within the primary enactment by the proviso which is equally applicable to the circumstances. I think we must follow the construction put upon that clause by the learned judges in England in the case to which your Lordship has referred. Taking it, therefore, that a person who has become entitled to an estate of inheritance in possession of the real estate to be purchased with the money left by the testator, means or includes a person who has become absolutely entitled to the money which the testator directed to be applied in the purchase of an estate, it appears to me that the only question which remains for consideration is that to which your Lordship has adverted, and which formed the subject of the greater part of the argument before us, viz., whether an heir of entail or an institute appointed by the testamentary disposition of the deceased comes into the position of a person entitled in the sense of that clause—absolutely entitled to the money or to the estate to be bought with it, if he became entitled only in consequence of an arrangement with the three next substitute heirs of entail, by which he is enabled to obtain the land or the money in fee-simple? Now, I am quite unable to see any sufficient ground for confining the meaning of the words "becomes entitled" in the manner contended for by the defenders. I am unable to draw any distinction between the operation of a will and the legal effect which the law in force at the time when it came into operation gives to a will. It is for the law in all cases to say what is the legal effect of a disposition in a will; and the question whether a right is given in fee-simple or absolutely, or whether it is given subject to the fetters of an entail, or subject to other restricting and limiting conditions, is always a question of law as well as a question of construction. I do not know that there could be a clearer illustration than that which was given by Lord M'Laren in the course of the discussion when he pointed out that a direction to convey to certain persons in succession by a simple destination would, according to the mere form of words, be a gift to persons in succession, but the law operating upon that direction declares that it shall create an absolute right in the first institute; and accordingly when we have to inquire whether an interest bequeathed by will is absolute or not we must always consider not the mere form of expression which the will contains, but what is the legal effect and operation of dispositions conceived in that particular form. I am unable therefore to see any ground upon which we could exclude from consideration the operation of law upon the clauses contained in the will when we have to determine whether a particular person has or has not become entitled under the will to a particular right.

The Court adhered, and remitted the case back to the Lord Ordinary for further procedure.

Counsel for the Pursuer and Respondent—The Lord Advocate—Young. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for the Defenders and Appellants—D.-F. Balfour, Q.C.—Johnston—Pitman. Agent—J. & F. Anderson, W.S.

Tuesday, February 16.

FIRST DIVISION.

[Sheriff of Dumfries and Galloway.

FERGUSON'S TRUSTEES *v.* MARTIN.

Executor—Competing Claims for the Office—Nomination of Survivor to be Sole Executor by Mutual Settlement by Husband and Wife—Subsequent Nomination of Trustees by One of Parties alone—Curator Bonis in Right of his Ward—A.S., 1730.

By a mutual deed of settlement executed by a husband and wife, the survivor was nominated sole executor to the predeceaser. By subsequent deed the husband, without the wife's consent, named certain persons to act as trustees along with his wife in case of his predecease. He was survived by his wife, who was shortly thereafter placed under curatory. Competing petitions for the office of executor were presented by the wife's *curator bonis* as in her place, and by the trustees.

Held (1) that whether the provisions in the subsequent deed by the husband innovated unwarrantably in other respects upon the prior mutual settlement or not—which it was premature to consider—it was competent for him to nominate trustees to act along with his wife; (2) that their nomination as trustees implied in the circumstances that they were also to be executors; and (3) that they fell to be decerned executors-nominate to the exclusion of the wife's *curator bonis.*

The late James Christal Ferguson, shipmaster, Kirkcudbright, and Mrs Elizabeth Jane Brown Christal or Ferguson, his wife, executed an antenuptial contract of marriage dated 7th April 1860. Upon 17th January 1878 they executed a decree of revocation and mutual settlement which revoked the marriage-contract and contained, *inter alia*, the following clause—"We recal and revoke the nomination of trustees and executors and tutors and curators contained in the foresaid deed, and we nominate the survivor of us to be sole trustee and executor of the predeceaser," &c.

Upon 14th June 1890 the husband, while at sea, and without the consent of his wife, executed a codicil containing, *inter alia*, the following words—"I wish my estate to be managed by the same trustees as my brother John Christal Ferguson, dead or alive, including to my wife Mrs Elizabeth J. B. Ferguson." . . .

J. C. Ferguson died at sea on 21st June 1890, survived by his wife, who became insane, and to whom James Martin, C.A., Edinburgh, was appointed *curator bonis* upon 12th June 1891. Ferguson's brother, John C. Ferguson, by a settlement dated 18th April and recorded 21st May 1891, nominated certain persons to be his trustees.

A petition was presented in August 1891 by these trustees to the Sheriff-Substitute as commissary at Kirkcudbright, craving to be confirmed as executors-nominate to J. C. Ferguson. A competing petition was presented at the same time by James Martin, C.A., to be decerned executor-dative in room of his ward Mrs Ferguson, the sole executrix-nominate under the mutual settlement of 17th January 1878, to the exclusion of the other petitioners. This petitioner pleaded in his answers to the other petition that "(1) The deed of revocation and mutual settlement by the spouses, by which the survivor is appointed sole executor of the predeceaser, being irrevocable, the codicil by the husband without the wife's consent is inept, and the petitioners having thus no valid title their petition ought to be dismissed."

These petitions were conjoined.

The Act of Sederunt of 1730 (concerning factors appointed by the Lords on the estates of pupils not having tutors and others) provides by section 7 that "Where it is necessary by law that such money or effects or moveables should be confirmed, the said factor may confirm the same in his own name as executor-dative, and as factor appointed by the Lords of Council and Session on the estate of such a person, and for the use and behoof of the said person, and of all that have or shall have interest, unless some other person having a title offer to confirm."

Upon 5th October 1891 the Sheriff-Substitute (LYELL) pronounced the following interlocutor:—"Finds in law (1) that the said deed of revocation and mutual settlement was not revocable by the one spouse without the consent of the other; (2) that in so far as the said codicil revokes the provisions of the said deed of revocation and mutual settlement, it is inept and invalid; (3) that the appointment of the petitioners (John C. Ferguson's trustees) to be executors in place of Mrs Elizabeth Jane Brown Christal or Ferguson, even if implied in the said codicil, was *ultra vires* of the said James Christal Ferguson: Therefore refuses the prayer of the petition; . . . decerns the petitioner James Martin, executor-dative of the said deceased James Christal Ferguson, *qua curator bonis* to the said Mrs Elizabeth Jane Brown Christal or Ferguson."

The petitioners Ferguson's Trustees appealed to the Sheriff (VARY CAMPBELL), who adhered.

"*Note.*—The competing petitioners alike found upon probative documents. The petitioner Mr Martin, as *curator bonis* for the widow, refers to the deed of revocation and mutual settlement of 1878, which contains an express nomination of his ward as executrix of her husband. The petitioners, Robert James Ferguson and others, refer to the codicil of 1890 by the husband alone.

"These deeds, as well as the equally probative antenuptial marriage-contract of 1860, deal with the whole estate, heritable and moveable, of the deceased husband; and it was argued to me that I am only concerned to find out whether he has made an express nomination of an executor to his moveable estate. There would have been no incongruity in holding that the wife, named expressly as executrix in the mutual settlement, was entitled to confirmation as such, even though she and the petitioners, Ferguson and others, were to be the trustees to manage the estate in terms of the codicil. But the matter is complicated, firstly, by the doubt whether the codicil fairly interpreted does not mean the trustees to be executors; and secondly, by the position of the petitioner Martin as claiming the executry as executor-dative in right of the wife under the 7th section of the Act of Sederunt 1730, and the practice following thereon. If the codicil stood alone the trustees would probably be entitled to confirmation as being impliedly nominated executors. As the deeds stand, and having regard to the practice and the explanation of the Act of Sederunt in *Whiffin* v. *Lee*, 10 R. 797, I would have confirmed the widow, if *compos mentis*, as expressly executrix-nominate under the mutual settlement, and I think also her *curator bonis* as executor-dative in her right, even though in terms of the Act of Sederunt 'some other person having a title offer to confirm,' because her title being express to the executry is preferable to that of the trustees. The petitioner Martin could not be trustee, but he might be executor-dative as in her right and place.

"I am not satisfied, however, to decide the competition on this technical ground. I regard the petitioner Martin as in right of the executrix-nominate and preferable as she is, but I think the judge in the Commissary Court has the duty to indicate under what instrument the executor is to act. Moreover, the trustees under the codicil are only called in to manage for the purposes of that deed, and if that deed be competent and valid." . . . .

The petitioners, Ferguson's trustees, appealed to the First Division of the Court of Session, and argued—The Sheriffs were wrong in considering the effect of the deeds executed by the deceased. The only question before them was who was to administer the estate. That administration should not be delayed until nice questions of law involved in the deeds had been decided. There was here an *ex facie* valid deed nominating the appellants to manage the estate along with the widow. That must be as executors as well as trustees, for the survivor was in the prior deed expressly nominated "sole trustee and executor." The first place among competitors for the office of executor was always given to executors-nominate—Ersk. iii., 9, 32;

Bell's Comm., 7th ed., ii. 78—and that even where the deed of nomination was challenged—*Grahame* v. *Bannerman*, February 28, 1822, 1 S. 339. A factor only came in as executor-dative and in his own name failing all other recognised claimants—Alexander on Practice of Commissary Courts, 41-44; A. of S. 1730, sec. 7. Here "other persons having a title offer to confirm." In *Johnstone* v. *Lowden*, February 15, 1838, 16 S. 541, relied upon by the other side, there was no competition. The nomination of the trustees to act along with the widow, who was named executrix, implied that they were to act from the death of the truster as executors as well as trustees—Currie on the Confirmation of Executors, 2nd ed., 52, and cases there cited.

Argued for the respondent—The wife was nominated sole executrix by the mutual deed, which was onerous, and could not be revoked by the later deed. He was entitled to be decerned sole executor in place of his ward—*Whiffin* v. *Lees*, June 12, 1872, 10 Macph. 797, Lord President Inglis, 800: *Johnstone* v. *Lowden*, *supra;* Currie, 67-98, and cases there cited. Could it be said that the curator of a minor, who was universal legatee, would not be decerned in his ward's place, but would be postponed to next-of-kin not named in the will? That was the logical outcome of the appellant's argument.

At advising—

LORD PRESIDENT—The Sheriffs have appointed the *curator bonis* to Mrs Elizabeth Jane Brown Christal or Ferguson to be executor on the estate of her late husband, and they have done so upon an examination of the relative effects of two deeds which are regarded by all parties, and necessarily so, as having come into collision. The Sheriff-Substitute, in a very anxious note, has confined himself entirely to the question as to which of these deeds is to prevail, and his ground of judgment is briefly stated in his fifth finding in fact and his first and second findings in law. His fifth finding in fact is—"That the said deed of revocation and mutual settlement proceeded upon onerous considerations, and that there is reasonable proportion between the grants between the spouses therein contained;" and the first and second findings in law are, "(1) that the said deed of revocation and mutual settlement was not revocable by the one spouse without the consent of the other;" and "(2) that in so far as the said codicil revokes the provisions of the said deed of revocation and mutual settlement it is inept and invalid."

I cannot say that I am surprised that the appellants should feel uneasy at the pronouncing of these findings, even apart from what was the immediate question before the Sheriff, namely, who was to hold the office of executor. The appellants come here not only seeking that those findings should be recalled, but also claiming the office of executor on the footing that they are the executors-nominate under the last codicil of the deceased. I think the Sheriffs have taken a wrong view of this question, and in any view I should not be inclined to adhere to findings such as those which I have read. The duty of the Sheriff as Commissary is to determine who is entitled to the office of executor on the face either of the deeds which are put before the Court, or of the relation to the deceased which is set out as the title of the applicant.

Now, in the present case the *curator bonis* stands in this position—He claims the appointment as executor-dative, and he does so upon the ground that his ward is appointed executrix-nominate in the deed of revocation and mutual settlement of 1878, but in order to make out his case he has to found upon the Act of Sederunt of 1730. But the Act of Sederunt of 1730, while giving right to officers of Court in his position to be confirmed to an estate in which their ward has a beneficial interest, is careful to say "unless some other person having a title offer to confirm," and that plainly means that if any person or persons can satisfy the Commissary that he, she, or they have a right under one of the known heads of the law to the office, that they shall have right to be confirmed, and the factor shall come in only failing any person having such a title offering himself.

Throwing him therefore out of account until we view the position of his competitors, what do we find? His competitors found upon what undoubtedly is the last testamentary writing of the deceased, and that contains these words—"I wish my estate to be managed by the same trustees as my brother John Christal Ferguson, dead or alive, including to my wife Mrs Elizabeth J. B. Ferguson, who is to own all in liferent except legacies mentioned, and at her decease to be divided as my brother John Christal Ferguson's estate." Now, the question is, what is the meaning of these words—"I wish my estate to be managed by the same trustees as my brother John Christal Ferguson?" In the first place, I think it can hardly be doubted that to whatever office this be a nomination, it is not invalidated by reason of its containing a reference to the settlement of another person, be he, as the testator puts it, "dead or alive." A man may quite competently appoint trustees or executors if he designates the persons sufficiently so as to identify them, even if the criterion of identification be another man's settlement.

Therefore I think it can hardly be doubted that this is a valid appointment to some office, and the question is, what is the office to which they are appointed? We have been very urgently invited to observe that this codicil does not at least purport to revoke the preceding deed. I have looked at the preceding deed, and I find this—that it splits up for separate consideration the office of trustee and the office of executor, but these two branches are conferred so as to confer the administration upon the same person. The codicil is expressed in much curter and briefer terms, and seems to have been executed at sea in somewhat condensed

language. What does the testator mean when he says—"I wish my estate to be managed?" One would naturally suppose that he used the word "manage" as the most comprehensive term available for describing all that required to be done to his estate after he was gone, and I arrive at the conclusion that the "management" included both the kind of management which is given by a trustee, and also the kind of management given by an executor. In short, I regard the word "manage," as used in this codicil, as representing generically all that required to be done with regard to the administration of the whole estate left by the testator.

If that view is sound, then this is a nomination of executors, and accordingly I think the application of the appellants to the Sheriff is in proper form. They do not ask to have the office as executors-dative, but they ask to have it as executors-nominate, and therein I think they have rightly construed the terms of the writings which I have read.

If that be a sound construction of the last writing of the deceased, the appellants occupy the first place in the competition, and the *curator bonis* is left out because the words of the Act of Sederunt of 1730 have been complied with, as another person having a title has offered to confirm. Upon that ground I think the appeal must be sustained, and that the appellants are entitled to the office of executors.

Lord Adam—There were three deeds before the Sheriff: first the marriage-contract between the deceased Mr Ferguson and his wife, who is now insane; second the deed of revocation and mutual settlement; and third the codicil. I understand neither party founds upon the marriage-contract. One party founds on the deed of revocation and mutual settlement; and the other party founds upon the codicil. The appellants claim the office as executors-nominate of the deceased, and they found upon this clause in the codicil—"I wish my estate to be managed by the same trustees as my brother John Christal Ferguson, dead or alive, including to my wife, Mrs Elizabeth J. B. Ferguson, who is to own all in liferent except legacies mentioned," &c. Now, they say, and it is the fact, that they are the trustees named by the brother John Christal Ferguson, and that being so nominated by the brother it is the same thing as if they were nominated in the codicil. That is the ground upon which they claim as executors-nominate of the deceased. I agree with the conclusion to which your Lordship has come. I think the question depends upon the clause of nomination in the deed of revocation taken in connection with the clause which I have read from the codicil. Now, beyond any doubt in the deed of revocation the survivor of the husband and wife is appointed sole trustee and executor of the predeceaser. Therefore I think there is no doubt that the widow Mrs Ferguson would have been the only party entitled to the office of executor.

But then comes this codicil, and what we find in it is this, that the testator wishes his estate to be managed by a set of trustees, the present claimants, including his widow. Now, under the deed the wife in the character of trustee and executor would have the management of the estate from the date of the death of her husband until the whole estate was distributed and applied in terms of the settlement, for in my view the mangement of an estate begins at the moment of the death of the deceased party. I think it is impossible to say that an executor does not "manage" the estate of a deceased party, and that a trustee does, and accordingly I do not think it is a reasonable construction of the terms of the codicil to say that so far as the duties of executor are concerned one of the trustees is to have the sole management, and that thereafter there is to be a different management, and the widow and the other parties are to manage as trustees. I think the intention was that from first to last the management of the estate should be one and the same. The testator drew no distinction between the management of his estate at one time and at another. I think he meant that from the beginning the widow and the appellants should have the management of the estate. That being so, I agree that he meant to associate them with her in the executry. If that is so, it follows that the appellants are entitled, as executors-nominate, to the office here.

I have arrived at that conclusion from the construction of these two deeds themselves. I do not wish it to be inferred that where the management of an estate is left to A, B, and C in the capacity of trustees, that that will imply necessarily an appointment as executors. But where the trustees are combined with a person who has been previously named as executor, that makes quite a different case. It is upon that speciality I proceed in the opinion which I have formed in this case.

Lord M'Laren—I think the Sheriffs have approached this case from a wrong point of view. The question which they had successively to consider was so simple as this—Who is entitled to the office of executor?—a question which is determined by rules which are now very well settled—one of the parties competing for the office claiming as executors-nominate under the codicil, while the other claims as factor, representing the interest of the deceased party's wife under the postnuptial deed of settlement. The Sheriffs seem both to have considered that in order to determine who was entitled to the office of executor, they must consider who had the best right to the estate when it came to be distributed—in other words, whether the deceased gentleman was entitled to innovate upon the mutual settlement which he executed in conjunction with his wife.

Now, we have no occasion to consider how far the mutual settlement was a remuneratory deed, and how far it was open to either spouse to give legacies or make

alterations on the disposal of the estate. I may observe in passing that it is a very well settled rule of construction, that although two spouses put their wills into the same deed, that by no means prevents either of them from altering his or her will in relation to individual property. It is only in so far as it contains contractual provisions that the deed is irrevocable, but so far as it is testamentary it is revocable. There is one part of a mutual settlement which must always be revocable, and that is the provision for administration—the appointment of trustees and executors. To say, for example, that if after a mutual settlement has been made, and it may be after the death of one of the parties, a trustee becomes insane or bankrupt, the surviving spouse shall not be able to recal that appointment and make another, would be really carrying the doctrine of remuneratory grants to an extravagant extent. In this case the husband, being at sea and without legal advice, and knowing that his wife's state of health and mental capacity was uncertain, made this codicil, leaving certain legacies, and, in the clause which has been read, appointing his estate to be managed by the same trustees as those appointed by his brother. I am of opinion that as regards his own estate it was quite competent to him to make a new appointment of trustees and executors, and in coming to that conclusion I of course give no opinion as to the validity of this codicil, in so far as it deals with the estate for testamentary purposes.

The only question, then, is whether the appointment made in the codicil is a good appointment of executors in place of the wife, who was the sole executor under the mutual deed. Now, my understanding of the law has been that an executor could only be appointed under that name. I am not aware of any equivalent expression, and consequently when the disponees in a testamentary deed were only declared to be trustees, it was necessary that they should apply to the Commissary or Sheriff for an appointment as executors-dative *qua* trustees or universal disponees — an application which would always be granted of course, because in a petition for the office of executor universal disponees take precedence of all other parties except executors-nominate. The distinction is that in the one case security must be found, which would not be the case where trustees are also appointed executors. I do not pause to examine the considerations connected with the original character of the office of executor which have led to the recognition of this distinction, but it appears to me to be a distinction strongly recognised in the law.

But, then, in the series of instruments which are said to constitute the will, we have a good appointment of trustees and executors—that is, by the mutual deed; and I agree with your Lordships that in the case of a codicil—a writing which is always very favourably construed—the substitution of certain other parties to be managers of the estate, means that they are substituted for those who have been previously well appointed trustees and executors. Therefore that is a good substitution to the office of executors as well as to the office of trustee, entitling the parties there named to take up the office of executor-nominate in their own right.

It follows from these considerations that the interlocutor of the Sheriff ought to be recalled, and that it should be declared that the persons named in the codicil—the competing petitioners—are entitled to be confirmed as executors.

LORD KINNEAR—I think, for the reasons stated by your Lordships, that the only question we have to consider is, whether this codicil contains or does not contain a nomination of executors? I agree with what I think is the opinion of all your Lordships, that the mere conveyance of an estate to persons with a direction to manage it, or a mere conveyance in trust, is not necessarily a nomination of executors. But, then, we are to read the codicil along with the mutual settlement as one testamentary deed, and taking the two together I arrive at the same conclusion as your Lordships.

In the mutual disposition and settlement the deceased, who for the purpose of the present question is to be treated as a testator dealing with his own estate, appoints his wife to be his sole trustee and executor. Now, if in the codicil he had appointed certain other persons to be trustees along with his wife, making no mention of the office of executor, there might have been very fair ground for maintaining that he did not thereby intend to give them any active title to ingather the estate, or to conjoin them with his wife in her office of executor, but that he intended merely that after the estate had been ingathered by his executor they should be conjoined with her in the separate office of trustees. But that is not the way in which the settlement is expressed. Its terms are—"I appoint my wife to be my trustee and executor;" and in the codicil "I appoint A, B, and C to manage my estate along with my wife." It appears to me that the natural construction of these words is what your Lordship has put upon them, and that the testator intended these trustees to take part with his wife in the management of his estate from the beginning, and did not intend to make any distinction between one act of management and another—that is to say, he intended them to be executors as well as trustees.

The Court found the petitioners Ferguson's Trustees entitled to be decerned executors-nominate; remitted to the Sheriff to grant the prayer of the petition of said trustees, and to decern them executors-nominate, and to proceed; also to refuse the petition at the instance of James Martin.

Counsel for Appellants—D.-F. Balfour, Q.C.—Jameson. Agents—T. & W. A. M'Laren, W.S.

Counsel for Respondent—Rankine—Cook. Agents—R. R. Simpson & Lawson, W.S.