provisions in their favour, was entitled in a question with the beneficiaries to take credit therefor.

Judicial Factor—Duties—A.S. 1730. A factor having failed to lodge his accounts annually, in terms of the Act of Sederunt of 1730, held (per Lord Jerviswoode, and acquiesced in) that his salary should be restricted to one-half.

Counsel for Factor—Mr Fraser and Mr Trayner. Agent—Mr Thomas Wallace, S.S.C.

Counsel for Objectors—Mr Millar. Agents—Messrs Tait & Crichton, W.S.

This action is raised by Mr John Murray, S.S.C., judicial factor on the trust-estate of the late Alexander Thomson, for the purpose of distributing the deceased's estate.

Some claimants objected to the condescendence of the fund *in medio*, lodged by the factor, on various grounds. *Inter alia*, they objected—1st, that the factor had failed to fulfil the duty of lodging accounts annually, as required by the Act of Sederunt of 1730, whereby he had rendered himself liable "to such a mulct as the Lords of Session shall modify, not being under a half-year's salary;" 2d, that the factor had improperly debited the estate with certain outlays. Lord Jerviswoode sustained the first of these objections, and restricted the factor's salary to one-half. He also sustained the second objection to the extent of £13, 13s. The factor reclaimed, but abandoned his reclaiming note at the bar.

The claimants further objected that the factor had made payments for behoof of the widow and daughter of the truster in excess or violation of his duty. The Lord Ordinary found that the claimants had failed to establish this objection; and they reclaimed.

It appeared that by the truster's settlement the residue and remainder of his estate, or the prices and produce thereof, after payment of his debts, &c., and an annuity of £30 to his widow, was to be held for the use and behoof of Martha Thomson, his only child, while she remained unmarried. Betwixt 1846 and 1859 the clear revenue received by the factor was £435, 13s. 9½d., while the payments made by him during the same period on account of the widow and daughter amounted to £673, 9s. 7½d., being in excess of the provisions made in their favour, £237, 15s. 10d. The factor justified this overpayment by saying that the daughter was blind and unable to earn anything for herself, and that he was entitled to make the overpayments, because the truster's estate, notwithstanding the settlement, was liable for the maintenance of his child. It appeared also that the daughter had right to the rents of other property beyond what fell under the factory, and that Mr Murray was her agent, and collected the rents for her. These rents amounted to at least £20 a year; while the claimants averred that they amounted to £30, and that the fee of the property was vested in the daughter. Both widow and daughter are now dead.

The Court to-day adhered to the Lord Ordinary's interlocutor. The judgment of the Court was delivered by

Lord DEAS, who said—The question depends upon whether the factor before making the overpayments was bound to realise the heritable property belonging to the truster's daughter. It was not disputed that if this property had not existed the factor would have been in the circumstances entitled to make the overpayments. Neither was it disputed that Miss Thomson's property was liable for any necessary supplement of the allowance to her and her mother. It is putting it very high to say that the factor was first bound to exhaust Miss Thomson's property. That might have required considerable time, and the overpayments which he made could not be delayed. Another way of putting the objection is that the factor having made the overpayments, is bound himself to make good his recourse against the property. This is more plausible; but I am rather disposed to think that all that the reclaimers are entitled to is reimbursement out of the property; and this involves no hardship, because Mr Christopher Scott, who has succeeded to Miss Thomson's property as her heir-at-law, is a claimant in this multiplepoinding, and the claim may be made good against him and the property in this process.

The other Judges concurred, and the Court adhered, reserving to the reclaimers to make good their claim either in this process or otherwise.

SECOND DIVISION.

LOWSON AND OTHERS *v.* FORD AND OTHERS.

Testament. Terms of three writings found in a truster's repositories along with her settlement, which held (alt. Lord Ormidale, diss. Lord Benholme) not to be testamentary; and terms of another writing, also found there, which held (aff. Lord Ormidale) to be testamentary.

This is an action of multiplepoinding and exoneration brought by the accepting trustees and executors nominated and appointed by the late Miss Jane Bell, residing in Dundee. The action is brought to determine what writings are to be regarded as testamentary in regard to the distribution of the succession of Miss Bell, and who are the various parties entitled to participate in it. Miss Bell executed a trust-disposition and deed of settlement in 1853. By this deed Miss Bell conveys her whole estate to trustees for the purpose of discharging her debts, of paying a variety of legacies, and disposing of the residue. The deed concludes with a clause in the following terms:—"Reserving always my own liferent of the premises, with full power to me at any time of my life, and even on deathbed, by a writing under my hand, to alter, innovate, or revoke these presents, in whole or in part, as I shall think proper, and to alienate, burden, or otherwise dispose of the means and estate, heritable and moveable, hereby disposed; but in so far as these presents shall not be altered, the same shall be valid and effectual, though found lying by me, or in the custody of any other person for my behoof, undelivered at the time of my death, with the delivery whereof I have dispensed, and hereby dispense for ever." In the repositories of the truster there were also found after her death four papers, all holograph of her, written on separate sheets of letter-paper, and lying beside her trust-settlement. Various legacies are bequeathed in these papers. In the first, after the truster's signature, there are the words, "This is to be handed to Mr Reid, to add to my settlement;" and in the second the bequest of legacies was prefaced by the words, "To be handed to Mr Reid; a codicil to my deed; should I be taken away suddenly, my trustees would act upon it the same as if it were written as a codicil to my settlement." A minute of admissions was put in by the various claimants, in which a letter is admitted which is said by one of the claimants in his condescendence to have been written by the truster in her lifetime to her agent, Mr W. J. Thomson, writer, Dundee, to the following effect:—"Miss Bell presents respectful compliments to Mr Thomson. She begs to acquaint him that she will be much disappointed if her late brother's matter is not completely settled by the term of Whitsunday, as she intends to make some alterations in her deed, and cannot do it until she knows what part of her brother's property falls to her share."

The question in dispute in the action is, whether these four papers are to be regarded as testamentary writings of Miss Bell, and as such are to be taken along with her trust-settlement in the distribution of her estate, or are to be looked upon as mere memoranda for the instruction and information of her agent. The Lord Ordinary (Ormidale) found that they were valid testamentary writings Before dis

posing of the case the Court allowed a proof. To-day the interlocutor of the Lord Ordinary was altered—the Judges, with the exception of Lord Benholme, who agreed with the Lord Ordinary, being of opinion that effect should only be given to the writing dated 29th April 1856. The facts are fully entered into in the annexed opinion of Lord Cowan:

"The question brought under review by this reclaiming note is, whether certain writings purporting to be written and subscribed by the deceased Jane or Jean Bell, are testamentary in their character, and to be taken into view in the distribution of her succession or not.

"The deceased died on 6th November 1862, leaving a trust-disposition and settlement, dated 21st September 1853, by which she conveyed her whole property, heritable and moveable, to trustees, for the purpose, after payment of debts, of providing for payment of certain special legacies, and of securing the whole of her remaining estate in liferent to her only brother Samuel, and after his death of securing certain provisions to her nieces (Fords), and of making payment of certain other legacies—the residue of the estate being provided for behoof of her nieces and nephew (Flowerdews)—and other parties equally among them. The directions to the trustees are very specific, and provide for the distribution, in the manner now generally stated, of the whole estate of the testatrix. The deed reserves the granter's liferent, and full power 'at any time of my life, and even on deathbed, by a writing under my hand, to alter, innovate, or revoke these presents in whole or in part, as I shall think proper; and to alienate, burden, or otherwise dispose of,' her heritable and moveable estate; 'but in so far as these presents shall not be altered, the same shall be valid and effectual,' though undelivered.

"This trust-deed and settlement was found in the granter's repositories, and along with it the four writings, the testamentary character of which is in question.

The parties are agreed that the writings are all of them holograph, but as there existed a difference of statement regarding the circumstances in which, upon the testatrix's death, the deed of settlement and the writings were found in her repositories, and upon other matters of fact of more or less moment, the Court considered it desirable to allow a proof, by interlocutor of 31st January 1866, 'of all facts bearing on the questions stated in the note No. 105 of process, and of all other facts bearing on the question what are the testamentary papers of the testator.' On the import of that proof, and its bearing on the question to be decided, parties were fully heard.

"In so far as regards the precise position in which the different writings referred to were found, it is enough to say that while there is some discrepancy between the statements of the witnesses examined, these facts may be held established—that the deceased obtained possession of her settlement from the solicitor by whom it was prepared immediately after its completion in 1853; that she continued to retain the deed in her own possession till her death; that the deed was found in a locked drawer in which she kept papers, and nothing else; that alongside of it were found the four writings in question; that there were in the drawer various other documents, of which an inventory is in process—some of them deposit-receipts and certificates of railway shares, and others documents of no value, including superseded deeds of settlement, and in particular two deeds of this kind, which the testatrix had previously executed in 1837 and 1840; that all the papers in the drawer were covered by the shawl of which some of the witnesses speak, and in particular the deceased's confidential servant, who says that 'it covered the papers in the drawer,' and that 'when Miss Bell wanted to get any of the papers she lifted the shawl—it covered all the papers;' and that while the four writings were found lying by the deed of settlement in this drawer, they were not wrapped up in it.

"It is in this state of the ascertained facts that the question arises whether all or any of the four writings are to be deemed testamentary. No doubt exists with regard to the genuineness of the writings nor of their probativeness. It is their effect as testamentary in their character which is alone for consideration. And this question arises in circumstances which distinguish the present case from most, if not all, of the decisions to which reference was made in the argument.

"A variety of questions have arisen with regard to the validity and effect of separate writings alleged to be testamentary, either under reserved powers or under special directions to the trustees, contained in formal deeds of settlement. The more recent cases are all of that character with scarcely an exception. For example, the case of Preston *v.* Baird arose under a trust-deed which contained a special direction to trustees 'to make payment of all legacies, and others I shall make, grant, or leave by any separate writing, letter, or jotting under my hand;' and that of Young's Trustees, 3d Nov. 1864, under a deed which directed trustees to pay all legacies or bequests which 'by any writing or writings under my hand hereunto annexed, or on paper or papers apart, I shall make or settle.' The inquiry in every such case is whether the separate writing comes within the description contained in the formal deed, and be truly the very kind of writing to which the deceased has taken his trustees expressly bound to give effect. When this is ascertained, the separate writing, however inept when judged of in itself, is held to have imparted to it the same efficacy as if it had formed part of the formal trust deed. But no such question exists in this case. The trustees are not taken bound to pay legacies which the testatrix might leave by a writing nnder her hand, formal or informal, as an express purpose of their trust. It is under the reserved power to alter that the argument arises; and in this respect the present case more resembles that of the leading decision of Dundas *v.* Lewis, 13th May 1807, than almost any other, and is even stronger for the application of the principles there acted on, the deed in Dundas' case having contained a declaration that any additional directions given by the testator should form part of the trust-deed. It is otherwise here. What we have to deal with are writings, from which it must be clearly shown to have been the testatrix's intention 'to alter, innovate, or revoke' the provisions of her well-considered and complete settlement 'in whole or in part.' This appears to me to be a different case from what the Court has had more usually to consider. Not that the writings or any of them can be refused effect because of their not being under the testatrix's hand. Their admittedly holograph character excludes all objection to them on that ground. But their effect as a revocation of or an alteration on the terms of the formal deed of settlement requires to be judged of upon a different principle from that applicable to writings of that different class to which I have adverted. The intention of the testatrix that these detached papers were to be treated truly as testamentary, must clearly appear from their contents. Alterations on a completed deed of settlement seem to me to belong to a different category of cases from instructions to trustees in relation to specific purposes of the trust.

"Keeping in view these considerations, let the nature and contents of the several writings now be considered.

"The trust-deed of settlement was dated in September 1853; the first of the writings is dated 17th March 1854, and the second of them 29th April 1856; and it is not immaterial to observe that the testatrix's brother Samuel died in 1860, a considerable time before the date attached to either of the later writings—the third being dated 20th February 1862, and the fourth 20th March 1862.

"The first writing is headed 'a codicil,' and there follow various sums, with the names attached to them of certain public and charitable institutions,

the paper closing with these words—'This is to be handed to Mr Reid to add to my settlement.' Mr Reid was the professional gentleman by whom the settlement had been prepared, and was her confidential man of business. She did not write this codicil on the deed, although it was in her own custody, and although it was admitted in the argument it had blank space enough for additions. She merely declares her intention to place in Mr Reid's hands this enumeration of sums and names with the view of their being added to her settlement. This declaration makes it unnecessary to consider whether the heading 'a codicil,' without any other testamentary words, would have supported this writing as a bequest of legacies. For it is impossible to view it as a concluded declaration of her intention so far to alter the settlement. I hold it clear, under the authority of the case of Monro *v.* Coutts, and the principle laid down by Lord Eldon in disposing of that case, that although a writing may contain words indicative of testamentary intention, that is not enough for its validity, unless the testatrix can be held to have intended the writing to take effect as her final will in that matter, although her man of business shall not have acted on her instruction by adding the bequests to her settlement. This certainly cannot be predicated of this writing.

"The second paper again has prefixed to the enumeration of sums and names. It contains these remarkable words—'To be handed to Mr Reid, a codicil to my deed. Should I be taken away suddenly, my trustees would act upon it the same as if it were written as a codicil to my settlement.' On the first part of these words the same observations occur as upon those annexed to the first writing. It was plainly the intention of the testatrix that this codicil was to be written on her settlement by Mr Reid; but there is an essential difference between the two writings, arising from the subsequent words, for the testatrix evidently contemplated that this writing in itself should in certain circumstances receive effect as testamentary. Her declared will is that the writing was to be acted on precisely as if written as a codicil to her settlement should she be taken away suddenly. There is thus a testamentary character stamped upon the writing by the testatrix herself, and in that situation, what the Court have to consider is the effect of the terms by which this testamentary character is apparently limited in its operation to a certain emergency. 'Taken away suddenly.' These words are capable of several meanings. They may mean 'soon,' before the testatrix had time to see Mr Reid, or they may mean taken away without much warning, even years afterwards; and I am not disposed, upon a stringent interpretation of words of this kind to destroy the effect of a writing which the testatrix undoubtedly held to be in itself testamentary at the time she subscribed it. No subsequent act of her will was necessary to give the writing validity as an expression of her intention. And this writing differs from the other in having embodied in it express words of gift, which the prior writing has not. I think, therefore, that this second paper is testamentary; and I arrive at this conclusion the more readily, because it plainly embodies, with a view to their receiving effect, bequests to those institutions and charities intended to be benefited by the first writing, which it may be fairly held to have been intended entirely to supersede.

"The third of the writings, dated in February 1862, contains no words of bequest, but consists of a mere enumeration of sums of money, amounting to between £5000 and £6000, to which certain names are attached. It is a mere list of names and sums, with but one exception, the words, namely, 'Margaret to get my clothes, a bed and bedding.' And the fourth writing again is precisely of the same character, containing an enumeration of eight names, with £100 attached to each. No doubt these papers are subscribed by the testatrix, and the names and figures therein are admitted to be holograph. But it seems to me impossible to hold them of a testamentary character, and entitled to effect as such. I know of no instance in the whole range of cases of this class where a mere enumeration of names and figures, without any words indicative that the names were intended to be those of parties intended to be benefited by the testator, and the figures to be indicative of bequests or legacies which these parties were intended to receive. And when it is remembered that what the exigency of the case in principle demands is a writing under the hand of the testatrix, clearly indicative of intention to revoke, alter, or innovate a formal deed of settlement, it would seem to me to be as contrary to the sound principle of construction applicable to such a case, as it would be unprecedented, to hold detached scraps of paper like those in question entitled to effect as valid testamentary documents.

"No doubt these writings were found along with the trust deed amongst the deceased's papers, and it may be fairly held, having regard to the evidence which I shall immediately notice, that the testatrix had in contemplation an alteration on her deed of settlement, and may have prepared these lists with a view to that intended alteration. Conjecture of that kind, however, will not make the writings testamentary if they are not so in themselves, and they fall to be treated as mere memoranda of what the testatrix may have intended subsequently to effect, but which she has not done.

"The evidence to which I allude is to be found in a holograph letter addressed by the testatrix to Mr Thomson, writer, Dundee, dated eleven days after the date of the last of these two writings. Her brother Samuel had died in 1860, leaving a considerable succession, to which the testatrix was entitled, but the realisation of which, from its being principally in England, had been much delayed. It seems probable that the intended alteration on her will, by which effect might be given to the memoranda in question, was dependent upon her obtaining possession of the estate to which she had thus succeeded, or at least upon her being assured of the extent to which her own succession might be thereby increased. This letter of 31st March 1862 accordingly states to Mr Thomson, who had the management of her brother's affairs, that the testatrix would be much disappointed if her brother's succession were not completely settled by the term of Whitsunday, 'as she intends to make some alterations in her deed, and cannot do it until she knows what part of her brother's property falls to her share.' Now, by the proof recently led, it is established that she did not get a settlement of her brother's succession, nor even any information as to the extent of her interest in it during her lifetime. The depositions of Mr Thomson and Mr Lowson are conclusive as to this matter. No alteration was in consequence made upon her deed of settlement by the testatrix, and the writings in question were left in the condition of mere memoranda in which they were found. But this view of their purpose—viz., that they might be available to the testatrix when she carried her intention of altering her settlement into effect, had she ever done so, quite accounts for the writings being kept by her in her repositories. Probable it is that had she got the desired information? her confidential agent, Mr Reid, might then have been applied to to make the necessary alteration on her settlement; but however this may be, it was never done.

"On the whole, I am of opinion that effect ought to be given only to the writing dated 29th April 1856, and that the other writings are not entitled to effect as testamentary."

BAILLIE *v.* HAY.

Poor — Assessment — Ferry — Pier. Held (alt. Lord Jerviswoode) that a pier which was an adjunct of a ferry was not assessable for the support of the poor.