Friday, July 5.

FIRST DIVISION.

CLOUSTON'S TRUSTEES *v.* BULLOCH AND OTHERS.

Succession—Direction to Trustees to Pay—Fee—Liferent—Intention of Testator.

A testator under the *fourth* purpose of his settlement directed his trustees (first) to divide the whole residue of his estate as it came to be realised into five equal shares, and (second) to pay or make over one of said fifth shares to each of his daughters M, C, and E, the shares to be paid over as soon as conveniently might be after his decease, and the remainder when the same became available, the said shares to be at the absolute disposal of his said daughters.

In a subsequent codicil with reference to the clause above named (second) the testator said, "I hereby revoke and alter the clause named (second) . . . to this extent, that in place of the absolute power therein given to my daughters M, C, and E, I restrict that absolute power in each case to one-half of their respective shares of my heritable estate, and in respect of the other half, none of them shall have power to deal with it during their respective lifetime beyond the interest or revenue derived from it, but they shall have power by any deed or writing duly executed by them to will the same over after their death to such person or persons or such objects as they may think proper, my object in making this restriction being that they shall not by any act on their part deprive themselves of a fair livelihood during their lifetime."

Held (1) that "respective shares of my heritable estate" must be read as "respective shares of my whole estate," that being the obvious intention of the testator; and (2) (*diss.* Lord Adam) that the trustees were not entitled to hold any part of the shares of residue given by the clause named (second) to the testator's daughters M, C, and E, but were bound to pay over the whole of said shares to these daughters.

The late Mr Peter Clouston, formerly insurance broker in Glasgow, died on 30th August 1888, leaving a trust-disposition and settlement dated 31st December 1883, and several codicils thereto, and in particular a codicil dated 29th November 1886.

By his trust-disposition and settlement the testator conveyed to the trustees therein named his whole estate and effects, heritable and moveable, real and personal. With reference to the disposal of the residue, the trust-disposition and settlement directed—"In the *fourth* place, my trustees shall from time to time as the same comes to be realised, divide the whole residue and remainder of my means and estate (including sums or property retained to meet annuities or liferent interests, or otherwise, as the same fall in) into five equal parts or shares, and hold and dispose thereof in manner following—(First) one of the said shares shall (subject to the provisions hereinafter contained in regard to the guaranteed minimum income to my said two unmarried daughters, and the survivor of them remaining unmarried, and subject also to the deductions after mentioned) be held by my trustees for behoof of all the children of my deceased daughter Mrs Sarah Clouston or Mactaggart, share and share alike; . . . (second) subject to the said provisions and the deductions after mentioned, my trustees shall pay or make over one of the said fifth shares of the said residue and remainder of my means and estate to each of my three daughters Mrs Maria Clouston or Bulloch, wife of the said Matthew Bulloch, and the said Miss Christian or Christina Clouston, and Elizabeth Keir Clouston, respectively (being three-fifth shares in all), the said shares so far as available to be paid or made over as soon as conveniently may be after my decease, and the remainder to be paid or made over as and when the same becomes available, the said shares to be at the absolute disposal of my said three daughters respectively;" and (third) the remaining fifth part or share was to be held for behoof of Mrs Hannah Clouston or Bulloch in liferent, and of her husband in the event of his survivance in liferent, restrictable to one-half in the event of his second marriage. On the termination of the liferent the capital was to be divided equally among the truster's surviving children, and the issue of any of them who may have died leaving issue, but in the event of her husband predeceasing her, the said one-fifth part or share was to be paid over to Mrs Hannah Clouston or Bulloch absolutely in the same way as was directed as regards the shares of the other three surviving daughters.

The testator further directed that if the shares of residue falling to his unmarried daughters should not be sufficient at four per cent. to yield each of them an income of £1200, his trustees should retain in their hands sums out of the capital of the shares of the children of his deceased daughter and of his married daughters, sufficient to make up the income of the married daughters to the required amount.

The codicil of 29th November 1886 was in these terms—"After serious and mature consideration, and reflecting on the uncertainty of circumstances which may happen, I hereby revoke and alter the clause named (second) on twenty-third line of page sixth in my trust-disposition or settlement, to this extent, that in place of the absolute power therein given to my daughters Maria, Christina, and Elizabeth, I restrict that absolute power in each case to one-half of their respective shares of my heritable estate, and in respect of the other half, none of them shall have power to deal with it during their respective lifetime beyond the interest or revenue derived from it, but they shall have power by any deed or writing duly executed by them to will the same over after their death to such person or persons or such objects as they may think proper, my object in making this restriction being that they shall not by any act on their part deprive themselves of a fair livelihood during their lifetime."

The value of the truster's moveable estate was estimated at about £175,000, and that of his heritable estate at about £8000, including the value of his house in Park Terrace, Glasgow, estimated at £6000, and which was assigned in

the settlement as a residence to the testator's two unmarried daughters.

The testator left four surviving daughters, Mrs Hannah Clouston or Bulloch, wife of James Bulloch, merchant in London, Mrs Maria Clouston or Bulloch, wife of Matthew Bulloch, merchant in Glasgow, Miss Christina Clouston, and Miss Elizabeth Keir Clouston. He was predeceased by a daughter Mrs Sarah Clouston or Mactaggart, leaving four children who survived the testator.

Questions having arisen as to the effect of the codicil of 29th November, as altering the terms of the original settlement, the present case was presented for the purpose of having the matter settled.

The first parties to the case were the trustees under Mr Clouston's settlement, and the second parties were Mrs Maria Clouston or Bulloch and her husband as her curator, and for any interest he might have, Miss Christina Clouston, and Elizabeth Keir Clouston.

The following questions were submitted for the opinion of the Court—"(1) Are the first parties, as Mr Clouston's trustees, bound by the codicil dated 29th November 1886 to hold one-half of the shares of the whole residue of the truster's estate given by the clause named (second) of the fourth purpose of his trust-disposition and settlement to his daughters Maria (Mrs Bulloch), Christina, and Elizabeth, for behoof of these ladies in liferent, subject to a power of disposal by will only of their respective shares? Or (2) Are the said trustees bound by the trust-disposition and settlement, and the codicil of 29th November 1886, to hold only one-half of the heritable or real estate of the truster for behoof of the said three daughters in liferent, subject to their power of disposal by will only, and to pay or make over their respective shares of the whole moveable estate, as well as the other half of the heritable estate, to the said three daughters in the manner directed by the clause named (second) of the fourth head or direction of the trust-disposition and settlement? Or (3) Is the codicil of 29th November 1886 void on the ground of uncertainty? Or (4) Are the first parties, as Mr Clouston's trustees, bound and entitled by the trust-disposition and settlement, and codicil of 29th November 1886, to hold any part of the shares of the moveable or heritable estate of the truster, or are they bound to pay and make over said shares or any and what part thereof to Maria (Mrs Bulloch), Christina, and Elizabeth, the truster's three daughters, and if so in what terms."

It was contended for the first parties that the truster had by his codicil of 29th November 1886 restricted the absolute right in their respective shares of residue conferred on his three daughters Maria (Mrs Bulloch), Christina, and Elizabeth, by the said trust-disposition and settlement, to a liferent as regarded one-half thereof, and that the trustees were bound to retain the half of such shares for behoof of these ladies in liferent, and subject to their power of disposal by will, but not otherwise.

It was contended by the second parties Mrs Bulloch and her husband, and Miss Christina and Miss Elizabeth Clouston, that the codicil of 29th November 1886 was void for uncertainty, and alternatively, that it applied only to the heritable or real estate of the truster.

Argued for the first parties—(1) The codicil of 29th November 1886 must apply to the testator's whole estate, and not only to his heritable estate. That was the obvious intention of the testator as shown by the terms of the settlement, and by the object of the restriction disclosed in the codicil. Half of a daughter's share of heritable estate would only be about £600 in value, which would not yield a comfortable income, and in his settlement the testator had contemplated £1200 as the proper income for each of his unmarried daughters. In the clause of the settlement referred to in the codicil the testator had not dealt with shares of heritable estate, but of residue, and the trustees had practically a power of sale conferred on them in the settlement, for the direction was to divide the estate as realised. The words "interest" and "revenue" were also more appropriate to income derived from moveable than from heritable estate—*Dunlop* v. *Macrae*, July 18, 1884, 11 R. 1104; *Archibald* v. *Archibald's Trustees*, June 15, 1882, 9 R. 942. (2) There was a valid restriction to a liferent in the codicil. That was the "extent" to which the codicil revoked the clause in the settlement. There was here a trust which was to be a continuing trust, and thus it was not a case in which the Court were asked to create or continue the machinery of a trust, which the testator had not created or continued. This circumstance took the case out of the rule of the cases of *Allan's Trustees* and *Massy—Allan's Trustees* v. *Allan*, December 12, 1872, 11 Macph. 216; *Massy* v. *Scott's Trustees*, December 5, 1872, 11 Macph. 173; *Duthie's Trustees* v. *Kinloch*, June 5, 1878, 5 R. 858, *per* Lord Gifford, 861.

Argued for the second parties—(1) The testator must have known the meaning of the term "heritable," and it must be assumed that he meant what he said. The Court could not construe the terms of a settlement contrary to what it clearly said. (2) There was no valid restriction to a liferent at all. The direction in the settlement to pay was clear and unequivocal, and must be recalled in clear terms, or else the trustees would be bound to carry it out. Doubtful expressions would not be read as inferring revocation. The case fell within the rule laid down in *Allan's Trustees*. The codicil was void from uncertainty, as to arrive at any definite meaning the first parties had to make very serious assumptions—*M'Nish* v. *Donald's Trustees*, October 25, 1879, 7 R. 96; *White's Trustees* v. *White*, June 1, 1877, 4 R. 786, *per* Lord President, 789, *per* Lord Shand, 793; *Smith's Trustees* v. *Smith*, July 11, 1883, 10 R. 1144; Jarman on Wills, i. 181; *Low's Executors* v. *Macdonald*, June 21, 1873, 11 Macph. 744.

At advising—

Lord President—The parts of the testator's will which we have to construe are, first, the provisions in the principal deed in favour of his three daughters Maria, Christina, and Elizabeth, and second, the alterations on those provisions introduced by the codicil of 29th November 1886. In making the provisions in the original settlement the testator expresses himself thus—"(Second) Subject to the said provisions and deductions after-mentioned, my trustees shall pay or make over one of the said fifth shares of

the said residue and remainder of my means and estate to each of my three daughters Mrs Maria Clouston or Bulloch, wife of the said Matthew Bulloch, and the said Miss Christian or Christina Clouston, and Elizabeth Keir Clouston respectively (being three-fifth shares in all), the said shares, so far as available, to be paid or made over as soon as conveniently may be after my decease, and the remainder to be paid or made over as and when the same becomes available, the said shares to be at the absolute disposal of my said three daughters respectively." That is a conveyance which the trustees are to make to the beneficiaries in absolute property, the payment being to be made immediately after the truster's death, so far as funds are available, and so far as funds are not available, then as soon as they become available. To emphasise his meaning the testator adds these unnecessary words at the end of the clause, "the said shares to be at the absolute disposal of my said three daughters respectively."

Now, in the codicil the truster expresses himself thus—"After serious and mature consideration, and reflecting on the uncertainty of circumstances which may happen, I hereby revoke and alter the clause named (second) on twenty-third line of page sixth in my trust-disposition or settlement to this extent, that in place of the absolute power therein given to my daughters Maria, Christina, and Elizabeth, I restrict that absolute power in each case to one-half of their respective shares of my heritable estate, and in respect of the other half none of them shall have power to deal with it during their respective lifetime beyond the interest or revenue derived from it, but they shall have power by any deed or writing duly executed by them to will the same over after their death to such person or persons or such objects as they may think proper, my object in making this restriction being that they shall not by any act on their part deprive themselves of a fair livelihood during their lifetime." Now, the part of the truster's property dealt with by that codicil, taking its words literally, is his heritable estate. That consists of a house (his own residence) in Glasgow, which he arranges in his settlement is to be occupied by his unmarried daughters, and also of another property of which the value does not exceed £2000. Thus, if these ladies were to be restricted only as regards each one's share of the heritable property, the effect of this codicil would be very slight—so slight that it is difficult to believe that that could be the meaning of the testator. Indeed, there are several circumstances which appear on the face of the codicil which point to a different result so strongly that it is impossible to resist the conclusion that the truster did not intend that this codicil should be restricted in its operation to his heritable estate only, but intended it to affect moveable property as well.

The first observation which occurs to me is, that the truster speaks of his daughters' respective shares of his heritable estate, the subject with which he is dealing is not "heritable estate," but "respective shares of heritable estate." Now, if we look back to the principal deed there are no such things as shares of heritable estate dealt with. The testator never contemplated shares of his heritable estate as going to his daughters, but shares of the residue of his means and estate. He dealt with his estate as a mixed estate, and the shares were shares of a mixed moveable and heritable estate.

In the next place, the utterly futile character of the restriction, if the codicil is read according to the strict meaning of the words, gives rise to the gravest doubts whether that strict meaning can be what the testator intended, particularly as the object of the whole codicil is to make sure that the daughters "shall not by any act on their part deprive themselves of a fair livelihood during their lifetime." Now, if they were entitled to spend everything they had just as they liked, except one-half of their shares of the heritable estate, they might very easily, notwithstanding the provisions of the codicil, reduce themselves to absolute poverty. The notion which the truster had of what was a proper income for his unmarried daughters may be gathered from the fact that elsewhere in his settlement he says that they shall not have less than £1200 per annum, and to insure that they shall have that income he burdens the shares falling to his married daughters with the amount necessary to make up that sum should the shares specially given to the unmarried daughters produce an income of less amount. The views therefore of the truster with regard to what was a proper income for his unmarried daughters were largely in excess of the revenue produced by one-half of his heritable estate.

But further, all the rest of the codicil goes to the same result. A power is given to these daughters to deal in their wills with the one-half shares in question, but during their lifetimes they cannot deal with it "beyond the interest or revenue derived from it"—that is, derived from the half he wished to tie up. Now, "interest or revenue" is not the proper way to speak of income derived from heritable estate, such income is almost always spoken of as rent, whereas "interest or revenue" is peculiarly applicable to moveable estate.

All these considerations lead me to the conclusion that there has been a palpable mistake in the use of the word "heritable," a mistake so palpable as to entitle the Court to construe the terms "respective shares of my heritable estate" as intended to mean "respective shares of my whole estate." The result of this would be in one view that these daughters would have an absolute power of disposal of one-half of their provisions under the settlement, but that as regards the other half they would be tied up in such a way that they could not spend the capital but only the income, though they might dispose of the capital by will.

That, I think, was the intention of the testator, but the question then comes to be, has he provided the machinery requisite for carrying out his intention? The original deed directs the trustees to pay over the shares without any qualification, and that direction has never been recalled. In these circumstances it is difficult to see what the trustees can do but pay over the money absolutely. There is no direction to them to hold this part of the estate, and the distinction between holding and paying over the estate was constantly in the mind of the testator throughout the deed, which contains various provisions which the trustees are to hold and not

pay over. To make this restriction, which was evidently the truster's intention, operative, it would require that some means should be given to the trustees to enable them to carry it out, and where, as here, there is a direction to pay over and no direction to hold, I do not see how trustees can hold and refuse to pay over.

If the question was one dependent entirely upon principle, and was now presented for decision for the first time, I should think it a matter of the highest importance, and should be inclined to get further aid before coming to a conclusion, but it has been expressly decided that where a truster has provided no machinery for carrying out such an intention as this, the intention cannot receive effect. That was decided in the case of *Allan's Trustees*, 11 Macph. 216, which was before the other Division of the Court in 1872. In that case a testator directed his trustees to pay and make over the fee of the residue of his estate to and among his whole children, "declaring that the provisions therein made in favour of females shall be purely alimentary to them, and not alienable or assignable, and shall be exclusive of the *jus mariti* and right of administration of husbands, and not affectable by their own or such husbands' debts or deeds." It was there held that as there was a clear direction to the trustees to pay to the beneficiaries who were alone interested, and as the Court could not consistently therewith create a trust which was the only mode of rendering the daughters' provisions inalienable, the daughters were entitled to receive payment on their own receipts. The Court, however, in order to give effect so far as possible to the testator's intentions directed that the receipts should bear an exclusion of the *jus mariti* and right of administration. Whether that would have any practical effect the Court did not say, but they at least paid that respect to the testator's intention.

The ground of judgment in that case is very clearly set forth in the opinions of the Lord Justice-Clerk and Lord Cowan. The former says—"If this condition had related to a sum payable annually it would perhaps have been proper that the Court should exercise its equitable jurisdiction for the purpose of carrying into effect such an intention. But in the present case I do not think this is practicable. The testator has attempted to do two inconsistent things. He has ordered his trustees to pay over, while he has endeavoured to limit the full right of property in the payees, and that without a trust, and without creating a separate or resulting right in anyone else." Lord Cowan says—"Mr Bell in his Commentaries, and other writers, lay it down that effectual protection for a fund left by a father to his children can only be obtained by means of a trust, and the question here raised comes in effect to be, whether we are to create a trust in order to carry out the conditions which Mr Allan annexed to his daughters' provisions. I am not aware of the Court having ever exercised such power. I think we are not entitled to authorise the trustees to do otherwise than the testator has directed, which is to pay the money directly to the beneficiaries." In that decision Lord Benholme and Lord Neaves concurred. Now, that is a very weighty decision, and I should be little disposed to dispute its soundness standing by itself. It was, however, followed by the case of *M'Nish* v. *Donald's Trustees*, 7 R. 96, in the same Division. I need not notice that case at any length, because it follows precisely on *Allan's Trustees*, but I may merely say that the Judges composing the Court in this case were not (with the exception of the Lord Justice-Clerk) the same as those who decided *Allan's Trustees*, which of course makes the judicial concurrence of opinion on the point all the stronger.

Another case of great importance which involved a recognition by this Division of the doctrine laid down in *Allan's* case, was the case of *Douglas' Trustees* v. *Kay's Trustees*, 7 R. 295, where by her antenuptial marriage-contract a lady, who was a minor, with consent of her father disponed to trustees the whole estate belonging or which should belong or accrue to her during the subsistence of the marriage. Her father thereafter by his settlement gave her a share of the residue of his estate as her absolute property, and directed his trustees to pay it over to her as here, but expressed a desire that it should not fall under the direction in her marriage-contract, and should be exclusive of the husband's rights, and he authorised his trustees "to take such steps as they may think necessary or proper for giving effect to the provision and declaration." The father there foresaw that if the money came into the wife's hands it would fall into the power of the marriage-contract trustees, and he thought that if he gave the directions I have mentioned to his trustees he might succeed in preventing that. But he had not, as the Court held, taken the proper means to effect his purpose, because there being a clear direction to the trustees to pay over the money to the daughter, it was held that as the father's settlement conferred on his daughter an absolute right to the property and possession of the share of residue, the declaration that it should not fall under the conveyance in the antenuptial marriage-contract was ineffectual.

The reasons which I assigned for the judgment I shall take the liberty to explain by a short quotation from my opinion. I say, speaking of the father—"He says to his trustees, 'Do all you can to prevent the fund from falling under the marriage-contract trust, but do so in a way consistent with giving Mrs Douglas an absolute fee and full power of disposal of the fund.' Now, the question is whether that could effectually be done, whether he could give her a full power of disposal, and yet exclude the operation of the marriage-contract trust. I do not doubt that it might have been done by creating a trust with a direction to pay the income to Mrs Douglas during her marriage for her alimentary use only, or by some provision of that kind. But then the fee would not be in Mrs Douglas, but in the trustees, and whether Mrs Douglas and her marriage-contract trustees would have been inclined to accept such a provision in lieu of her legal rights would have been for them to consider. But in the case here which we have actually to consider there is nothing more than a declaration of will and intention by the testator. He does not give any power, and does not give any authority by which his trustees can do what he wishes. They could not create a subordinate trust at their own hand; that is well settled by the case of *Allan's Trustees*, 11 Macph. 216, nor

could they continue to hold the money themselves, for they are directed to pay it over to Mrs Douglas as soon as the state of the trust permitted. The father desired that the money should not pass into the hands of the marriage-contract trustees. But what has that to do with the question? Could it be said for one moment that he could by a mere expression of intention exclude the diligence of his daughter's creditors? As I said before, this is a most onerous obligation by Mrs Douglas. She is personally bound just as if she had contracted a debt by borrowing so much money. Therefore I think that there is no answer to the demand of the marriage-contract trustees.

"I may put the question in this way—Was Mrs Douglas not entitled if she chose to give the money to the marriage-contract trustees? It would be very difficult to answer that question in the negative. She had full power of disposal; she could give the money to whom she pleased, including these trustees, and if she had the power was she not also under an obligation to give it." The rest of the Court, with the exception of Lord Deas, agreed in that opinion. Now, that case appears to me to involve a full recognition by this Division of the authority of the case of *Allan's Trustees*, and the principle embodied therein. The application of the principle to the present case is too clear to require explanation.

I am therefore of opinion that though the intention of the testator in this codicil was to tie up one-half of his daughters' shares, he has not effectually done so, not having provided means whereby his intention may be carried into effect.

Lord Mure—On the first question for consideration here, namely, the precise meaning of Mr Clouston's codicil of 29th November 1886, I think it is quite clear from the terms of the codicil that the testator's intention was to restrict the daughters' right to the provisions made to them in his settlement to the extent of giving them only one-half of their shares in absolute property, but the other half in liferent, with a power to dispose thereof by will; and he gives a very distinct intimation of his reasons for taking this course, for he says his object in making the restriction was that they should not "by any act on their part deprive themselves of a fair livelihood during their lifetime."

Now, in making this short codicil the testator unfortunately uses the expression "heritable estate," which gives rise to the question whether the restriction is meant to apply to the whole of the provisions to his daughters, or only the part which is heritable. It is, I think, quite plain from the nature of his fortune, the moveable estate being very large, and the heritable estate small, that the object stated in the codicil can never be carried out by applying the restriction to the respective shares of the "heritable estate," as that is so small that a liferent of half a share would not be much more than the wages of a superior servant.

It is quite clear therefore to my mind that the testator meant to deal with the daughters' shares of the provisions of residue consisting of his estate of whatever kind it might be, and we are, I think, entitled to construe the codicil as applicable to each daughter's shares of the residue, and as meaning that one-half of their shares should go to them in absolute property and one-half in liferent.

The difficulty in my opinion begins with the question, has Mr Clouston provided the machinery by which this can be done? And on that matter I am in the same position as your Lordship. If we were free to deal with it, I should be inclined to adopt some means by which the intention of Mr Clouston could be carried out. But we were referred to two cases in which it was held that where there was a direction to trustees to pay absolutely, followed by a subsequent qualification, such qualification cannot be made operative without provision being made for a continuing trust. I do not go into the reasons of the rule there laid down to the effect that any alteration of a testator's intention, unaccompanied by machinery to give effect to it, fails of its purpose. I hold we are bound by these decisions, and are not entitled to consider what would have been the effect here if the rule had not existed.

Lord Shand—I am of the same opinion on both points.

I think nothing can be plainer on the terms of the settlement and codicil to which we were referred than this, that when the testator used the word "heritable" he did not mean heritable as opposed to "personal." Taking that as clear, it appears to me it must be held to mean the estate in general of the testator, and I think Mr Graham, in the argument he submitted to the Court, gave us the means of doing so without doing violence to the words of the deed. The word "heritable," in the popular sense, has received a meaning which is given to it in the leading dictionaries, and which makes its use by the testator quite intelligible. In Webster's dictionary the word is defined in this way—(1) "Capable of inheriting or taking by descent," and as illustrating this meaning of the word he quotes the following line from Hale—"By the canon law this son shall be legitimate and heritable;" and (2) "that may be inherited." If we substitute for "heritable" "that may be inherited," the language of the codicil is quite correct, and I have in that view, it being clear that the term is not used as opposed to "personal," and there being a use of "heritable" which includes all estate, no difficulty in construing the word here in that sense.

As to the other point I have no difficulty. It is clear, in the first place, under the provisions of the original settlement, that there is an absolute direction to pay over, and I see nothing in the codicil to withdraw that direction. I doubt very much if such a direction could be withdrawn as a matter of inference. I think if there is such a direction in the settlement there must be an equally clear direction to the trustees in the subsequent deed to hold.

Now, what is the provision in the deed of settlement. It is in these terms—"My trustees shall pay or make over one of the said fifth shares of the said residue and remainder of my means and estate to each of my three daughters." The important clause in the codicil refers to half of the shares so given, and is in these terms—"In respect of the other half, none of them shall have power to deal with it during their respective lifetime beyond the interest or revenue derived from

it, but they shall have power by any deed or writing duly executed by them to will the same over after their death to such person or persons or such objects as they may think proper." Can we read into that clause words conveying a suggestion and instruction to the trustees not to pay over, but to continue to hold the same in trust for the daughters? I do not think we can. The Court is not entitled to add words to those in the deed. There is a clear direction to pay, and the testator may have thought that, even if the fund were paid over, that might be done under conditions which would attach to the fund in the hands of the legatee. No doubt that would have been an error on his part, and it would require a recal of the direction to pay, and the addition of a direction to hold, to make the restriction of the daughters' rights effectual.

As a contribution to the cases to which we have been already referred, I may add the case of *Gibson's Trustees* v. *Ross*, 4 R. 1038.

On these grounds I agree with your Lordships.

Lord Adam—I concur with your Lordships on the first point, and have nothing whatever to add. But I differ with regard to the conclusion at which you have arrived on the second question, as to whether the half share is now to be paid over to the testator's daughters absolutely. Of course I do not differ as to the law applicable to the case; I must accept the law contained in *Allan's Trustees* and the other cases referred to; but I differ on the construction of this settlement and codicil. I think the effect of the codicil is to take away and destroy the direction to pay the half share in question to the daughters. I think the case must, like other cases, be settled by the intention of the testator, unless the testator has expressed his intention in such a way that the law will not give effect to it.

I am, however, humbly of opinion that if the intention of a testator be clear, his trustees are bound to give effect to it so far as they can, and that there is no doubt here as to the intention of the testator; it is clearly expressed in the codicil. He there says, in the first place, that he alters and revokes the clause named (second) on the twenty-third line of page six of his settlement, that is, the clause beginning with the direction to pay, and he then goes on to say, "in place of the absolute power therein given to my daughters Maria, Christina, and Elizabeth, I restrict that absolute power in each case to one-half of their respective shares"—that is, as regards one-half, the daughters' shares remain to them as before to be paid over in absolute property. He thereby relieves the other half from the absolute direction to pay, and goes on to set out his intention with regard to it. Now what is his intention with regard to this second half? He says, "and in respect of the other half, none of them shall have power to deal with it during their respective lifetime beyond the interest or revenue derived from it, but they shall have power by any deed or writing duly executed by them to will the same over after their death to such person or persons or such objects as they may think proper, my object in making this restriction being that they shall not by any act on their part deprive themselves of a fair livelihood during their lifetime." I do not think the intention of the testator is anything else than that his daughters should have nothing but a liferent—"the interest or revenue"—of the half of their shares, for the fee is directed to be paid "to such person or persons or such objects as they may think proper." I therefore look upon the clause as an expression of intention on the part of the testator directing that the liferent of one-half of their shares should be paid to each of his daughters, and the fee to the persons named by them.

If such is the intention of the testator, it humbly appears to me that it goes to the roots of the direction to pay. If it is his intention, clearly expressed, that the trustees should not pay the fee to the daughters but to persons named by them, I think that necessarily implies a withdrawal of the direction to pay. That being so, I think the case does not fall under the principle of the cases of *Allan's Trustees*, *Massy*, and *Douglas' Trustees*, because there is no direction to pay to the daughters absolutely, but a direction to pay to persons named by them. In these cases there was a direct and imperative instruction to the trustees to pay or make over the legacies to the legatees. There being that direct order to pay as in *Allan's Trustees*, and to settle as in *Massy*, on certain conditions, it was considered, and quite properly, that the direction to convey in absolute property could not be qualified except by the creation of a trust. This case differs from these, because the effect of the clearly expressed intention of the testator is, that the trustees are not to pay to the daughters the one-half of their shares, and there being no direction to pay, the question arises, is there any difficulty in carrying out the testator's intention as I read it? I think there is none, for if I am right the truster's clearly expressed intention that that half should be paid over to persons named by his daughters implied a direction to the trustees to hold till the time for paying it over arrived. My construction of the deed does not conflict at all with the authority of *Allan's Trustees* and the other cases, simply because we have no direction here to pay the fund over to the daughters in absolute property or to give them a fee of it. In *Allan's Trustees* and the other cases there was a direction to pay over the fee under certain conditions; here there is a direction that the fee is not to be paid over. That is a distinction to which attention has been called before, and which your Lordships have said might possibly call for the exercise of the equitable power of the Court to give effect to it. We do not, however, require the exercise of any such power here, because here we have a continuing trust provided in the deed by which the intention of the truster may be given effect to completely.

The Court pronounced this interlocutor:—

"Find and declare that the first parties, as Mr Clouston's trustees, are not bound or entitled by the codicil dated 29th November 1886 to hold any part of the shares of the residue of the truster's estate, given by the clause named (second) of the fourth purpose of his trust-disposition and settlement to his daughters Maria (Mrs Bulloch), Christina, and Elizabeth, for behoof of these ladies in liferent, subject to a power of disposal by

will only of their respective shares; but that the said trustees are bound to pay over the whole of the said shares to the said Maria, Christina, and Elizabeth, and decern."

Counsel for the First Parties—Sir C. Pearson—J. E. Graham. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Second Parties—Gloag—Sir Ludovic Grant. Agents—Fraser, Stodart, & Ballingall, W.S.

Friday, July 5.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

STEWART *v.* NORTH.

STEWART *v.* ELDRED & BIGNOLD.

Jurisdiction—Arrestment jurisdictionis fundandæ causa—Foreign—Transference of Right to Fund Arrested.

An arrestment valid to found jurisdiction at its date is not rendered ineffectual, though, after the raising of the action but before the defences are lodged, the right to the fund arrested is transferred from the party against whom it is sought to found jurisdiction to someone else.

Arrestment—Foreign—Transference of Right to Fund Arrested.

A having used arrestments to found jurisdiction, raised an action against B, on the dependence of which he again used arrestments. The fund arrested was in both cases the amount of costs due by the arrestee to B under the decree of an English Court. About a fortnight after the arrestments had been laid on, the solicitors who had acted for B in the action before the English Court obtained from that Court a charging order upon the costs in said action.

In an action of multiplepoinding raised by the arrestee to determine who had right to the fund arrested, the Court ranked and preferred B's solicitors, in respect that by the law of England the charging order transferred the right to the fund arrested from B to his solicitors, and that the arrestments on the dependence were thereby rendered ineffectual.

Robert Stewart, farmer, Elibank, near Peebles, raised an action of count, reckoning, and payment against John Thomas North, residing near London, against whom arrestments had been used *ad fundandam jurisdictionem*.

The arrestments were used in the hands of a Mr Welsh, and the fund arrested consisted of a sum of £419, 11s. 4d., due by Mr Welsh to the defender under a decree of the High Court of Justice in England, Queen's Bench Division, for costs. That decree was pronounced on 25th April 1887. The arrestments *ad fundandam* were executed on 26th May 1887, and the summons in the present action was signeted on 27th May, and on the same day the said fund was again arrested on the dependence of the action. A certificate of the judgment in the English suit, dated 31st May, was registered in the Books of Council and Session on 1st June under the Judgments Extension Act 1868. On 13th June Messrs Eldred & Bignold, solicitors in London, who had acted for the defender Colonel North in various litigations in England, including the action before the High Court of Justice already referred to, obtained from the English Court a charging order upon the costs recovered in that action, and this was intimated to the arrestee on June 14th.

The defender averred, *inter alia*—"The sum in the said decree was not arrestable or attachable in respect of claims against the defender. Messrs Eldred & Bignold are in right of the whole fund, which is due and payable only to them in respect of their costs as solicitors to the defender North in the said cause, which costs exceed the said fund of £419, 11s. 4d., and have not been otherwise paid or satisfied. They hold the said judgment or decree as from the date of the same being signed, and instructed registration thereof to recover their said costs, consisting chiefly of outlays. According to the law of England, so long as the costs of the solicitors of the party found entitled to costs by decree of Court are not otherwise paid or satisfied, the debtor in the said decree is not entitled to pay or satisfy the decree except with their assent or through their hands, and they have a lien on the decree, and all costs payable to their client in the cause, for the full amount of their costs as between solicitor and client, which lien attaches *ipso jure* on judgment being signed, and is preferable to the claim of any assignee or creditor of their client. The said solicitors are held as creditors in the said debt *quoad* their unpaid or unsatisfied costs substantially to the same effect as law-agents who have obtained decree for expenses in the Courts of Scotland in their own names as agents-disbursers. The said Messrs Eldred & Bignold on or about 13th June 1887 obtained a charging order for their said costs upon the said fund, which is produced and referred to, and which declares their pre-existing right as aforesaid."

The defender pleaded—"(1) The said debt not being arrestable by a creditor of the defender, no jurisdiction has been founded against him. (2) The alleged arrestments not having affected any property of the defender, the jurisdiction ought not to be sustained, and the present action should be dismissed, with expenses."

On 2nd December the Lord Ordinary (LEE) repelled the plea of no jurisdiction, and allowed parties a proof of their averments on the merits.

Against this interlocutor the defender reclaimed to the First Division, and on 20th December their Lordships recalled the interlocutor of the Lord Ordinary, and remitted to him to allow the defender a proof of his averments (above quoted) in support of the plea of no jurisdiction.

At the proof Mr Eldred, of the firm of Eldred & Bignold, who was the only witness examined, gave evidence to the effect that Colonel North had been due from 25th April 1887, and still was due, to his firm in respect of their account in the action before mentioned, a sum exceeding £419, 11s. 4d., which was the amount of costs found due by Welsh to North.

A case was thereafter prepared for the opinion of English counsel, on the assumption that from and after April 25th 1887 there had been due by