Tuesday, February 27.

SECOND DIVISION.

KIRKWOODS *v.* NICOL AND OTHERS (KIRKWOOD'S TRUSTEES).

Succession — Trust — Administration — Trustees Directed to Invest Certain Sum to Provide Alimentary Liferents to Children, to Pay Themselves Annually Certain Sums, and to Divide Residue among Children — Retention of Residue to Meet Payment to Trustees — Payment out of Income of Alimentary Fund.

A testator directed his trustees to invest a certain sum for behoof of his children in alimentary liferent, to divide the residue among his children on a certain event, and to pay themselves a certain sum annually.

Held that, on arrival of the period for division of the residue, the trustees were not entitled to retain part thereof to provide for the annual payment to themselves, but must charge the same against the income of the alimentary fund.

A Special Case was presented for the opinion and judgment of the Court by John Macdonald Kirkwood and others, the four children of the late James Kirkwood, printer in Edinburgh (*first parties*), and the Rev. Thomas Nicol, D.D., and others, the trustees acting under James Kirkwood's trust-disposition and settlement (*second parties*).

The late James Kirkwood, who died on 25th March 1901, by his trust-disposition and settlement conveyed his whole estate to certain persons named and such others as might be assumed, "and the acceptors and acceptor, survivors and survivor of them, and the heir of the last survivor," as trustees, and after directing payment of mournings for his children and household debts, deathbed and funeral expenses, and the expenses of executing the trust and certain legacies, provided as follows— "*In the sixth place*, with the view of securing to my children an alimentary provision, I direct my trustees on my decease to set aside out of the first available funds of my estate the sum of Sixteen thousand pounds sterling, to be held by them in trust for my children equally," for, *inter alia*, payment to the children and the survivors or survivor equally among them of the free annual income of the said sum in liferent alimentary: . . . "*And in the seventh place*, I direct my trustees to hold and retain the whole residue and remainder of my means and estate for behoof of my children equally, share and share alike, . . . and, subject to the discretion hereinafter conferred on my trustees, I direct them to make payment to my sons of their shares at the first term of Whitsunday or Martinmas which shall happen after my death, and after they shall respectively attain twenty-five years of age; and in regard to the shares of my daughters, I direct my trustees at the first term of Whitsunday or Martinmas which shall happen after my death, and after my daughters respectively attain twenty-five years of age or be married with the approbation of my trustees, whichever of these events shall first happen, to pay or to settle on my daughters, exclusive of the *jus mariti* and right of administration of their husbands, their respective shares. . . . : And I hereby direct my trustees to pay to themselves annually the sum of Twenty-six pounds five shillings sterling, to be divided equally among them, but I declare that the acceptance by them of said sum shall not deprive them of the powers, privileges, and immunities of gratuitous trustees as conferred by statute."

The Case stated—"5. The second parties, in terms of the testator's directions, set aside the alimentary trust fund of £16,000 provided for by the sixth purpose of the trust-disposition and settlement, and have paid the revenue thereof to the first parties regularly. They have also divided among the first parties the residue of the estate, but have retained the sum of £900 or thereby to meet the legacy of £26, 5s. per annum payable to the trustees. . . . .

"6. . . . The first parties *maintain* that the said legacy forms a proper charge against the said alimentary fund of £16,000, upon the ground that the trust administration only now subsists for the purposes of this particular fund, and that the said sum of £900 retained out of the general residue to meet the said legacy falls to be divided among the first parties as residuary legatees of the testator.

"7. In the event of the Court being of opinion that the said legacy of £26, 5s. cannot be charged against the alimentary fund, the second parties hereby express their willingness to discharge the said legacy. Upon this further ground the first parties also maintain that they are entitled to an immediate division among them of the said sum of £900.

"8. The second parties maintain that the said legacy is a charge upon the general estate of the testator, and that the said alimentary fund of £16,000 is not liable to be charged with the said legacy or any part thereof. Further, the second parties have been advised that it is doubtful whether, in the event of a discharge by them of their annual legacy, they would be in safety to divide the said sum of £900 or thereby among the first parties as residuary legatees of the testator, as he directed the said legacy to be paid yearly to his trustees for the time being, whether original or assumed, and that, although they should discharge their said legacy, their discharge would not bind future trustees who may hereafter be assumed."

The *questions of law* were—"(1) Are the second parties, in the circumstances set forth in the case, entitled to charge their annual legacy against the alimentary fund of £16,000? (2) In the event of the first question being answered in the affirmative, or, otherwise, in the event of the second parties discharging their annual legacy,

are the second parties entitled to divide among the first parties the residue of £900 retained by them?"

LORD JUSTICE-CLERK—This is a somewhat novel question, but I have no doubt in my mind what is the proper answer to be made. The testator here ordered his trustees to set aside a capital sum of £16,000 out of his estate for certain alimentary liferents, and for other purposes which it is unnecessary to enumerate. He also directed that the residue should be divided in a certain way, and the trustees have carried out that direction, and have distributed the whole remainder of the estate, with the exception of a sum of £900 which they have retained in their hands to meet the gift that was given to them by the testator, for their trouble, in his will, namely, twenty-five guineas to be divided annually among the trustees.

Now the beneficiaries who are entitled to the residue maintain that this £900 ought not to be reserved, but ought to be paid to them as being part of the residue, the practical result of which will be that if the gift to the trustees is to continue to be paid, it must be paid out of the annual proceeds of the £16,000. The present trustees state their willingness to give it up altogether, and that would remove any difficulty as regards them personally, but then it is said that these trustees may gradually disappear, and that the heir of the last survivor is to be the trustee in the event of their all dying without assuming other trustees, and that he then accepting the trusteeship must assume certain other trustees. Therefore the present trustees point out that a renunciation by them might not bind their successors.

I am decidedly of opinion that the trustees are not entitled to retain this sum of £900 in their hands for the purpose stated. It is part of the residue, and in my opinion must be divided among the beneficiaries. The purpose of the trust being to pay liferents out of the proceeds of the £16,000, I think the income derived from this sum must suffer deduction of all the expenses which the trustees have to meet, including the payment to themselves, before distribution of the balance among the persons entitled to it.

LORD SALVESEN—I entirely agree. I think the key to the problem that is presented to us for solution is what is meant by "residue." Mr Wilton contended that you can only ascertain residue after you have made provision, for the expenses of executing the trust by setting aside a capital sum for this purpose, and that accordingly it was the trustees' duty to retain the sum of £900, the income of which would suffice to pay the annual sum of twenty-five guineas which the testator said they should receive for the performance of their trust duties. I asked Mr Wilton whether he could refer us to any case in which it had been held that in ascertaining residue you had first to make an estimate of the annual expenses of the trust, and capitalise that and deduct it from whatever the trustees had in their hands, but he was unable to refer us to such a case. The truth is that the expenses of a trust are a continuing charge which will vary according to the amount of the estate which the trustees hold, and which are properly a charge upon whatever estate the trustees happen to be in possession of at the time. Now here, according to the scheme of the testator, the whole of his estate was to be divided amongst his children after £16,000 had been set aside as an alimentary provision for them. He contemplated that that trust would continue for an indefinite period—and it may be a very long period—and it is admitted that the expense of collecting the revenue and of having the accounts audited forms a deduction from the revenue payable to the alimentary liferenters. I see no distinction between that and the sum which is to be paid to the trustees in accordance with the testator's expressed direction. I think that also, in this particular trust, forms just part of the expense of administration of this trust estate which remains. Of course the testator might have directed that the sum payable to the trustees should be reduced after so many of the trust purposes had been fulfilled, but he gave no such direction, and we must therefore interpret his will as meaning that during the subsistence of the trust the trustees are entitled to charge this sum for their trouble in connection with the trust management. So reading the settlement I have no difficulty in arriving at the same conclusion as your Lordship in the chair.

LORD GUTHRIE—I agree. This trust has lasted for some years, but the question before us has only arisen since the beneficiaries attained the age of twenty-five and became entitled to a division of the residue. Up to the present no part of the annual fund of twenty-five guineas payable to the trustees has been charged against the fund which was set aside by the trustees on the testator's death as an alimentary provision for his children, and it is not necessary to decide whether that was right or not—whether a proportion of that sum ought in accounting to have been charged against that provision. The question arises now because the trustees have paid away all the residue except a sum of £900 which they have set aside to meet that payment, and, as stated in the case, to meet that payment only, not, that is to say, in addition to meeting the expenses of the trust.

I agree that the view presented by Lord Salvesen as to the meaning of the word "residue" is sound. Further, if one considers the clause providing for payment of the expenses of executing the trust, I am not at all clear that on a true construction of the settlement that was intended to include anything except the ordinary expenses of executing every trust in every case. I do not think that the subsequent purpose at the end of the will, by which the truster makes this unusual but extremely appropriate and proper provision

for his trustees, was in his contemplation when he made the provision about expenses in the earlier part of the settlement.

LORD DUNDAS was sitting in the Justiciary Court in Glasgow.

The Court answered the first question in the affirmative, and the second question by declaring that the second parties were entitled to divide among the first parties the residue of £900.

Counsel for the First Parties—Ballingall. Agents—W. & W. Saunders, S.S.C.

Counsel for the Second Parties—Wilton. Agents — Cairns, M'Intosh, & Morton, W.S.

Thursday, February 27.

FIRST DIVISION.

[Sheriff Court at Glasgow.

UNITED CREAMERIES COMPANY, LIMITED *v.* DAVID T. BOYD & COMPANY.

Arbitration — Reference to "Arbitration in Glasgow"—Application to Court to Appoint Arbiter — Proof of Custom — Arbitration (Scotland) Act 1894 (57 *and* 58 *Vict. cap.* 13), *secs.* 1, 2, *and* 3.

A contract for the sale of oil contained an arbitration clause in these terms — "Disputes to be settled by arbitration in Glasgow." In a petition for the appointment of an arbiter under the Arbitration (Scotland) Act 1894 the petitioners averred that by the custom of the oil trade in Glasgow, where the contract provided that disputes were to be settled by arbitration in Glasgow, each party nominated one arbiter and the arbiters named an oversman. *Held* that the averment was relevant, and if proved would render the arbitration clause sufficiently specific to bring it within the scope of the Act, that the reference therefore was not invalid, and proof *allowed.*

Sheriff — Arbitration — Process — Application to Appoint Arbiter—Summary Procedure — Competency — Arbitration (Scotland) Act 1894 (57 *and* 58 *Vict. cap.* 13)—*Sheriff Courts (Scotland) Act* 1907 (7 *Edw. VII, cap* 51), *sec.* 3 (*p*).

A contract for the sale of oil contained an arbitration clause in the following terms: — "Disputes to be settled by arbitration in Glasgow." One of the parties to the contract having refused to nominate an arbiter, the other party presented a petition in the Sheriff Court for the appointment of an arbiter under the Arbitration (Scotland) Act 1894. The petition was in the form of a summary application within the meaning of the Sheriff Courts Act 1907 and was so dealt with by the Sheriff, who allowed the petitioner a proof of his averment, that by the custom of the oil trade in Glasgow such a clause meant that each party nominated one arbiter and the arbiters named an oversman.

The Court *allowed* the case to proceed, but *transferred* it to the ordinary Court, *observing* that summary procedure was in the circumstances inappropriate, and that the petition should have taken the form of an ordinary action in which the evidence would have been recorded and there would have been an appeal as of right.

The Arbitration (Scotland) Act 1894 (57 and 58 Vict. cap. 13) enacts—Section 1—"From and after the passing of this Act an agreement to refer to arbitration shall not be invalid or ineffectual by reason of the reference being to a person not named, or to a person to be named by another person, or to a person merely described as the holder for the time being of any office or appointment."

Section 2—"Should one of the parties to an agreement to refer to a single arbiter refuse to concur in the nomination of such arbiter, and should no provision have been made for carrying out the reference in that event, or should such provision have failed, an arbiter may be appointed by the Court, on the application of any party to the agreement, and the arbiter so appointed shall have the same powers as if he had been duly nominated by all the parties."

Section 3—"Should one of the parties to an agreement to refer to two arbiters refuse to name an arbiter in terms of the agreement, and should no provision have been made for carrying out the reference in that event, or should such provision have failed, an arbiter may be appointed by the Court, on the application of the other party, and the arbiter so appointed shall have the same powers as if he had been duly nominated by the party so refusing."

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts—Section 3 (*p*)—"'Summary application' means and includes . . . all applications, whether by appeal or otherwise, brought under any Act of Parliament which provides, or, according to any practice in the Sheriff Court, which allows that the same shall be disposed of in a summary manner, but which does not more particularly define in what form the same shall be heard, tried, and determined."

First Schedule, Rule 4—"The warrant of citation shall be as nearly as may be—(*a*) In summary causes and summary removings, and also in summary applications when citation is necessary, and in cases under the Workmen's Compensation Act, in the form B hereto annexed; (*b*) in all other causes in the form C hereto annexed."

On 10th August 1911 the United Creameries Company, Limited, Dunragit, Wigtownshire, *pursuers*, presented a summary application in the Sheriff Court at Glasgow against David T. Boyd & Co., 50 Wellington Street, Glasgow, *defenders*, in which, after setting forth that the defenders had refused to nominate an arbiter to act with