policy of assurance for £1750 by the Northern Assurance Company on the life of the deceased Mrs Euphemia Wilson Baxter or Ramsay, dated 11th August 1892, subject to the security held by the said company, and that the second party is bound to repay to the first parties the debt of £1500 with the accrued interest, being the amount of the debt due by him under bond and disposition in security, dated 16th August 1892, all as deducted by the said Northern Assurance Company on paying over the proceeds of the said policy for £1750: Find and declare accordingly, and decern."

Counsel for the First Parties — Cooper. Agents—Henry & Scott, W.S.

Counsel for the Second Party — E. H. Robertson. Agents—W. & J. Cook, W.S.

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*Wednesday, February* 1.

## FIRST DIVISION.

## RATTRAY'S TRUSTEES *v.* RATTRAY AND OTHERS.

*Succession—Fee or Liferent—Liferent with General Power of Disposal*

A testator directed his trustees upon the death of himself and his wife to realise his estate and to divide and set apart the residue in certain proportions for his daughter and his son's children, directing them at the same time to pay to those beneficiaries "during their respective lives the annual income or revenue of said shares, and at their respective deaths they—the trustees—shall pay over their respective shares to their respective heirs or assignees, declaring that no part of my said estates shall vest in my said daughter and grandchildren until the death of the survivor of me and my said wife except to the extent that they may test thereon."

The daughter and the grandchildren having survived the testator's widow, *held* that the liferent and power of disposal was equivalent to a fee, and that their respective shares vested in them at the date of the widow's death.

*Re Weddell*, February 3, 1849, Scottish Exchequer Reports; *Morris* v. *Tennant*, July 6, 1855, 27 S.J. 546, March 26, 1858, 30 S.J. 493; *Alves* v. *Alves*, March 8, 1861, 23 D. 812; *Pursell* v. *Elder*, June 13, 1865, 3 Macph. H.L. 58, *explained and commented on.*

By his trust-disposition and settlement Peter Rattray, who died in 1874, conveyed his whole heritable and moveable estate to trustees for the following among other trust purposes:—"(Twelfth) On the death of me and my said wife, my trustees shall realise my said estates as they shall think proper, and invest the proceeds for the benefit of this trust, but should they consider it to be most advantageous not to realise it, or part thereof, they shall use their discretion and act accordingly, and they shall divide and set apart the residue into three shares as follows, videlicet:—one-half of said residue shall be set aside for my said daughter, one-fourth thereof for my said grandson David Rattray, and one-fourth for my said granddaughter Margaret Rattray, and they shall pay to them, or for their behoof, during their respective lives, the annual income or revenue of said shares, and at their respective deaths they shall pay over their respective shares to their respective heirs or assignees, declaring that no part of my said estates shall vest in my said daughter and grandchildren until the death of the survivor of me and my said wife, except to the extent that they may test thereon: Declaring further, that in the event of my said daughter predeceasing me and my said wife, and dying intestate, my said trustees shall retain my daughter's said share for behoof of her children, and shall maintain those who are unable to maintain themselves until the youngest is twenty-one years of age, when my said trustees shall divide their mother's share equally among her said children."

The testator was survived by his wife, who died in March 1895, by a married daughter Mrs Chatham, and by two grandchildren, the children of the testator's son who predeceased him.

By her trust-disposition and settlement Mrs Chatham, who died in July 1875, conveyed to trustees for certain purposes her whole estate, heritable and moveable, and more particularly the share of the estate destined to her and her family by her father's settlement.

This special case was presented by (1) Mr Rattray's trustees, (2) Mr Rattray's grandchildren, (3) Mrs Chatham's trustees, to determine the following questions, *inter alia*, arising upon the construction of Mr Rattray's settlement, viz.—"(1) Did Mrs Chatham, prior to her death, acquire a vested right to the fee of one-half of the residue? (2) Have the second parties acquired a vested right to the fee of their respective shares of residue? (5) If the first question is answered in the affirmative, are the third parties, as representing Mrs Chatham, entitled to immediate payment of the shares of residue destined to her? (6) If the second question is answered in the affirmative, are the second parties entitled to immediate payment of their respective shares of residue?"

The first parties contended that the testator's intention was to restrict the interest of his daughter and grandchildren in the residue of his estate to a liferent with a power of disposal, and that consequently no share of the residue had vested in Mrs Chatham or in the second parties.

The second and third parties contended that the shares of residue vested and became divisible at the date of the death of the testator's widow, and further that the first parties were bound immediately to divide the whole estate among the beneficiaries.

The following cases were referred to at the discussion—*Hunter's Trustees* v. *Hunter*, February 9, 1888, 15 R. 399; *Brown* v. *Brown's Trustees*, February 27, 1890, 17 R. 517; *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301; *Wilkie's Trustees* v. *Wight's Trustees*, November 30, 1893, 21 R. 199.

At advising—

LORD M'LAREN — At the close of the argument yesterday I believe none of your Lordships had any doubts as to the decision of this case. But I am glad to have had the opportunity of making sure that nothing is overlooked which has a bearing on the questions submitted to us.

The chief questions are whether a right of fee in the residue of the estate of the testator Mr Rattray has vested in his daughter Mrs Chapman and the two children of his son who survived their father. Now, the destination in this case presents certain peculiarities which I shall presently consider a little in detail, but in substance it is this, that after providing an annuity to his wife, the testator goes on to direct his trustees, after the death of himself or his wife, to realise the residue of his estate and to pay the income of that estate to the beneficiaries whom I have named, for life, then at their deaths the capital is to go to their respective heirs and assignees.

This case, I think, must be distinguished carefully from two forms of destination which are of not uncommon occurrence in wills and trust-deeds The one is where a liferent is given to a person and the fee to his children, and there is added a power of disposal in case the liferenter shall die without leaving issue. The other case is where there is a liferent with a general power of disposal, and failing disposal a destination-over to persons specified by name or description. Now, there is a seriesof decisions with reference to destinations in the two forms which I have described, the essence of these decisions being that wherever there is a contingent destination to fiars named or designed, that would prevent the power of disposal being added to the liferent so as to create a fee; in any event, it would prevent that result being attained so long as the conditional destination should be in force. There is the case of *Weddell* in the Scotch Court of Exchequer, where the question of fee or liferent was raised to determine the incidence of legacy-duty. In the case of *Morris* v. *Tennant*, which went to the House of Lords, and was the subject of a very instructive judgment by Lord St Leonards, the question of fee or power of disposal arose in an action of reduction on the head of deathbed. There is also the case of *Alves* in this Court. But I observe in all these cases the eminent judges who gave their opinions recognised that if the liferent and the power be given to one person, and there be no other person claiming an interest in the residue, that is, to all intents and purposes, a right of fee. And lastly, there is the very authoritative and unqualified opinion of Lord Westbury in the well-known case of *Pursell* v. *Elder* (3 Macph., H.L. 58), where his Lordship uses the expression that a grant to a person with power to dispose of the subject as he pleases is nothing more than a mode of giving him the fee. At the same time, his Lordship distinguishes the case before him, where there was a qualification of the power.

Now, in the present case we have presented to us for decision, so far as I know for the first time, a case of a gift of a liferent, or what is equivalent, a direction to trustees to pay to certain persons the income of the truster's estate for life, and then a direction to deal with the fee by giving it to assignees, which in my opinion may be regarded as a general power of disposal or assignment. It is, at all events, what Lord Westbury describes as giving the grantee the power to deal with the subject as he pleases. Accordingly, it appears to me that the only point—I will not say difficulty—which the case presents is, that it is desirable to examine the provisions of this residuary clause in order to make sure that there are no qualifications of the general purpose or intent such as would prevent the gift of the fee from taking effect.

The residuary clause presents three points for consideration—first, there is a direction in the 12th purpose, that should the trustees consider it most advantageous not to realise the testator's estate or part thereof, they shall use their discretion and act accordingly. It appears to me that this is a direction which concerns only the administration of the estate, and can have no effect in qualifying the destination, for it is nothing more than a direction to do what would be the duty of any trustee—to use his discretion as to the time of realising the securities which form the fund for division.

The next point might have required more consideration, and that is the direction to pay the annual revenue of the shares to the legatees during their respective lives. But I think it can no longer be a matter of doubt or question that if the full fee of a sum of money is given to legatees, a direction to the trustees who manage that estate for the legatees, to pay them the income for life, has no further effect than as a mode of management, to subsist only as long as the beneficiary is content that it should subsist. The fiar can at any time recal the trust made for his benefit, just as he can recal a trust made by himself for the more prudent and economical management of his estate.

Lastly, it is set forth in the latter part of the residuary purpose — "No part of my estate shall vest," &c. That is followed by a condition to take effect in the event of the truster's daughter predeceasing the testator or his wife. Now, I do not doubt that the declarations to which I refer would be effectual to prevent the vesting of fee during the widowhood of Mrs Rattray. But then she only survived her husband one year, and all those provisions being conditional upon the death of the legatees during Mrs Rattray's lifetime, it is unnecessary to consider them further.

In all the circumstances I am of opinion

that the fee of the residue of Mr Rattray's estate vested in his daughter and his grandchildren at the death of the testator's widow in the proportions specified; that being so, and if your Lordships agree with me, it follows that the first, second, fifth, and sixth questions will be answered in the affirmative, and then I think it will be unnecessary to answer the third and fourth questions, which are put upon the hypothesis that there is no fee given.

LORD KINNEAR and the LORD PRESIDENT concurred.

LORD ADAM was absent.

The Court answered the first, second, fifth, and sixth questions in the affirmative.

Counsel for the First Parties—D. Anderson. Counsel for the Second and Third Parties—A. M. Anderson. Agents for all Parties—Macpherson & Mackay, S.S.C.

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*Friday, February 3.*

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.

## STILL'S TRUSTEES *v.* HALL.

*Succession—Division per capita or per stirpes—"Nephews and Nieces."*

A testator directed his trustees to pay the liferent of the residue of his trust-estate to his widow, and on her death to convey and make over one-half of the residue "to and in favour of my nephews and nieces, Mrs Catherine Stewart Morison or Sinclair, Alexander Simpson, Peter or Patrick Simpson (a niece and two nephews), the children of the now deceased William Simpson (a nephew), the children of the also now deceased Charles Still Simpson (a nephew), Major Simon Simpson, Captain James Simpson, George Simpson, Catherine Stewart Simpson or Matheson (nephews and niece), James Oughterson (only) son of the deceased Charlotte Still Simpson or Oughterson (a niece), Alan Matheson (only) son of the deceased Rachel Ellinor Simpson or Matheson (a niece), and Helen Anne Simpson or Stewart (a niece), and to the lawful issue of such of my said nephews and nieces as may have died leaving lawful issue, their deceased parent's share equally among them, and failing any of my said nephews and nieces without leaving lawful issue, to the survivors of them equally, whom also failing, to their nearest lawful heirs whomsoever."

The testator died survived by the liferentrix and all the beneficiaries called by him. Between his death and the death of the liferentrix three of the beneficiaries died, viz., Peter or Patrick Simpson, without leaving issue, and James Simpson and Mrs Stewart, who both left issue.

On the death of the liferentrix, *held* (1) (*rev.* judgment of Lord Ordinary) that the words of the primary clause imported a division *per stirpes* among nephews and nieces who had survived the liferentrix and the issue of those who had predeceased, and (2) that the share which would have fallen to Peter or Patrick Simpson if he had survived the liferentrix fell to be divided *per stirpes* among the nephews and nieces of the testator and those grand-nephews and grandnieces named or instituted as primary legatees in the settlement who had survived the liferentrix.

Charles Stewart Still, of Burgar and Smoogrow, died on 11th April 1879, leaving a trust-disposition and settlement dated 30th May 1878, in which he left his whole estates, heritable and moveable, to trustees for, *inter alia*, the following purposes:—Secondly, that his wife Mrs Anne Thomson Low, otherwise Still, should have the liferent of his whole estate; "Thirdly, that on the decease of my said spouse should she survive me, or on my own decease should she predecease me, the said whole remainder of my estates, heritable and moveable, real and personal, shall be divided into two equal parts," the one of which should be conveyed to certain persons, "and the other of which two equal parts shall be conveyed and made over . . . to and in favour of my nephews and nieces, Mrs Catherine Stewart Morison or Sinclair, residing at Durban, Natal, the said Alexander Simpson, advocate and Procurator-Fiscal of Aberdeenshire, Peter or Patrick Simpson, master mariner, the children of the now deceased William Simpson, New Zealand, the children of the also now deceased Charles Still Simpson, engineer in the East Indies, the said Major Simon Simpson, Royal Artillery, Captain James Simpson, Royal Engineers, George Simpson, sheep farmer in New Zealand, Catherine Stewart Simpson or Matheson, wife of Reverend John Matheson of the Presbyterian Church, Hampstead, James Oughterson, lieutenant, Eighteenth Royal Irish Regiment, son of deceased Charlotte Still Simpson or Oughterson, Alan Matheson, son of deceased Rachael Ellinor Simpson or Matheson, and Helen Anne Simpson or Stewart, wife of Dr Robert Stewart, Glasslough, Ireland, and to the lawful issue of such of my said nephews and nieces as may have died leaving lawful issue their deceased parent's share equally among them, and failing any of my said nephews and nieces without leaving lawful issue, to the survivors of them equally, whom also failing, to their nearest lawful heirs whomsoever." James Oughterson and Alan Matheson were both only children of their respective parents.

With reference to the second equal part or share of the residue, the truster was survived by his wife Mrs Anne Thomson Low or Still, the liferentrix, and by all the beneficiaries named by him.

Between the date of the testator's death and the date of the death of Mrs Still, the liferentrix, three of the beneficiaries died, viz., Peter or Patrick Still Simpson, who