundary of the pursuers' property, and that the defenders would require to prove prescriptive use of the continuation of a specified road to some public terminus through the lands of other proprietors who were not parties to the process. The Court appointed the action to be tried by proof before the Lord Ordinary.

This was an action of declarator and interdict by the trustees of William Fraser-Tytler of Sanquhar, Elgin, against certain parties residing in Forres, to have it declared that the portion of the said estate which lay between the town of Forres and the farm of Marcassie, the property of A. D. Ainslie, of Delgetty Castle, was free of any public right-of-way.

The defenders, as members of the public, claimed a right-of-way over a portion of the lands of Sanquhar, and they averred as follows—"From time immemorial, or at least for forty years immediately prior to the raising of the present action, there has been a public road and right-of-way for foot-passengers, which has been used continuously and without interruption by members of the public through the said estate. The said public road and right-of-way was the original or at all events a very ancient public road between the burgh of Forres and other places to the south and west, and the village of Rafford and other places to the south and east, and was used by the public from the first, and for greatly more than the prescriptive period, not only for foot passage but for driving sheep, cattle, and other bestial, and for cart traffic." They averred that after reaching the march of the Sanquhar estate the road entered the farm of Marcassie, and thence proceeded to the village of Rafford.

Mr Ainslie was not called as a party to the process.

The pursuers denied the existence of any such right-of-way as that claimed by the defenders.

In April and May 1889 an agitation was commenced in Forres with a view to induce the public to vindicate their rights over the road in question; and upon several occasions members of the public proceeded along the said road after taking, when necessary, violent measures to obtain access.

The defenders pleaded—"The road in