whole circumstances as now before the Court we have the ground taken, full possession enjoyed, and all that remains is that the owners shall be satisfied by private arrangement or otherwise. This was actually done—Mr Donaldson was himself present and in the chair at the meetings. Accordingly, we must hold that the Road Trustees in 1838 obtained a statutory title to the ground of the road.

What then remains? I cannot think that anything more could have been done. I agree with your Lordship that while the Donaldson trustees did give a disposition to the pursuers without excepting the road, yet in point of fact all parties were well aware that they were not transferring the right to this road, and I may use the illustration of an estate sold with an inclusive acreage, as is commonly done—an acreage embracing all public roads passing through the lands.

Lord Gifford—I have arrived at the same result. Though there may be some questions of nicety raised, yet I have not any doubt whatever that Donaldson's trustees and not the pursuers are entitled to receive the bond or the money it represents from the Road Trustees for this portion of the land of the late Mr Donaldson. The minutes of the Road Trustees show that Mr Donaldson was a party to the whole arrangement, and accordingly are very important, as indeed truly constituting the contract. He sold his ground to the Road Trustees for the purposes of the road only; he had agreed to accept a bond from them with postponed payment. He stood in the position of a postponed creditor and nothing else. Had Mr Donaldson died intestate, I think that this debt was moveable, and as such would have gone to his executor, while the estate as heritage would have passed to the heir-at-law. If that heir had sold the estate, he could not have sold a right to this price. Now, of course, there is no difference in the fact that a will actually was made.

Now, what did the Donaldson trustees sell? Did they sell the estate, or did they sell also the personal debt due to them? If we read the disposition we find no reference to this. It is a sale of the estate with the road on it. It is proper enough to include the road in the measurement of acreage, because many rights are left to the proprietor of the *solum*—as, for example, minerals and so forth. I confess that I am not at all moved by the fact that here the full acreage of 4 acres was disponed to the pursuers, for where a very wide road existed, for instance, you might afterwards actually have buildings put up in the road itself were it the absolute property of the Road Trustees, and not included in the titles of adjoining lands. Nothing short of an assignation of the debt would, I think, have been sufficient to transfer it if this had been intended, but I think it never was intended, and further that the debt never was transferred.

The Court adhered.

Counsel for Pursuers (Respondents)—Lord Advocate (Watson)—Trayner. Agent—H. B. Dewar, S.S.C.

Counsel for Defenders (Reclaimers)—Kinnear—Pearson. Agents—Cowan & Dalmahoy, W.S.

Saturday, June 7.

SECOND DIVISION.

[Lord Adam, Ordinary.

M'DONALD *v.* M'DONALDS.

(*Ante*, Jan. 16, 1879, and March 18, 1879, pp. 271 and 460).

Entail—Petition for Disentail—Expenses—Stat. 38 *and* 39 *Vict. cap.* 61 (*Entail Amendment Act* 1875), *sec.* 5.

In a petition for disentail, where a number of questions had arisen between the petitioning heir in possession and the second and third heirs in regard to the value of their expectancies in the entailed estate, and a great amount of litigation ensued, in which the petitioner was substantially successful—*Held* that in the circumstances neither party were entitled to expenses.

This case has already been reported (Jan. 16, and March 18, 1879, *ante* pp. 271 and 460), and the present question arose in regard to the expenses connected with the litigation which was the subject of the previous reports. After the proceedings reported *ante*, pp. 460, the case was remitted to the Lord Ordinary to proceed in accordance with the findings of their Lordships of the Second Division, and Lord Adam (Ordinary) after various procedure, and after having obtained reports from men of skill, pronounced the following interlocutor:—"In respect of consignation, in terms of the preceding interlocutor of May 27 current, dispenses with the consent of the respondents . . . Approves of the instrument of disentail: Interpones authority thereto, ... and decerns; and having heard counsel on the question of expenses, finds no expenses due."

The respondents reclaimed, but afterwards stated that they would not offer argument against it. The petitioner then asked for the expenses of the litigation so far as the respondents had been unsuccessful. The Court held that the questions being novel and difficult, the respondents were entitled to appear in the circumstances, and refused the motion, but the Second Division adhered.

Counsel for Petitioner—Balfour—Pearson. Agent—A. P. Purves, W.S.

Counsel for Respondent—Kinnear—Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, June 13.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

DEWAR *v.* URQUHART.

Succession—Testament—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 20—*Conveyance of Heritage—"Residue of my Estate."*

A person in possession of heritable and moveable property left a holograph settlement in which he appointed an "executor," with power to assume other executors. He then made provision for the payment of certain debts and annuities, and went on to say

that after this was done "the residue of my estate" shall be divided in a certain way. In the latter part of the deed he alluded several times to the executor as "trustee." *Held* (*rev.* Lord Curriehill, and *diss.* Lord Mure) that these expressions were not strong enough to show that the testator intended to convey his heritage as well as his moveable property, and thus to bring the case under the terms of the 20th section of the Titles to Land Consolidation (Scotland) Act 1868.

Remarks by the Lord President and Lord Deas upon the cases of *Pitcairn* v. *Pitcairn*, Feb. 25, 1870, 8 Macph. 604, and *Edmond* v. *Edmond*, Jan. 30, 1873, 11 Macph. 348.

Mr Robert Urquhart died at Aberdeen on Nov. 8, 1877, leaving a holograph *mortis causa* settlement dated Nov. 13, 1876. The clauses of that deed, so far as they need be quoted, were as follows—"*Aberdeen, 13th April* 1876.—This morning I have received a telegram intimating the sudden death of my only surviving brother James; and before leaving for London, I desire to appoint my nephew Dr John Urquhart my executor, considering it fitting to do so from my being so long almost exclusively connected with his father and his family, but with power to him (Dr Urquhart) to assume such other executor or executors as he may consider fit; and instruct that after paying all my lawful debts, £500 to each of the surviving children of my sister Jessy (Mrs Dewar), and making provision for the payment of £100 a-year to Mrs Urquhart, the widow of my now deceased brother James, during her life, and £20 a-year during her life to my faithful and kind friend Bell Brewster, the residue of my estate shall be divided equally among the surviving children of my late brother John, or if any of them should predecease me and leave a family, their share shall go to their family, and payment shall be made as after directed. . . . As the business of Marshall & Company has been paying about £1500 a-year for some years, it is recommended that a thoroughly competent business man be put into it to assist Mr Ledingham in the management of it, provided the following arrangement is carried out—In consideration of Mr Ledingham's faithful and devoted service to me for so many years, for which I feel deep gratitude to him, I desire that he shall have not less than one-half share of the profits, after deducting interest of capital at 4 per cent. and the usual expenses of management, and he shall have also £200 a-year as salary, which shall be a part of the expenses of management to be deducted from the profits before division, the other half of the business to belong to my nephew and trustee Dr John Urquhart. In the event of Dr John Urquhart not wishing to connect himself with the business, Mr Ledingham shall be allowed to continue the business, either by himself or by assuming a partner or partners, and to pay up the capital annually at the rate of not less than £1500 a-year, with interest on said capital of not more than 4½ per cent. per annum, in the event of Mr Ledingham getting security for the due payment of the instalments to the satisfaction of Dr Urquhart, my trustee; and it is specially conditioned that he shall not be responsible to any of the legatees for any failure of the security or of Mr Ledingham to pay such instalments. The legacies to my sister Jessy's children shall be paid first in full, when funds are realised sufficient for the purpose; and the residuary legatees shall only be entitled to receive payment from year to year as the funds come in. In consideration of the trouble Dr Urquhart will have as trustee, I so far alter the foregoing provisions as to an equal division of the residue, and provide that he shall have double the share of his sisters. All debts due to me by William Dewar, my brother-in-law, to be considered cancelled, and are hereby cancelled."

Dr John Urquhart, the executor under the deed, raised an action of declarator against Mr W. Dewar, the heir-at-law, concluding for a finding that the said holograph deed contained a valid general conveyance, "not only of the whole moveable property, but also of the whole heritable property," of the testator. Besides the premises in which the business was carried on, that included dwelling-houses in Aberdeen.

The decision of the question involved the construction of the 20th section of the Titles to Land Consolidation (Scotland) Act 1868—"From and after the commencement of this Act it shall be competent to any owner of lands to settle the same, in the event of his death, not only by conveyances *de præsenti*, according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings, and no testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands which shall have been granted by any person alive at the commencement of the Act, or which shall be granted by any person after the commencement of this Act, shall be held to be invalid as a settlement of the lands to which such deed or writing applies on the ground that the granter has not used with reference to such lands the word 'dispone,' or other word or words importing a conveyance *de præsenti*; and where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain, with reference to such lands, any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the granter, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing . . . . shall be deemed and taken to be equivalent to a general disposition of such lands within the meaning of the 19th section hereof by the granter of such deed or writing in favour of the grantee thereof."

The Lord Ordinary (Curriehill) [the case having previously been before the Inner House, where a minute of admissions obviating a question of proof was put in] pronounced an interlocutor granting decree as asked. He added the following note:—

"*Note.*—The question raised in the present action is—Whether the holograph will or settlement of the deceased Robert Urquhart, which is dated 13th April 1876, is so expressed as to apply to his heritable estate in whole or in part, and carry the same to his executor? The leading portion of the will is in the following terms—[*His Lordship here quoted the first clause of the deed, supra*] The pursuer Dr John Urquhart is the executor of the will. He is also one of the surviving children of the testator's brother John, and is therefore one of the residuary legatees. He maintains that the will is a settlement of the *universitas* of the testator's estate, heritable as well as moveable, and that he as executor is the general dis-

ponee of the testator. The defender is the eldest son of the testator's sister Jessy (Mrs Dewar), and is the testator's heir-at-law. He maintains that the settlement is so expressed as to apply only to the moveable estate of the testator, and not to his heritable estate.

"Had the present been a will which had come into operation before the commencement of the Titles to Land Consolidation (Scotland) Act 1868, the contention of the defender would have been sound. Indeed, the present question could not have arisen. But as Mr Urquhart did not make his will till 1876, the question to be determined is —Whether the settlement is so expressed as to be equivalent to a general disposition of the testator's heritage, in whole or in part, within the sense and meaning of the 20th section of the statute?

"The leading words of that enactment are as follows—[*His Lordship here quoted the section of the Act, supra*]. This enactment removed what had long been a blot upon the law of real property in Scotland, as it enabled an owner of lands to settle such by testament in the same way as it had previously been competent for him to settle his moveable estate,—all that is required being that he should express his intention to transmit his heritable estate in words which if used in a testament regarding moveables would be sufficient to carry these. The settlement of Robert Urquhart, now under consideration, is undoubtedly so expressed as to carry to the pursuer, his executor, his whole moveable estate. The question is—Does the settlement embrace heritage as well as moveables? and if so, to what extent? The word 'estate' which the testator employs in the part of his will already quoted is a flexible term; it may include the whole heritable and moveable estate belonging to the testator, or it may be limited to his moveable estate, or to his heritable estate; and the construction to be put upon the word will generally depend upon the context of the writing in which it occurs. If there had been nothing more in this settlement than the passage already quoted, I should have had difficulty in holding that the words 'residue of my estate' imported anything more than the residue of that portion of the defunct's estate which properly falls under the administration of an executor, viz., the moveable estate. But the term is, as I have said, a comprehensive one; and its range is to be determined by the context. Let us see, therefore, whether in the remainder of the settlement there is any indication of the idea which was in the testator's mind when he wrote the words 'the residue of my estate.' On referring to the deed it will be seen that the subsequent part of the settlement mainly consists of directions as to the continuance and realisation of what the testator calls his 'business.' The words of the deed are"—[*His Lordship here quoted the words of the deed, supra*].

"Now, the business with which the testator here deals, and in which he was engaged at the date of his will and at the time of his death, was carried on by him in Aberdeen under the name of 'Marshall & Company.' The partners of that company were originally John Marshall and the testator; and until the death of Marshall in 1870 the business consisted of three branches, viz., a preserved-provision manufactory, a chemical match-work, and a pail or bucket manufactory, all of which were carried on in premises at Spring Gardens, east side of Jopp's Lane, and in George Street. These premises had been purchased by the firm at various times; and at the death of Marshall the titles to the whole stood in name of John Marshall and Robert Urquhart as trustees for the firm—the fact of the trust being expressed in some of the titles and ignored in others. The prices were paid out of the funds of the company. Until the dissolution of the partnership by Marshall's death in 1870 the premises were regularly included in the annual balance-sheets of the firm as part of the assets of the company, although no value seems to have been placed upon them. From and after 1870 the business was carried on by the testator Robert Urquhart for his own behoof, but under the old name of Marshall & Company until his death in 1877; and the premises seem to have been enlarged and improved from time to time by the erection of new buildings, paid for by the firm. In all the annual balance-sheets of the concern these premises are entered, not merely as assets, but assets of considerable value. Thus they are stated at upwards of £1370 in 1875, while the total profit for the year is only £1632, 15s. 11d. In short, had these premises not been included as assets of the business the profit in 1875 would not have exceeded £234, and in other years it would have been *nil*.

"It appears, then, to me that these balance-sheets and the other excerpts from the books of the concern, read along with the statements and admissions in the record, in the minute and answers for the pursuer and defender respectively lodged in the Inner House, and in the joint-minute lodged in process since the case returned to the Outer House, establish the fact that both before and after Marshall's death, and until the death of the testator Robert Urquhart in 1877, the premises in question were uniformly dealt with by the testator as forming assets, and valuable assets, of the company. The books further show that the annual outlay for taxes and repairs, and the rents of the property, both that part thereof let to tenants and the part thereof occupied by the company, were dealt with as items of the company accounts. It is true that in some of the private ledger accounts kept in name of Robert Urquhart after 1870 there are entries showing that the rents of portions of the premises let to tenants were credited to him; but as he was sole partner of the company, and *ex hypothesi* of the present case the sole owner of the subjects, the fact that he received the rents in question is not material.

"The important point is, that the way in which he caused these heritable subjects to be dealt with in keeping the books and striking the balances of the firm shows very clearly that he considered these subjects as forming an important part of the business of Marshall & Company. Indeed, as I have already pointed out, but for the value put upon these subjects in their annual balance-sheets, the amount of annual profit would in some years have disappeared, and would in every year have been greatly less than that brought out on paper; and would never have amounted to the sum of £1500, at which it is estimated in the settlement.

"Now, in dealing with this business in the manner in which the testator has dealt with it in his settlement, and by vesting it in his executor and trustee Dr John Urquhart, with the large powers of administration and disposal already quoted, I

think it is clear that he intended to include and did include the whole assets of the concern, and, *inter alia*, the heritable subjects now in question. To hold otherwise would, in my opinion, render unavailable the anxious provisions which he makes for the preservation and continuance of the business, because in that view the heritable subjects would have fallen to the heir-at-law, who would have then had it in his power to put a stop to the whole business by refusing to allow it to be conducted in the premises which had been specially constructed for it by the testator himself. The settlement of Mr Urquhart thus deals with 'lands' in language admittedly effectual as a bequest of moveable estate; and I am therefore of opinion that the Statute of 1868 applies to this case, and that the settlement operates as a general conveyance of the subjects connected with the business in favour of the pursuer.

"This being so, the only other question is—Whether the settlement includes the other heritable property belonging to the testator, viz., his house in Golden Square and certain dwelling-houses in George Street? I am inclined to answer the question in the affirmative. I do not think that the testator intended any distinction to be drawn between these premises and the business premises, and that in bequeathing 'the residue of my estate' to the children of his brother John, he meant them to have the free residue of his whole estate, whether heritable or moveable. It is not unimportant to observe that the interest of his heir-at-law is not neglected in the settlement, for he gets a bequest of £500 as one of the children of Jessy Dewar, and the debts due by his father William Dewar to the testator are all cancelled. On the other hand, the testator plainly desired to favour the children of his brother James, and to confer a double share on the pursuer, for whom he seems to have had a special regard.

"The present case may be usefully contrasted with that of *Pitcairn*, 8 Macph. 604. In that case the words of bequest were—'I hereby declare that B, my brother, shall not inherit any of my effects, but that they shall all descend to my brother C.' It was there held that these words were ineffectual to transmit heritage to C, because 'effects' is not a term which is applicable to heritable estate. But if the word had been 'estate' or 'estates,' it cannot, I think, be doubted that the decision would have been the other way, and that the will would have been held sufficient to carry the heritable estate as well as the moveable to C. In the present case the 'estate' which is bequeathed does include part at least of the testator's heritage. The will, therefore, does, within the meaning of the statute, apply to lands, and I do not think there is anything in the context to limit the application of the deed to the subjects connected with the business. In my opinion, the testator's whole estate, heritable and moveable, is conveyed to the pursuer, and decree is therefore given in his favour, with expenses which will include the Inner House expenses as part of the costs of the cause."

The defender reclaimed, and argued that the testament was not sufficient to show the testator's intention of conveying his heritable as well as his moveable estate without going upon mere conjecture, which was not sufficient to satisfy the clause in the Act. The fact that he used the word "estate" in speaking of the residue was not sufficient to indicate that intention, unless it was strengthened by other words in the deed, while the fact that in the leading clause of the will he appointed an executor, sufficiently showed that he meant only to convey moveables. The mere use of the word "trustee" in the latter parts of the deed meant nothing, as an executor was truly a trustee, and the words were used as convertible terms.

Authorities — *Pitcairn* v. *Pitcairn*, Feb. 25, 1870, 8 Macph. 604; *Edmond* v. *Edmond*, Jan. 30, 1873, 11 Macph. 348; *Morrison* v. *Marshall*, May 13, 1871, 9 Macph. 736; *M'Leod* v. *M'Leod*, Feb. 28, 1875, 2 R. 481; *Pringle & Others*, Nov. 14, 1877, 15 Scot. Law. Rep. 89.

The pursuer argued that the presumption was against partial intestacy, especially in the circumstances under which the will was made; and that from the use of technical words in the deed, such as "trustee" and "estate," it was for the defenders to show that the conveyance was a limited one.

Authorities—*Mayor of Hamilton* v. *Hodsdon*, 6 Moore P.C. 76; M'Laren on Wills, i. 312; *White* v. *Finlay*, Nov. 15, 1861, 24 D. 38.

At advising—

Lord President—The question in this case is, Whether the will of Robert Urquhart, dated April 13, 1876, is sufficient to convey his heritable as well as his moveable property under the 20th section of the Titles to Land Consolidation Act 1868. Various cases under this section have come before the Court, and I think that not only are they reconcileable but harmonious. It seems to have been thought that some expressions made use of by myself and Lord Deas in the case of *Edmonds* led to a different construction of the statute from the general tendency of the construction given in the opinions of other judges. I think that this is not so, and the idea has arisen from the expressions not being rightly understood. The clause provides in its first part that lands may be conveyed by *mortis causa* deeds without the use of technical words, and especially without the use of the word "dispone." In its second part it provides that "where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain with reference to such lands any word or words which would, if used in a will or testament with reference to moveables, be sufficient to confer upon the executor of the granter, or upon the grantee or legatee of such moveables, a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and taken to be equivalent to a general disposition of such lands within the meaning of the 19th section," &c. Now, the question under this latter branch will always be, Does the deed contain a "word or words" having reference to lands sufficient to explain the intention of the testator to pass his heritage by his will? If there be such, either when taken by themselves or in connection with the rest of the will, then I think the lands will be effectively conveyed. When I say this, I do not mean that a "word or words" (to quote the statute) which necessarily mean the conveyance

of lands as a gift must be used, but any "word or words" which sufficiently explain the meaning of the testator that the lands shall pass. This intention may therefore be implied from the language used, and there can be no better illustration of what I mean than the words which occur in the case of *M'Leod.* There the words are a direction to "realise all my heritable and moveable property when they see fit," and this was held to clearly imply an intention to make a conveyance of lands as well as moveables. I only further desire to add, by way of caution, that of course words sufficient to convey moveables are not sufficient to convey heritable property unless the wish is clearly implied in the language. They must be words importing that heritable property is meant to be conveyed as well as moveable, or that the whole estate is to be conveyed without distinguishing between the two classes.

Such being the statute, let us take this will. The testator possessed estates of both kinds; he had moveables to the extent of about £12,000, and that constituted the larger part of his fortune, but he also had heritable property. He had a house in Aberdeen, and also had business premises in which he carried on business with a Mr Marshall until Mr Marshall died. He, Mr Urquhart, then became the proprietor of the estate. There was also some other heritable property as to which there is some dispute—whether or not it belonged to Mr Urquhart. That being so, we have to explain the meaning of his will, which proceeds thus:—"*Aberdeen, 13th April* 1876.—This morning I have received a telegram intimating the sudden death of my only surviving brother James; and before leaving for London I desire to appoint my nephew Dr John Urquhart my executor, considering it fitting to do so from my being so long and almost exclusively connected with his father and his family, but with power to him (Dr Urquhart) to resume such other executor or executors as he may consider fit." Now, in some after parts of the will this executor is called "trustee," and it is contended that as the testator made him also a trustee, and gave him power to assume other executors, he really meant to create a trust of all his estate of every kind. I think that that is a rash conclusion. No doubt an executor has no power of assuming other executors as a trustee has, but it is not impossible that a sole executor may induce another—one of the next-of-kin possibly—to join with him in the confirmation, and that is enough to account for these words; besides, an executor is in fact a trustee. I cannot sustain that consideration as sufficient to indicate an intention to convey heritable property as well as moveable, nor do I think it an element for consideration in dealing with other parts of the will.

Having done this, the testator proceeds—"And instruct, that after paying all my lawful debts, £500 to each of the surviving children of my sister Jessy (Mrs Dewar), and making provision for the payment of £100 a-year to Mrs Urquhart, the widow of my now deceased brother James, during her life, and £20 a-year during her life to my faithful and kind friend Bell Brewster, the residue of my estate shall be divided equally among the surviving children of my late brother John, or if any of them should predecease me and leave a family, their share shall go to their family, and payment shall be made as after directed." The purpose of this clause and the instructions to the executor can perfectly well be carried out without trenching on the heritable property. The moveable property is quite sufficient to provide for all the provisions and to leave a residue to be divided. But it is said that when the testator speaks of the residue he speaks of the residue of my "estate"—a word capable of comprehending both classes of property, and no doubt it is. In certain circumstances in which it may be used it clearly implies both classes, but it may also be used only to mean conveyance of one kind, and therefore it is a word always subject to construction, and if in the present case we cannot gather any intention to convey heritage from the rest of the deed, the use of the word by itself is not strong enough to imply intention. If a man says—"I nominate A B my executor, and tell him to do so and so with my funds, and then to divide the residue of my estate," that clearly means that it is the residue of the funds. There must be something to give the word a more comprehensive meaning. Another part of the will, which has evidently made a very strong impression on the Lord Ordinary's mind, is that part dealing with the business. The testator says—"As the business of Marshall & Co. has been paying about £1500 a year for some years, it is recommended that a thoroughly competent business man be put into it to assist Mr Ledingham in the management of it, provided the following arrangement is carried out—In consideration of Mr Ledingham's faithful and devoted service to me for so many years, for which I feel deep gratitude to him, I desire that he shall have not less than one-half share of the profits, after deducting interest of capital at 4 per cent. and the usual expenses of management, and he shall have also £200 a-year as salary, which shall be a part of the expenses of management to be deducted from the profits before division; the other half of the business to belong to my nephew and trustee Dr John Urquhart. In the event of Dr John Urquhart not wishing to connect himself with the business, Mr Ledingham shall be allowed to continue the business, either by himself or by assuming a partner or partners, and to pay up the capital annually at the rate of not less than £1500 a year, with interest on said capital of not more than 4½ per cent. per annum in the event of Mr Ledingham getting security for the due payment of the instalments to the satisfaction of Dr Urquhart, my trustee; and it is specially conditioned that he shall not be responsible to any of the legatees for any failure of the security or of Mr Ledingham to pay such instalments." Now, this has struck the Lord Ordinary in this way—He thinks that Mr Urquhart must have intended that his business premises, which form the most important part of his heritable estate, should be carried along with the business, viz.—one-half to Mr Ledingham, and the other half to Dr Urquhart, his executor. He says that if this were not the case it would be difficult to see how the business could be said to yield £1500 per annum, for the premises were included as assets of the business—otherwise, except in the year 1875, the profits would really have been *nil.* This view seems to me to be a mistake, because the value of the business is to be estimated after deducting 4 per cent. on the capital from the profits, and that would still leave

a large residue to be divided after the deduction had been made; and further, I think that the expression of this part of the will is against this construction. The capital consists not only of the material and stock, but also of the premises. The meaning of the testator does not seem to me difficult to gather. He intends that the nett profits of the business shall, after deduction of the 4 per cent. interest, be divided between Mr Ledingham and Dr Urquhart. If the testator had meant to embrace the heritable property in his will, it is difficult to see what is to become of it afterwards. Is it to belong jointly to these two gentlemen, or is it to be divided between them? The Lord Ordinary does not explain this. There is, besides, an alternative in the will—"In the event of Dr John Urquhart not wishing to connect himself with the business, Mr Ledingham shall be allowed to continue the business, either by himself or by assuming a partner or partners, and to pay up the capital annually at the rate of not less than £1500 a-year, with interest on said capital of not more than 4½ per cent. per annum in the event of Mr Ledingham getting security for the due payment of the instalments to the satisfaction of Dr Urquhart, my trustee." Now, according to the Lord Ordinary's view, that the heritable and moveable property are inseparable, this can only mean that Mr Ledingham is to buy up the heritable property and pay up the capital in instalments to the executor if he (Dr Urquhart) does not wish to enter the business. If the testator had had any such intention he would certainly have said so. I cannot believe that in writing that clause he meant that Mr Ledingham should do that. So far, therefore, from these provisions as to the business adding any strength to the idea that the testator meant to include his heritable property in his will, I think they have an exactly opposite effect. I certainly have not experienced much difficulty in coming to the conclusion that it is impossible to hold that such was his intention. It will not do to say that perhaps he may have meant to do so. Under the section of the statute a distinct intimation is required, and I should consider it most unfortunate if such a doctrine received any countenance. Nothing in my opinion can satisfy the statute except exact words. I am for altering the interlocutor of the Lord Ordinary.

Lord Deas—The question as regards this clause in each individual case must always be whether words are used with reference to such and such lands. I have had occasion to give my opinion upon the construction of the clause in *Edmunds'* case, and looking back at that, I am disposed to adhere to it as it stands, with this slight explanation, that when I said the testator must use words of gift, I meant that he must use words of gift or words importing gift. No other construction of the clause can be reasonably contended for. To that opinion I distinctly adhere, and I would just say in reference to this case that the statute does not go so far as to allow us to judge upon a mere probability. It does not in fact substitute conjecture for technical words. If we adopted the Lord Ordinary's finding we should be merely doing that. Such a course would lead to endless litigation and confusion. I agree with the Lord Ordinary so far when he says that a man's estate may mean his whole estate—the question is, Does he mean that it shall mean his whole estate?

What the testator does here is to appoint an executor. It must be something after this that means that he wishes to convey his whole estate. And there are just two things that could possibly mean that. The first is the expression "residue of my estate." Of what estate? The residue of the estate of which he has appointed his nephew executor. And if you go on after this you do not find one other word to the effect contended for except that two or three times he calls this executor "trustee." No doubt an executor is always a trustee. There may often be words in a deed showing that the appointment of an executor does not necessarily mean immediate winding-up. I can find nothing more in the will, and I cannot help thinking that if we were to give the heritable estate, as we are asked to do, we might very likely be going exactly contrary to the testator's wish.

Lord Mure—I have felt this case to be attended with considerable difficulty, but after mature consideration I have not been able to see my way to any conclusion other than that at which the Lord Ordinary has arrived, although, I may not have come to that conclusion on the precise same grounds. The general import and effect of the statute does not I think admit of doubt, whether regard is had to the provisions of the section on which the question here raised mainly depends or to the construction which has been given to those provisions in the various cases referred to in the argument. The statute in substance dispenses with all technical words of disposition in the matter of a will, and declares that they shall no longer be necessary to the effectual *mortis causa* settlement of land. It then provides that a bequest shall be effectual as regards lands if words of conveyance are used which will suffice to carry moveables, provided they are contained in a deed purporting to convey or bequeath lands, or, in other words, provided it appeared from the deed that the meaning and intention of the maker was that it should comprehend heritage.

In the will here in question the general instructions or directions given by the late Mr Urquhart to his executor are, that after paying all his lawful debts, £500 to each of the surviving children of his sister Jessy (Mrs Dewar), of whom the pursuer, his heir-at-law, was one, and making provision of £100 a-year to the widow of his deceased brother James, and for one or two other legacies, "the residue of my estate shall be divided equally amoung the surviving children of my late brother John," &c; and he then goes on to make particular provisions relative to the disposal of the business in which he was engaged.

Now, it is not disputed that the words "residue of my estate" are amply sufficient to carry the testator's moveable estate; but the question is, whether they are sufficient to operate a settlement or disposal of his heritable estate? Taking the words by themselves, I am of opinion that they are. I think that they may fairly be said to purport to settle or dispose of heritable property, because the word "estate" is one which, in its general acceptation, is not limited to moveables. It is broad enough to cover heritable estate also; and I am disposed to think that, according to its ordinary and primary acceptation it is under-

stood to apply to land rather than to moveables. To satisfy myself of this, however, I thought it right to look into some even elementary authorities on the subject. In the leading dictionary of the English language I find that the word is thus interpreted "fortune, possession, generally meant of possessions in lands, realities." In Bell's Law Dictionary it is said—"The term estate in its most ordinary acceptation signifies a person's land estate; but it also frequently applies to moveables." In support of this Mr Bell refers to a passage in Bankton, ii. 3, 597, which seems to bear out his interpretation; for Bankton's words are, that "estate is generally taken for a man's land estate; but it is frequently applied to moveables, as when we speak of one's personal estate"—thereby showing that in his opinion some restrictive word, such as "personal" or "moveable" was necessary to limit its application to moveable property. The interpretation clause of the Bankrupt Act of 1856 bears—"Property or estate shall, when not expressly restricted, include every kind of property, heritable and moveable."

Such being the meaning given to the word, both in its ordinary and in its legal acceptation, I am unable to come to the conclusion that when this testator directed the "residue of his estate" after payment of all his debts, and after paying the legacies and annuities bequeathed by him to his various relatives, including his heir-at-law, to be divided "among the surviving children of his brother John," he did not intend that residue to include landed as well as moveable estate. Having formed that opinion, I feel myself bound, in dealing with a remedial Act of this description, to hold that the word "estate" must be construed in its widest and most comprehensive sense, and must be held to have been used with a view to include real as well as personal estate, unless there is a clear intention disclosed in other parts of the will which necessarily leads to an opposite result.

We were not referred to any decision, and I am not aware of any case in the Scotch Courts, in which any question as to the precise legal meaning of the word "estate" in a settlement has been raised and decided. But reference was made in the course of the discussion to a passage in a judgment of Lord Brougham delivered in the Privy Council in the case of *Hamilton* v. *Hodsdon* (6 Moore, P.C., 76) relative to the construction to be put upon the word "estate" in dealing with a question of this description. I have carefully examined that case, and although the decision may not be so binding upon the Courts of this country as a judgment of the House of Lords, it appears to me to have a very important bearing on the question we are now called on to decide, because it is a very authoritative exposition of the law of England on the subject; and I rather think one main object of the provisions of the 20th section of the Act which is here in question was to place the law of Scotland in the same position as that of England in the construction of wills applicable to heritable estate. It was pronounced on an appeal from one of the colonies in 1847, when the Privy Council consisted of several very eminent men besides Lord Brougham. It related to the construction of a will, and depended mainly on the meaning which in law was to be attached to the word "estate," and it bears to proceed on a very full and anxious examination of all the leading authorities on the subject, from which it is shown that as far back as the days of Lord Mansfield, in the case of *Hogar* v. *Jackson*, in 1775 (1 Cowper 306), the word "estate" was held to be a technical legal expression and properly applicable to real estate.

Lord Brougham thus laid down what he considered the undoubted rule of law on the subject "The principle is now (whatever it may have been anciently) perfectly recognised, nor do I understand it to be substantially disputed on the part of the appellant at the bar, that the word "estate" is *genus generalissimum*, and will by its own proper force, without any proof *aliunde* of an intention to aid the construction, carry the reality as well as personality, and is not to be confined and restrained to personality only, unless there is a clear intent expressed in other parts of the will, to be gathered either from the whole will, which (I agree with what Lord Eldon has said in one or two of the cases cited) you are always to look to, or from the way in which the word is used in the particular part of the will where the contested use of it arises, or in some other way it is shown to be restricted to mere personal estate, contrary to the strict, usual, and now established force, effect, and value of the word."

The rules of construction thus laid down humbly appear to me to be sound in principle, and to have a very direct application to the circumstances of the present case. And if I am right in this, the only question which remains for consideration is, whether there is anything in other parts of this will which necessarily restricts the meaning of the word "estate," and shows that the intention was to confine it to personal estate? Now, I have frequently read the will, and must confess that I have been quite unable to find either in its general conception or in any of the expressions used anything to show that this gentleman meant to die intestate as regards his heritable property, and did not use the word "estate" in its widest and most general acceptation.

The circumstances under which the will was made, as these are to be gathered from its introductory words, appear to me to lead to the inference that it was the maker's intention to execute a general settlement of his affairs. He had that morning heard of the sudden death of his only surviving brother, and as he was about to leave home he seems to have thought it right to make a settlement; and the presumption when a man so sits down to make a settlement is, I think, that he means to settle his whole affairs. To this end he appoints the pursuer, his nephew, to be his executor, having selected him because of the long and intimate connection which had subsisted between himself and the pursuer's father, who was his half-brother; and although he began by appointing him his executor, he describes him as his trustee in other parts of the deed. Having done this, he proceeds to distribute his property among his relations, and in doing so he appears to have provided the them all, including the defender, the heir-at-law, who was a son of his sister Mrs Dewar. He then leaves "the residue of his estate" among the children of his brother John, to whom he was apparently much attached, and of whom the pursuer is one; and there is nothing that I can find in the deed to show that he meant to restrict that bequest to the residue of his moveable estate, and leave

his heritage undisposed of, in order to enhance the bequest made to his heir-at-law, who had already been provided for.

In the argument addressed to us on the part of the defender the use of the word "executor" was strongly dwelt upon, as showing an intention to restrict the bequest to moveables. But if I am right in holding that the word "estate," in its ordinary and proper legal acceptation, necessarily includes heritage, the mere use of the word "executor" ought not, I think, to be construed as ever ruling the legal import of the words of bequest; and Lord Brougham, in the Privy Council case to which I have referred, cites a case in which that very argument from the use of the word "executor" appears to have been rejected.

With reference to the arguments founded upon the manner in which the testator's business was carried on, and upon the provision made by him as to how he wished it to be conducted after his decease, I am not disposed, and do not feel it necessary, to rely much on the details of those business transactions as disclosed in the testator's books; and I rather doubt the competency in a question of this description, of examining those details in order to throw light upon the meaning of a will. But it is not, I think, unimportant to observe that in the latter part of his will the testator uses the word "trustee" and drops "executor" as descriptive of the position of the pursuer; while the careful directions he gives as to the way in which his business is to be carried on after his death tend strongly to the conclusion that he meant to make a settlement of his whole affairs. There is, in short, nothing, in my opinion, to be found in the whole will which can be held to exclude the construction which is in law applicable to the word "estate," and I am on these grounds for adhering to the interlocutor of the Lord Ordinary.

Lord Shand—I have come to the consideration of the provisions of this deed with a decided leaning in favour of holding it a general settlement of both heritage and moveables, for I think there is force in the observation made in the argument, that the circumstances in which the will was made make it probable that the testator meant it to be a general settlement. If we were at liberty to go on probabilities or conjecture, the argument would have considerable force. But it is clear that to proceed in that way would be quite unsafe, and the true test of the testator's intention is what we find expressed in the deed. The intention must be there expressed. If we are asked to go on probability there are two answers against the advisability of that course—in the first place, that the testator may not have meant to do what is said to be probable, and secondly, that if he did intend to do so he has not so expressed himself. In this case I am by no means satisfied that Mr Urquhart meant to convey his heritable as well as his moveable estate, and I am satisfied that he has not used language sufficient to show that this was his meaning.

Coming to the consideration of the deed itself, I first notice that it does not express the intention of making a general settlement at the outset. It relates the occurrence which gave rise to the execution of the deed, and then the testator says that he desires to appoint an executor. This clause certainly does not show any intention in the testator's mind of conveying heritage; all that it does is to appoint Dr Urquhart to be executor. Now, there is nothing better settled in law than that the appointment of an executor only confers on the person appointed the right to administer the moveable estate. Formerly an executor was benefited personally to the extent of one-third of the dead's part by the nomination, but the Statute 18 Vict. cap. 23, changed that. So much of the old Act was repealed as dealt with the personal benefit to executors. It is clear that the result in law of nominating an executor is merely to convey right to the administration of moveables only. The deed in its next clause refers to "the residue of my estate," but I think that must be read with reference to what is undoubtedly the leading clause in the will—that regarding the executry estate. It must be observed that this reference to the residue occurs in a clause of instruction and not in one of conveyance, and there is nothing to show that the testator had any intention of enlarging what had gone before. As regards the effect of the statute, I had occasion in *M'Leod's* case, 2 R. 481, to go fully into the provisions of this section of the Act of 1868, and having then expressed at length my views on the subject, I need merely refer to what I then said, and particularly page 483 of the report. It is worthy of notice that the words "residue of my estate" occurred in *M'Leod's* case. I thought that they did include heritage, because a consideration of the other parts of the will showed that to be so, whereas here the words seem limited to moveable estate.

Further, I do not differ from Lord Mure on the interpretation of the word "estate." That word, I think, if not otherwise limited, ought to be held to include heritable estate as well as moveable. It is broad enough to do so. If at the outset the testator had used words of conveyance of his estate, I should have had no difficulty in holding that he meant to convey both kinds of estate; but he does not; for the strong feature of the deed is the appointment of an executor, and therefore I can only read the deed as a conveyance of moveable estate. Something was said as to the fact that the testator sometimes uses the word "trustee;" but I think this is of no material consequence, for when we look at the deed we observe that wherever it is so used it is used as a convertible term with executor; and quite rightly so, as an executor always is a trustee. Only one other circumstance is founded on, viz., the provisions in regard to the business of the testator. I cannot agree with the Lord Ordinary in the view he has taken of these provisions. The business with which the testator dealt is moveable estate. I do not think that the way in which the testator dealt with the business in his ledger can be looked at. It is necessary to ascertain what a man possessed when construing his will, but the construction of the deed cannot be affected by the way in which he treated his business in his balance-sheets. If we did so the word "business" would mean one thing if he treated it in one way in his books, and another if he treated it in another. So I think no light can be got from the provisions as to the business. Everything, in short, in the deed appears to me to point to a conveyance of moveable, not of heritable estate. On the whole matter, I feel far from satisfied that

the thought of conveying heritable estate was in the mind of the testator, and certainly he has not used words habile to convey such subjects.

The Court recalled the Lord Ordinary's interlocutor, assoilzieing the defender from the conclusions of the summons and finding him entitled to expenses.

Counsel for Pursuer (Respondent)—Dean of Faculty (Fraser)—J. A. Reid. Agent—R. C. Gray, S.S.C.

Counsel for Defender (Reclaimer)—Balfour—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Friday, June 13.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—(SMITH'S CASE)—JAMES SMITH *v.* THE LIQUIDATORS.

Public Company—Winding-up—Liability of Trustees—Authority—Acquiescence.

A and B entered into an antenuptial marriage-contract, whereby B, the wife, made over to trustees all her goods, which consisted, *inter alia*, of stock in a bank which afterwards failed. The trustees named all accepted office by minute annexed to the contract. The agents under the contract wrote, without consent of the trustees, to the manager of the bank a letter containing the following words, *inter alia*:—"We suppose you will issue and send us a new certificate in the names of the trustees." This was done. For some time the dividends were paid upon the signatures of the trustees, but C, one of the number, signed no dividend warrants. Sometime after they were paid to B on her own receipt, she being one of the trustees, under a mandate to the following effect:—"We, trustees under her marriage-contract, beg that you will arrange to make future dividends on the stock of B payable to her order at Edinburgh, and request that you will advise her to that effect." This was signed by C as well as by the other trustees. In the winding-up of the bank *held* (*diss.* Lord Shand in the case of C) that the trustees fell to be placed upon the first part of the list of contributors under the rule laid down in *Muir's* case, Dec. 20, 1878, 16 Scot. Law Rep. 139; H. of L. April 7, 1879, 16 Scot. Law Rep. 483.

Mr James Shanklie Smith and Sarah Ann Smith were married in October 1872, and of the same date entered into an antenuptial marriage-contract whereby Mrs Smith made over to James Smith, James Brown Smith, the said Mrs Sarah Ann Smith, the said James Shanklie Smith, and Peter Shanklie Smith, as trustees for certain purposes, everything then belonging to her or which might belong to her during the subsistence of the marriage, and specially a sum of £1250, being a provision secured to her by her father. James Brown Smith was Mrs Smith's brother, and all the other trustees besides herself and her husband were near relations. The trust-estate conveyed by Mrs Smith consisted, *inter alia*, of £200 stock of the City of Glasgow Bank standing in her name and acquired by her before marriage. There was no special assignation of this stock in the marriage-contract. Mrs Smith also possessed some Union Bank stock.

By minute annexed to the contract of marriage, dated in December 1872, the petitioners all accepted the office of trustee under the contract. No transfer of the bank stock was executed in their favour. On 17th Jan. 1873 Messrs Fisher & Watt, the agents under the contract, sent a stock certificate in favour of Mrs Smith to the manager of the City of Glasgow Bank. This letter was in the following terms:—

"Dear Sir—Certificate No. $\frac{29}{149}$ of £200 stock, City Bank, Miss Smith.

"We send herewith this certificate, which has been assigned by Mrs Smith in a general conveyance under her marriage-contract, also now sent. For the use of the Banking Company we send an excerpt of that deed *quoad* the general conveyance of the lady's estate, and we will thank you to notify that intimation of the assignment has been made. Be good enough to return the marriage-contract at your earliest convenience. We suppose you will issue and send us a new certificate in the names of the marriage trustees. Any fee you may have we shall remit on hearing its amount.—Yours, &c.,

"FISHER & WATT."

This letter was received at the bank, and a stock certificate was made out certifying that the above-named trustees had been entered in the books as holders of the stock. The entry in the stock ledger was in the following terms:—

"Miss Sarah Ann Smith, No. 64 St Vincent Crescent, Glasgow.

	Dr.	Cr.	Balance.
1869.			
June 3. By Stock from Ledger, No. 4/788.		200	200
1873.			
Jan. 18. To her Marriage-Contract Trustees, 627, . .	200		
	£200	£200	

"James Smith, Stove and Range Manufacturer, Glasgow, James Brown Smith, Stove and Range Manufacturer there, James Shanklie Smith, Chemist and Druggist Edinburgh, Peter Shanklie Smith, Chemist and Druggist there, and Sarah Ann Smith, daughter of the said James Smith, and now wife of the said James Shanklie Smith, Trustees under the Antenuptial Contract of Marriage between the said James Shanklie Smith and Sarah Ann Smith, dated 16th October, and registered in the Books of Council and Session 23d December 1872.

1873.
Jan. 18. By Stock for Sarah A. Smith, £526=£200."

For some time after the marriage the dividends on this stock were paid on the signature of three of the trustees, viz., Mrs Smith, James S. Smith, her husband, and Peter S. Smith, her father.