

Friday, January 31.

MURRAY'S EXECUTORS v. MURRAY AND OTHERS.

Succession—Residuary Legatee—Fee of Residue—Condition—Clause of Return. A testator appointed curators and executors to his daughter; and, after directing payment of debts and certain legacies, he bequeathed to his daughter the whole residue of his estate, but declaring that if she married without consent of a majority of her curators, or died without leaving lawful children, "her whole effects shall return back to my kindred" in manner specified. In an action of multiplepointing raised by the executors, after the daughter had attained majority, held that the daughter, on attaining majority, became absolutely entitled to the whole residue.

William Murray, sometime farmer, thereafter residing at Turriff, in the county of Aberdeen, died in December 1845, leaving a holograph will and codicil, both dated 6th February of that year. By that will he nominated and appointed certain persons to be "my curators and sol executors for my daughter Charlotte Murray, . . . with full powers to them to intromite with my whole movable subject, goods and gear of every kind and executory of every denomination as the same shall be, and that may be pretaining and belonging to me or due and adbed to me, at the time of my death, and to give up inventories, &c., competent to executors and curators." After directing payment of debts, &c., and of certain legacies, the deed continued—"The whole residue of my effects, after what is given away by this will and testament, I leave to my daughter, Charlotte Murray, in the following menar and conditions under, the management and control of her curators, &c. It is to be understood that, after my decease, my daughter Charlotte Murray's maintenance and education is to be directed by hir curators, untill shis fifteen years of age, and afterwards to apply himself as her curators shall think proper to direct hir. Also it is my will and desire that my daughter Charlotte Murray should not marrie any one without the consent and approbation of a majority of hir curators, hereby declaring, if she shall do otherways, the whole effects left or given to hir by me shall all be forfeit, or should she die without leaving lafull begotten children in life at the time of her decease, in both cases hir whole effects shall returne back to my kindred in the following manner, should be divided into three parts, one part to my nice, Mrs Alexr. Stephen; and one part to my cousin, William Murray senior, in Slap; and the other part to be divided equally amongst my cousions of the Stonwlls family, who may be in life at the time this will and testament could take effect in this way, but on this last part of my will I leave a discreatonery power to curators for to give a part to my daughter altho her conduct in every point is not exactly conformed to hir curators wishes, if her general charactor is not notorious bad." By the codicil the testator bequeathed to Charlotte Murray his household furniture, &c.

Charlotte Murray was now upwards of 30 years of age, and unmarried.

In an action of multiplepointing raised by William Murray's executors, Charlotte Murray claimed the testator's household furniture and the rest of the fund *in medio* absolutely in fee.

Mrs Elspet Murray or Stephen, the nearest of kin of William Murray, and her husband, claimed that the executors should make provision for the conditional or contingent interest in one third part of the estate provided to the claimants, should Charlotte Murray forfeit the residuary bequest in her favour, or die without leaving lawfully begotten children in life at the time of her decease.

The Lord Ordinary (JENVISWOODE) sustained the claim of Charlotte Murray, finding that, under a sound construction of the said will, the conditions and provisions above referred to had relation to and were intended to have effect only during the period of the minority of the said Charlotte Murray, and that, on her attainment of majority, the office and powers conferred on the curators named in the said will came to an end; and that the said Charlotte Murray, on attaining majority as aforesaid, became absolutely entitled and vested as in her own right in the whole residue of the moveable estate of the deceased, including therein the deposit-receipts mentioned in the fifth head of the condescence, and the household furniture and others mentioned in the codicil of the same date as the will, subject only to the exception therein specified. And finding the raisers entitled to expenses out of the fund *in medio*, but in the competition finding no expenses due to either party. In his note his Lordship said—"It appears to the Lord Ordinary to be his duty to draw from the language actually used what the intention of the testator was, and he has now come to the conclusion that, under the will of the deceased, the claimant, Charlotte Murray, took, on attaining majority, a full vested right in the whole residue of the estate. In arriving at this result, the Lord Ordinary has been, in a considerable degree, moved by the consideration that the persons appointed executors are also named 'curators' to his daughter. It has appeared to the Lord Ordinary to be almost necessary to assume that, in using a term which is strictly technical and legal, the deceased knew that he was nominating persons who were to hold, and could hold, a certain relation towards his daughter during her minority only. Can it be supposed, for instance, that in providing as a condition that she should not marry without the consent and approbation of her curators, the truster contemplated a superintendence and control of his daughter's conduct as respected the matter of marriage during her whole life? The Lord Ordinary thinks not. But if this be so far the just interpretation of the will of the deceased, it tends directly to prove his purpose, that on arriving at majority, at least, she was to be vested with the full right and fee of the residuary estate, because on her majority the office of curators naturally and necessarily would come to an end, at least in the absence of most explicit and express provision to the contrary. In short, according to the views of the Lord Ordinary, the true intent of the truster was to appoint guardians to his daughter, with special powers, which were to be operative while such an office could legally exist, but without any intention on his part to create a trust, the powers of which were to endure for an indefinite period, and perhaps during the whole life of his daughter."

Mrs Stephen and husband reclaimed.

Charlotte Murray also reclaimed on the matter of expenses.

SOLICITOR-GENERAL (MILLAR) and LEE for Stephens. LORD ADVOCATE and GLOAG for Charlotte Murray. The Court unanimously adhered.

LORD PRESIDENT—In order to give effect to the argument of the claimer, we should have to restrict the right of this lady to a liferent. There is no middle course; it is either a fee or a liferent. And it would be very strange that this lady should be sole residuary legatee, and yet be restricted to a liferent, when there is no trust constituted by the testator. The thing is impracticable to work out. The bequest is to Charlotte Murray direct, and executors are named. If this lady had been of full age, the residue would have been bound, so soon as the residue was realised, to pay it over. That was their duty, and there is nothing in the will to restrain them. So long, no doubt, as this lady was under age, there were provisions for guardianship, but she is now long past that age. All conditions of that sort have flown off, and all that remains as a condition of her right is the clause of return. In these circumstances, the law is plain that the residuary legatee is heir of the residue.

Agents for Mrs Stephen and husband—Hamilton & Kinnear, W.S.

Agents for Charlotte Murray—Wilson, Burn, & Gloag, W.S.

Friday, January 31.

HOWDEN (ROCHEID'S TRUSTEE) v. ROCHEID AND OTHERS.

Entail—1685, c. 22—*Prohibitory, irritant, and resolute clauses—Facts and deeds done—Bankrupt.* Objections to validity of deed of entail, stated by trustee on sequestrated estate of former heir in possession, deceased, founded (1) on alleged defect in the resolute clause, by reason of its not containing the words *restrictions and limitations*; and (2) on the alleged omission in the irritant clause of words nullifying written instruments made in contravention of the prohibitions of the entail, *repelled*.

Entail—*Pro Indiviso Right—Contraction of Debts.* Objections (1) that the subjects entailed were originally a *pro indiviso* right; and (2) that the prohibitory clause was defective in regard to the contraction of debt, *repelled* by Lord Ordinary on the authority of *Stewart v. Nicolson*, and *Arbuthnott*, and his judgment acquiesced in.

These were conjoined actions of declarator and declarator and adjudication at the instance of James Howden, C.A., trustee on the sequestrated estate of James Rocheid of Inverleith, in the county of Mid-Lothian, against Charles Henry Alexander Frederick Camillo Everhard James John Rocheid, heir of entail in possession of Inverleith and Darnchester, and the other heirs called in the deed of entail—the principal conclusion of the action being, to have it found and declared that the disposition and deed of entail of the said lands, executed in 1749 by Mrs Elizabeth Rocheid, “was not, during the possession of the bankrupt, the said James Rocheid, of the subjects contained therein, and is not now a valid and effectual tailzie in terms of the Act of the Parliament of Scotland, passed in the year 1685, chapter 22, entitled ‘Act concerning Tailzies,’ in regard to the prohibitions against alienation and contraction of debt, and alteration of the order of succession, but was, and is, invalid and ineffectual under the said Act in regard to all or some of the said prohibitions; or, at least, that

under the said Act the said subjects were not held by the said James Rocheid under the fetters of a strict entail, but were fee-simple in his person, liable to his debts and deeds, and have been transferred to the pursuer as trustee foresaid, and now stand vested in him by force of the said sequestration, and act and warrant of confirmation in his favour freed from all limitations or entail fetters, for behoof of the creditors of the said James Rocheid.”

The prohibitory clause provided that “it shall not be lawful to nor in the power of the said Alexander Kinloch and the heirs whatsoever of his body, or of any other of the heirs succeeding to the said lands and estate above disposed, to alter, innovate, or change this present tailzie and settlement or yet the order of succession hereby prescribed, nor to do any other deed that may import or infer any alteration, innovation, or change of the same directly nor indirectly; nor to sell, annulzie, or dispose either irredeemably or under reversion; nor yet to wadsett or burden with infestments of annualrent or any other servitude or burden my lands and estate above written or any part thereof; nor to sett tacks nor rentals of the same for any longer space than nineteen years or for the settor's lifetime and always without diminution of the rental except where such diminution happens of necessity as when a sufficient tenant cannot be found to pay the whole rent, in which case the same is to be sett by publick roup to the highest offerer; nor yet to contract debts upon the said estate, nor even to committ treason (as God forbid); nor to do any other fact or deed of omission or commission, civil or criminal, directly or indirectly, in any sort whereby the said lands and estate hereby disposed or any part thereof may be affected, appraised, adjudged forfeited become escheat confiscat or any manner of way evicted from the said Alexander Kinloch and the heirs whatsoever of his body, or from the other heirs before specified succeeding to the said lands and others foresaid, or this present settlement and tailzie, or the succession to the said estate prejudged, hurt, or changed.”

The irritant and resolute clause provided “that if the said Alexander Kinloch or the heirs whatsoever descending of his body or the other heirs before specified and the descendants of their bodies succeeding to the said lands and estate hereby disposed, shall contravein or fail to fulfil and obey and perform the several conditions and provisions above exprest, or any one of them, or shall act contrair to the said restrictions and limitations, or any of them; that then and in these or any of these cases not only such facts, deeds, debts, omissions, and commissions, done, contracted, neglected, or committed contrary hereto, with all that may follow thereupon shall be in themselves void, null, of no avail, force, strength, or effect, as if the same had never been done, contracted, neglected, or committed, in so far as concerns the lands and estate above written, which nor no part thereof shall be anyways affected, burdened, or hurt therewith in prejudice of the said Alexander Kinloch, and the heirs descending of his body, or any other of the heirs above specified, appointed to succeed by virtue of their presents; but also the person or persons so contraveining or ffailzieing to fulfill the before written conditions and provisions, or any of them, shall for themselves only *ipso facto* amitt, lose, and tine their right and interest in my said lands and estate, and the samen shall become void and extinct, and the said lands and estate shall devolve upon and belong to the next heir of tailzie