Judge, though he held himself to be bound by previous decisions if they applied. The exact point had never before been decided. The buyers therefore rightly defended the action. It is in accordance with a vast amount of practice that the party ultimately liable is responsible for the whole expense of defending the claim.

The Court recalled the interlocutor of the Lord Ordinary, and decerned in terms of the declaratory conclusion of the summons, and for payment by the defender, as trustee, to the pursuers, of £824, 6s. 1d., and £100, 3s. 6d., and remitted the other accounts to the Auditor.

Counsel for Pursuers — Kinnear — Jameson. Agents—Welsh & Forbes, S.S.C.

Counsel for Defender—Solicitor-General (Balfour, Q.C.)—J. P. B. Robertson. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, December 14.

SECOND DIVISION.

(Before Seven Judges.)

SPECIAL CASE—LINDSAY'S TRUSTEES AND LINDSAY AND OTHERS.

Trust Disposition and Settlement—Repugnancy—Protected Succession—Fee and Liferent.

T. L. died survived by seven children of his second marriage and two children of his first, viz., W. L. and C. L. In a trust-disposition and settlement and codicil thereto, T. L. directed his trustees, in the third purpose of the trust, in respect that he had acquired considerable means by his first wife, to convey to W. L. a dwelling-house, and (as equivalent to this gift) to C. L. the sum of £1200 (afterwards restricted by the codicil to £1000). In the ninth purpose, while settling the shares of his estate to be given to his whole children, he directed that the above legacy of £1000 should be settled on C. L. on her attaining majority, "so as to provide to herself a liferent only thereof, and to the lawful issue of her body equally among them the fee thereof." She died unmarried, a major, and intestate. On a competition between her executor-dative *qua* next-of-kin and the trustees, as such and as tutors and curators to the rest of the children, —*held*, that looking to the intention of the truster, it was clear that the qualification in the ninth purpose of the trust was only intended to apply in the event of C. L. marrying and leaving children, and that therefore the fee vested in her and had passed to her executor.

Thomas Lindsay, Shipowner, Leith, died on the 8th April 1877, survived (1) by his widow, (2) by two children of his first marriage, viz., William Bruce Lindsay and Catherine Bruce Lindsay, (3) by five children of his second marriage, viz., Thomas James Lindsay, John Allan Lindsay, Charles Cossar Lindsay, Agnes Veitch Lindsay, and Mary Eliza Louisa Lindsay. He left a trust-disposition and settlement and codicil, dated 5th June 1874 and 7th April 1877. In the former, after appointing William Lindsay Esquire of Hermitage Hill House, and others, his trustees, he directed them as follows:—"*Secondly*, I direct my said trustees to implement and fulfil the obligation undertaken by me in antenuptial contract of marriage entered into betwixt me and my spouse Mrs Agnes Cossar or Lindsay, bearing date 2d April 1859, whereby I bound and obliged myself to invest in heritage or other good security the sum of £3000 sterling, in addition to the heritage therein conveyed, and to take the titles thereto as therein stipulated and agreed on. *Thirdly*, In respect that I acquired considerable means by my deceased wife Catherine Bruce or Lindsay, who, by a mutual disposition dated the 14th day of April 1852, and recorded in the books of Council and Session the 7th day of March 1857, disponed and bequeathed to me all the heritable and moveable estate which she might die possessed of, it is my wish that the following provisions to my children by the said Catherine Bruce or Lindsay, viz., William Bruce Lindsay and Catherine Bruce Lindsay, should be preserved or made for them over and above the other provisions herein contained in their favour, viz.—I direct my said trustees to execute and deliver, so far as that may be necessary on their part, a legal disposition or other regular conveyance for vesting in my son the said William Bruce Lindsay the dwelling-house and pertinents in Charlotte Street, Leith, now occupied by me, the conveyance to which is dated the 17th day of May 1853, and which subjects fall to him in virtue of the said conveyance; and as I consider the said subjects to be of the value of £1000 or thereby, to make my said daughter, the said Catherine Bruce Lindsay, equal thereto I leave and bequeath to her the sum of £1300 sterling, which legacy shall be payable at the first term of Whitsunday or Martinmas that shall happen six months after my decease." He then, after directing them to pay certain specific legacies, said—"*Sixthly*, I appoint my said trustees, after fulfilling the before-written purposes, to pay over to my said spouse, in case she shall survive me, and so long as she shall remain my widow, the nett income which shall accrue from the residue of my means and estate, and that by such instalments or intervals of not longer than six months, as may suit the position of my estate, or in the opinion of my trustees be proper and expedient; but it is hereby provided and declared that my said spouse shall be bound, as by acceptance hereof she binds and obliges herself, to clothe, educate, and maintain all my children herein named (including the said William Bruce Lindsay and Catherine Bruce Lindsay), and any other that may still be born of my marriage with her; and she shall be bound also to keep her own children in family with herself so long as they shall remain unmarried; and my said spouse shall be bound also to keep the said William Bruce Lindsay and Catherine Bruce Lindsay in family with her so long as they choose to remain, provided always that the said William Bruce Lindsay shall not be entitled to remain longer than his reaching twenty-seven years of age, unless the trustees see fit to decide otherwise, which I hereby empower them to do; declaring that the said William Bruce Lindsay shall throughout pay for his own clothes, and the sum of ten shillings per week for bed, board, and washing;

and that if the said Catherine Bruce Lindsay shall express a wish to reside elsewhere, and the trustees consider it desirable that she should do so, she shall be entitled to receive out of the income of the trust such sum as my trustees may consider sufficient for her clothing and maintenance, which shall in that case come in lieu of the obligation on my said spouse to clothe and maintain, above set forth. *Seventhly,* In the event of my said spouse entering into a second marriage, she shall from the date thereof *ipso facto* forfeit and lose all interest under this settlement; and in that event my said spouse shall still be bound to implement the obligation, which by acceptance hereof she came under, to clothe, educate, and maintain my children as above provided for. *Ninthly,* Upon the death of my said spouse, or in the event of her entering into a second marriage, upon that event my whole estate, heritable and moveable, not already otherwise appropriated by these presents or by the foresaid antenuptial contract of marriage with my said spouse, shall be divided into as many parts as may be necessary to give each of my children, William Bruce Lindsay and Catherine Bruce Lindsay (children of the marriage betwixt me and the said deceased Catherine Bruce or Lindsay), and Thomas James Lindsay, John Allan Lindsay, Charles Cossar Lindsay, and Agnes Veitch Lindsay, surviving children already born of the marriage betwixt me and the said Agnes Cossar or Lindsay, and any other child or children who may yet be born of the marriage, an equal share, so that the same may be divided equally among them, the lawful issue of those predeceasing taking their parent's share; and in regard to the application of my means so divided for the benefit of my children, I hereby direct as follows, viz.:—I direct that the legacy of £1000 sterling to the said Catherine Bruce Lindsay shall be held by the trustees for her sole behoof during her minority, and shall, upon her attaining majority (with any savings of interest that may have resulted therefrom), be settled or placed so as validly and effectually to provide to herself a liferent only thereof, and to the lawful issue of her body, equally among them, the fee thereof: And as regards the respective shares of my said estate, heritable and moveable, both under these presents and under the antenuptial contract of marriage aforesaid (exclusive of the £1000 legacy to the said Catherine Bruce Lindsay), I hereby provide that the same shall vest in each of my children on my death, and in the case of a posthumous child on the birth thereof, but the said respective shares shall be held by my trustees for the sole behoof of my said children respectively during their respective minorities, and the annual produce, or such part thereof as may be necessary, applied for their use, and the respective shares, with any savings of interest that may result therefrom, shall then be settled as follows, viz.:—In the case of daughters, on themselves in liferent for their respective liferent uses allenarly, and on the lawful issue of their separate bodies, equally among them, in fee, and in the case of sons, it shall be settled on them so as the share of each shall be paid when they respectively attain twenty-five years of age: But declaring that, in the event of its appearing to my said trustees to be desirable or expedient, they are hereby expressly authorised and empowered to postpone the time of payment of any one or more of the shares of my said means for such period or periods, and under such conditions as to the application of the annual income and otherwise, as they may think fit to impose: And in case any of my said children, born and to be born as aforesaid (including the said William Bruce Lindsay and Catherine Bruce Lindsay), shall die without leaving lawful issue before the share or respective shares above provided to him, her, or them shall have vested in them, or have become payable, then and in such case both the original share or shares of the child or children so dying, and the share or shares accrescing to him, her, or them by virtue of the present clause, shall accresce (except as after provided) to the survivors or survivor of my said children, and be equally divided amongst them, share and share alike, and shall be held by my said trustees in the same way, or become payable at and upon the same events, as his, her, or their original share or shares, are hereby directed to be held or become payable: Provided nevertheless that in case the child or children so dying shall have left lawful issue, such issue shall be entitled to the share or shares, both original and accrescing, which their deceased parent or parents would have been entitled to if alive." He further appointed the trustees to be tutors and curators to such of his children as should be under age at his death. In the codicil of 7th April 1877 he restricted the bequest of £1300 to his daughter Catherine Bruce Lindsay to the sum of £1000.

Catherine Bruce Lindsay (the daughter by the first marriage) died on 24th January 1879, unmarried and intestate, being then above the age of twenty-one years, and her brother William Bruce Lindsay was appointed her executor-dative *qua* next-of-kin. The truster's other children, and also his widow, were alive when this case was presented. A question having arisen as to the destination of the legacy of £1300 (restricted by the codicil to £1000) mentioned in the third purpose of the trust-disposition and settlement the parties agreed to present this Special Case to the Second Division of the Court of Session for opinion and judgment. The party of the second part, who represented William Bruce Lindsay in his capacity of executor-dative *qua* next-of-kin to the deceased Catherine Bruce Lindsay, on the one hand, contended that upon a sound construction of the third purpose of the trust-disposition and settlement and codicil the fee of the said legacy of £1000 vested in the said Catherine Bruce Lindsay, and had passed to him as her executor. On the other hand, it was contended by the trustees, as parties of the first and third part respectively, in their character as trustees and as tutors and curators to the truster's remaining children, who were all under age, that "upon a sound construction of the said deeds, and in particular of the ninth purpose of the said trust-disposition and settlement, the right of the said Catherine Bruce Lindsay in the said legacy was a right of liferent only, and that upon her death the fee of the said legacy lapsed and fell into residue, or otherwise was undisposed of and fell *ab intestato* to the whole children of the truster, as being his next-of-kin and heirs *in mobilibus.*"

The questions submitted to the Court were—"(1) Does the legacy of £1300, mentioned in the third purpose of the said trust-settlement, and restricted to £1000 by said codicil, fall to the

party of the second part as the executor of the said Catherine Bruce Lindsay; or, (2) Has the said legacy lapsed so as to fall into residue; or, (3) Is the fee of the said legacy undisposed of, so as to pass to the heirs *in mobilibus* of the truster."

Their Lordships of the Second Division having heard the case, ordered it to be debated before seven Judges.

It was argued for the first and third parties that where two repugnant clauses appeared in a deed the latter cancelled the former. Here the original gift of £1000 as an out and out fee in the third purpose of the trust had been cancelled by the direction contained in the ninth purpose, and which limited the original gift to a mere liferent. Therefore in law the fee of the said legacy lapsed and fell into residue, and belonged *ab intestato* to the whole children of the truster as being his next-of-kin and heirs *in mobilibus*.

It was argued for the second party—The testator did not intend to die intestate. He indicated his intention to give his two children by his first marriage all the funds which had came to him from their mother, and therefore as an equivalent to the property which he bequeathed to the son he left Catherine the fee of £1000. It was true that this gift was qualified in the 9th purpose of the trust, but this qualification only arose from his desire to protect the succession of Catherine's children should she have any. She died unmarried and without children, and therefore the contingency qualifying the original gift never arose. In construing a deed such as this, the intention of the testator was to be looked to, and if the intentional meaning of two repugnant clauses could be got at, then that should prevail. It was sound law then to hold that the fee of the legacy vested in Catherine and passed to her executor.

Authorities — *Falconer* v. *Wright*, Jan. 22, 1824, 2 S. 537 (N.E.), 633 (N.E.); *Wilson* v. *Reid*, Dec. 4, 1827, 6 Shaw 198; *Fulton's Trustees*, Feb. 6, 1880, 7 R. 566; *Gibson* v. *Ross*, July 2, 1877, 4 R. 1038; *Smiths* v. *Chambers' Trustees*, Nov. 9, 1877, 5 R. 97, House of Lords, April 15, 1878, 5 R. 151.

At advising—

Lord President—The question here to be determined by us arises from the construction to be put on the trust-disposition and settlement of Mr Thomas Lindsay, who died on the 8th April 1877, and it is substantially this—Whether the special bequest of £1000 which he left to his eldest daughter vested during her life and passed to her executor?

The general scheme of Mr Lindsay's settlement may be very shortly stated. He first directs that the marriage-contract provisions in favour of his second wife (now his widow) should be implemented, and after leaving a number of specific legacies he directs that the whole residue should be liferented by her, and then he provides that after her death the whole residue of his estate not already otherwise appropriated should be divided into equal shares, one to be given to each of his seven children, and as regards the shares of the sons, he directed that they should be settled on them so that the share of each should be paid when they respectively attained the age of twenty-five; and then the clause of survivorship is expressed thus:—"In case any of my said children, born or to be born as aforesaid, including my two eldest children William Bruce Lindsay and Catherine Bruce Lindsay, shall die without leaving lawful issue before the share or respective shares above provided to him, her, or them shall have vested in them, or have become payable, then and in such case both the original share or shares of the child or children so dying, and the share or shares accrescing to him, her, or them by virtue of the present clause, shall accresce (except as after provided) to the survivors or survivor."

Now, I repeat, the scheme of settlement is simple, but the legacy with which we have to deal is one left as a special legacy, and the motive is very distinctly expressed in the third purpose of the trust. He says that he had acquired considerable means by his first wife Catherine Bruce or Lindsay, and he is anxious that the two children which he had by her, viz., William Bruce Lindsay and Catherine Bruce Lindsay, should be secured in certain provisions over and above those already secured to them. He therefore directs his trustees to execute a conveyance for vesting in his son William Bruce Lindsay a dwelling-house in Charlotte Street, Leith, and then, as regards his daughter Catherine Bruce Lindsay, he says, "as I consider the said subjects (*i.e.*, the dwelling-house) "to be of the value of £1000 or thereby, to make my said daughter the said Catherine Bruce Lindsay equal thereto I leave and bequeath to her the sum of £1300 sterling, which legacy shall be payable at the first term of Whitsunday or Martinmas that shall happen six months after my decease." It appears then, that while anxious to leave these two children something over and above the provisions already made for them, he directs certain heritable property to be conveyed to the son and a sum of £1000 (erroneously entered into this part of deed as £1300, but afterwards corrected) to his daughter; and this is the legacy with which we have to deal. Now, so far as the words are concerned there can be no doubt of their legal meaning. It is a distinct bequest of £1000 payable six months after his death. But then there is a provision regulating the same legacy in an after part of the deed, when dealing with the shares to be given to the children, and this creates the only difficulty. He says—"In regard to the application of my means so divided for the benefit of my children, I hereby direct as follows:—viz., I direct that the legacy of £1000 sterling to the said Catherine Bruce Lindsay shall be held by the trustees for her sole behoof during her minority, and shall upon her attaining majority (with any savings of interest that may have resulted therefrom) be settled or placed so as validly and effectually to provide to herself a liferent only thereof, and to the lawful issue of her body, equally among them, the fee thereof."

Now, it is contended that the effect of this clause is to alter the previous bequest from a bequest of a fee out and out into a mere bequest of a liferent provision of that sum, and that Catherine Bruce Lindsay having died after majority but without issue the fee of £1000 is undisposed of by the settlement.

I think it would be a strange thing if in the same deed there were to occur two clauses of so contradictory a nature, and I am not disposed to read them as being so, for I am satisfied that if I did so I should not be giving effect to the desire of the testator. There can be no doubt that he

intended that the children of his first marriage should have a preference over those of his second marriage, and he therefore gave his daughter the £1000 as an equivalent to the heritage which he gave his son. That was the one idea of the specific legacy, but it naturally occurred to him afterwards, as he was settling the shares of his whole children, that if his daughter had children it was right that they should have the fee to the property left to their mother, and therefore he says that while the trustees are to hold the £1000 for her behoof, they are to settle it so that she may have the liferent use of it and the children the fee. Therefore, except in so far as this clause secures the fee of the £1000 to the children if they should ever exist, it can have no effect on the early portion of the deed. Catherine Bruce Lindsay died after majority without leaving issue, and I am therefore of opinion that the property vested in her as a fee, and went to her executrix on her death. If I thought that in arriving at this result it were necessary to construe the words "liferent allenarly" in opposition to the technical meaning which has been settled for these words by a long series of decisions, I should not be disposed to come to such a decision, but here the later clause was clearly to have effect in the event only of that happening which did not happen. I therefore am of opinion that the first question falls to be answered in the affirmative, and the second and third in the negative.

Lord Justice-Clerk—I entirely concur. The question seems to be whether the bequest as given in the earlier part of the trust as £1000 in fee is to be controlled by the subsequent clause, or whether that clause is only a qualification to arise in contemplated circumstances. I think, on every principle of construction, that the latter is truly the state of the case. I do not think it is necessary to go into the meaning of the expressions "allenarly" or "alimentary," though I must own that my own leaning is to relax the excessive strictness of interpretation applied to them in some cases.

Lord Deas—Your Lordship has very clearly and distinctly stated where the question lies. Now, if we had the first portion of the deed to construe alone, I could not have any doubt that the bequest was given as a fee to the daughter, and, on the other hand, if we had the subsequent clause alone, it would be equally clear that the daughter was to have a liferent merely, and that the fee was to go to her children. It would be a dangerous thing, now after so many decisions both in this House and the House of Lords, to deny effect to such a bequest as distinctly gives a subject to the mother in "liferent allenarly or alimentary." There can be no doubt that in such a case the fee would be given to the children, and I cannot throw doubt upon that without going in the teeth of a series of authorities stretching over a long period of time. But the peculiarity of this case is, that while the £1000 is given to the daughter as a fee in the first portion of the deed, for reasons assigned it is restricted in a later portion to a liferent in the event of her having children. It seems clear then, that this was a restriction of the original gift only to take effect if there were any children, and I think we may decide that the fee vested in her without touching the class of authorities to which I have alluded; and therefore I agree with your Lordships.

Lord Mure concurred.

Lord Gifford—The question in this case really is, What was the true intention of the testator the late Thomas Lindsay in reference to the special legacy of £1000 bequeathed by him to his daughter the late Catherine Bruce Lindsay? Of course that intention must be gathered solely from the terms of the late Mr Lindsay's trust-settlement and codicil, and from the words which he has used in these deeds. But if upon a sound construction of these testamentary deeds, and of the whole expressions contained therein, it can be made to appear what was the true wish and intention of the testator, then that wish and intention must receive effect, and the testamentary trustees must do whatever is necessary for this purpose. There is no technical rule forbidding this, for we are not construing a deed of conveyance or other deed by which anything is professed to be done and the terms of which must receive only their legal and their fixed meaning; but we are construing a deed of settlement which effectually conveys the testator's whole estate to his trustees, who are fully vested therewith, and the only question is, How are these trustees to carry into full effect the real intentions of the testator? Whatever can be shown from the deeds to have been the real will of the testator, that will the trustees are bound to make effectual.

Now, it appears from the deed itself that the testator was twice married, and he informs us in the third purpose "that I acquired considerable means by my deceased wife Catherine Bruce or Lindsay," who conveyed her whole estate to him by a certain mutual disposition dated in 1852. Upon this narrative the testator proceeds to say—"It is my wish that the following provisions to my children by the said Catherine Bruce or Lindsay, viz., William Bruce Lindsay and Catherine Bruce Lindsay, should be preserved or made for them over and above the other provisions herein contained in their favour." He then directs his trustees to convey his dwelling-house and pertinents in Charlotte Street, Leith, which he values at £1000, to his son William, one of his two children by the first marriage, and in order "to make my said daughter the said Catherine Bruce Lindsay (his other child by the first marriage) equal thereto, I leave and bequeath to her the sum of £1300 stg., which legacy shall be payable at the first term of Whitsunday or Martinmas that shall happen six months after my decease." This sum of £1300 is plainly an accidental error for £1000, which was the proper sum required to produce equality, and to which sum it is accordingly restricted by the codicils.

Now, if there had been nothing else in the deed, the case would have been perfectly clear. The testator was survived by all his children of both marriages, and his daughter Catherine by the first marriage took upon her father's death this legacy of £1000 over and above her other provisions, just in the same way as the son by the first marriage got the Charlotte Street house over and above his other provisions, and thus the

intention of the testator would have been effectuated.

But a difficulty is created by the subsequent parts of the deed, and in particular by the ninth purpose thereof. By this purpose the testator directs that upon the death of his wife, or upon her entering into a second marriage, the whole residue of his estate shall be divided into as many parts as may be necessary to give each of his whole children by both marriages, the whole number being seven, an equal share of said residue, the lawful issue of those predeceasing taking their parent's share, and he then proceeds—"and in regard to the application of my means so divided for the benefit of my children, I hereby direct as follows, viz., I direct that the legacy of £1000 sterling to the said Catherine Bruce Lindsay shall be held by the trustees for her sole behoof during her minority, and shall upon her attaining majority (with any savings of interest that may have resulted therefrom) be settled or placed so as validly and effectually to provide to herself a liferent only thereof, and to the lawful issue of her body equally among them the fee thereof: And as regards the respective shares of my said estate, heritable and moveable, both under these presents and under the antenuptial contract of marriage aforesaid (exclusive of the £1000 legacy to the said Catherine Bruce Lindsay), I hereby provide that the same shall vest in each of my children on my death, and in the case of a posthumous child on the birth thereof,"—and he then provides that in the case of his daughters their shares should be settled on them for their liferent use allenarly and to their lawful issue in fee. There is a subsequent clause which provides that in case any of the testator's children born or to be born, including his two children by his first marriage, should die without leaving lawful issue before their respective shares shall have vested in them or become payable, then their shares shall accresce to the surviving children. I think there are no other clauses in the deeds bearing upon the present question.

Catherine Bruce Lindsay, the daughter by the first marriage, survived her father and attained majority, but she died unmarried and intestate on 24th January 1879. The question now is, What becomes of her special legacy of £1000?

I am of opinion that that legacy vested in Catherine Bruce Lindsay in fee, and now belongs to her only surviving full brother William Bruce Lindsay, as her only executor and nearest of kin.

The direct bequest in the first part of the deed is in express terms, and absolutely unqualified, to Catherine Bruce Lindsay £1000 sterling, payable at the first Whitsunday or Martinmas six months after the testator's death. Under this bequest Catherine Bruce Lindsay, who survived the testator and outlived the term of payment, took the legacy absolutely to herself. It vested in her at her father's death. I do not think that the subsequent provisions of the deed in any way cancel or destroy the original bequest. Their intention is not to diminish Catherine's share, but only to secure it for her children in case she should have any, and accordingly I read the provision directing the legacy to be held "so as to provide her a liferent only thereof and the fee to her children" as a conditional provision only in the event of her having and leaving children. The legacy was to be hers by being secured to herself in liferent and her children if any in fee, and it never could have been the intention of the testator, in the event of her dying unmarried, and dying early, as she did, to deprive her of the legacy altogether, and of all the power of testing thereon, and to send it to his whole other children, including his five children by his second mariage. It is here that the specialty seems to me so important that the testator intended this legacy and the house corresponding thereto, given to his son by the first marriage, to be in substance estates left to them by their own mother, the testator's first wife, and it would utterly defeat this intention if either William's house or Catherine's legacy of £1000 should accrue equally among the children of the second marriage. This would be to deprive the house and the legacy of £1000 of their character of succession by the first family to their own mother, the testator's first wife.

But apart from this, I am of opinion that the legacy of £1000 absolutely vested in Catherine Bruce Lindsay, notwithstanding the direction given to the trustees to secure the sum to herself in liferent only and to the lawful issue of her body in fee. There is no repugnancy between the direct bequest of the sum to the lady herself and the direction to secure the fee to her children. Both must be read together, and the effect is that if she have no children the fee remains in herself. Suppose the trustees had actually settled the sum in terms of the trust-deed, as indeed they were bound to do on the death of the testator, and while the said Catherine Bruce Lindsay was still alive and unmarried; Or suppose that she were alive still, and that the question now was, In what terms should the sum be settled, she being still unmarried? I think the answer must be that the sum should be settled by a trust or otherwise to Catherine Bruce Lindsay in liferent for her liferent use only, and to the issue of her body in fee, whom failing to Catherine Bruce Lindsay herself and her nearest heirs and assignees whomsoever. I think that this, and nothing but this, was the true intention of the testator as gathered from his deed, and I should so have decided the question had Catherine been still alive and unmarried. This would have given Catherine the full fee in the event of her dying without issue. Of course the result must be the same whether the sum was formally settled by the trustees during Catherine's life or not.

The alternatives put in the case are, I think, both excluded by the sound construction of the trust-disposition and settlement. It was not the intention of the testator that Catherine's legacy of £1000 should in the circumstances which have emerged fall into residue, and still less that it should, as estate undisposed of, fall into intestacy and pass to the heirs *in mobilibus* of the testator.

I am therefore of opinion that the first question should be answered in the affirmative and the two alternative questions in the negative.

LORD SHAND concurred.

LORD YOUNG—The will in question first bequeaths a legacy of £1000 to the testator's daughter Catherine so that it should vest *a morte testatoris*, and then declares a trust with respect to it which, having regard to the terms of the trust,

might exhaust it or not according to an uncertain future event, which being the death of the legatee with or without issue, was incapable of being ascertained before the legatee's death. According to the trust, the trustees were to pay the income of the legacy to the legatee during her life, and on her death leaving issue they were to pay the capital to them, whereby of course the legacy would be exhausted and the trust ended. If she died without issue, as in fact she did, the trust was ended, there being no longer any trust purpose to fulfil; but the trustees having the capital of the legacy in their hands, the question is, what are they to do with it? and that is the question which we have to decide. It depends, I think, on the consideration whether the trust I have referred to, subsequently declared with respect to the legacy previously bequeathed, operated as a revocation of the bequest, leaving the rights of parties to depend entirely on the declaration of trust, or whether the bequest remained subject only to the trust subsequently created; and I am of opinion that the latter is the right view. I think the testator put the legacy which he had bequeathed so as to vest *a morte testatoris* in trust for a specified purpose, and that subject to this trust the legacy subsisted as originally constituted, in the same way exactly as if the trust had been created by the legatee, whether voluntarily or pursuant to a direction in the will. I am accordingly of opinion that on the termination of the trust by the legatee's death without issue the legacy was set free of the only burden that was ever upon it, and became payable to her legal representative, just as it would have become payable to herself had the trust been such as might have been fulfilled and ended in her lifetime without exhausting the legacy. Had the trust been for a purpose that disappeared before the testator's death or was fulfilled thereafter, leaving the legatee, I think it not doubtful that the legacy must have been paid in terms of the unrevoked bequest. The fulfilment of the trust on the legatee's death (the legacy being extant) no otherwise varies the case, in my opinion, than that the legatee being dead her representative takes her place.

The Court answered the first question in the affirmative, and the others in the negative.

Counsel for First and Third Parties—Pearson. Agent—James W. Lindsay, W.S.

Counsel for Second Party—Kinnear. Agent—John T. Mowbray, W.S.

Wednesday, December 15.

SECOND DIVISION.

SPECIAL CASE—HASTIE AND OTHERS.

Succession—Words Importing Bequest of Heritage—Titles to Land Consolidation Act 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 20.

Terms of a document *held* effectual to carry heritage under the 20th section of the Act of 1868.

John Aim died on the 24th February 1880 at Bournemouth. He was unmarried, and was survived by his mother Mrs John Aim (who died before this case was presented), his brothers William Laughton Aim and James Barrie Aim, and by his sister Jane Aim or Hastie. After his death there was found in his repositories a document in an unclosed envelope addressed to his mother. That document, which was written on two sides of a half sheet of notepaper, and the the address on the envelope, were holograph of the deceased, the document being in the following terms:—"All furniture, books, and personal effects to Mrs Jon Aim absolutely, and the free liferent use of all my other means and estate.

"To John Aim, son of W. L. Aim, Pollokshields. On After Mrs A.'s disease, The whole of the estate to turned into cash at the time my trustees deem most suitable for best realising, and *proceeds* safely invested for disbursing as under, viz., To John Aim, son of W. L. Aim, Pollokshields, on his attaining the age of 21 years, £300. In event of his prediseasing, the same to be equally divided between his two sisters Catherine and Mary Jane, or the survivor of them (on their attaining their majority.)

"To John Aim, son of Jas. B. Aim, Rockhill, Hunter's Quay, on his attaining the age of 21 years, £300. In event of his prediseasing, the same to be equally divided between his brother James and his sister Agnes, or the survivor of them (on their attaining their majority).

"To Mary Margaret Hastie, daughter of Peter Hastie, Crosshill, on her attaining her majority, £300. In event of her predeasing, the same to go to her brother John Aim Hastie on his attaining his majority.

"To John Aim Hastie, son of Peter Hastie, Queen Villa, Crosshill, the residue with the accumulated interest, on his attaining the age of 21 years. In the event of his prediseasing, said residue, with accumulated interest, to be equally divided, share and share alike, between my sister Jane Aim or Hastie, James Barrie Aim, and William Laughton Aim, *or the survivors of them.*

"Trustees for carrying out the foregoing, I wish to name my two brothers and brother-in-law, and Mr Ritchie Lennie.

"JOHN AIM, 8 *March* 1877."

(The words underlined above were scored out, the word "proceeds" italicised was interlined in pencil, and the other words in italics were added in pencil.)

The heritable estate left by the deceased consisted of a dwelling-house and ground, which, if he was held to have died intestate, would fall to his immediate younger brother James Barrie Aim. The moveable estate consisted of money in bank, &c., amounting to about £1670. He also left household furniture, books, and other articles contained in an inventory and valuation of his effects which amounted in all to £35, while his whole estate was worth about £2100.

Peter Hastie was the sole accepting and acting trustee. Questions having arisen as to the effect of the above document, the trustee, the beneficiaries under the will, the next-of-kin of the deceased as representing their mother, and the heir-at-law, agreed to present this Special Case to the Court for opinion and judgment.

The questions of law to be decided were—"(1) Whether the document referred to is a valid testamentary settlement and conveyance of deceased's heritable and moveable estates in favour