Friday, March 5.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

RUSSELL *v.* BELL'S TRUSTEES.

Succession — Vesting — Gift Qualified by Restrictions—Fee or Liferent.

A testatrix by her trust-disposition and settlement directed that twelve months after her death her trustee should pay the residue of her estate to her four children *nominatim* equally; that in the event of any of her children dying "before the said residue becomes payable" his share should go to his children, and if he died without leaving lawful issue, to the survivors or survivor of the testatrix' children. There was no special clause as to vesting. By a codicil dated ten years later she provided—"I desire that the portion falling to my son William James Bell should not be handed over to his own care, but that he should only draw from my trustees the interest thereon weekly; if, however, at any time my trustees consider it would be for his true benefit to hand over to himself what might then be his share, I hereby empower them to do so. After the death of the testatrix the trustees paid certain sums at various times to the son out of capital, but ultimately determined only to pay him the interest on his share. In an action of furthcoming at the instance of a creditor of the son, who, subsequent to the determination of the trustees to pay the interest only to the son, had obtained decree against him, and had used arrestments in the hands of the trustees—*held* that the son's interest was effectually restricted to a liferent, and that vesting of the capital was suspended till payment, and that the trustees were not bound to make the share originally destined to the son furthcoming to his creditor.

Chambers' Trustees v. *Smiths*, April 15, 1878, 5 R. (H.L.) 151, *followed.*

Miller's Trustees v. *Miller*, December 19, 1890, 18 R. 301; *Wilkie's Trustees* v. *Wight's Trustees*, November 30, 1893, 21 R. 199; and *Greenlees' Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136, *distinguished.*

Mrs Mary Flint or Bell died in 1880, leaving a trust-disposition and settlement dated 2nd September 1870, and relative codicil dated 30th August 1880. By her trust-disposition and settlement she conveyed her whole estate, heritable and moveable, to a trustee for the purposes therein mentioned, *inter alia* providing as follows:—"In the third place, on the death of the said Jeremiah M'Lellan Bell (the husband of the testatrix), should he survive me, but should he predecease me then within twelve months after my death, my said trustee shall pay over the residue and remainder of my means and estate, except the household furniture and plenishing belonging to me, to and in favour of my four children Amelia Agnes Bell, Adelaide Mary Bell, Mary Hutcheson Bell, and William James Bell, share and share alike; the shares payable to my daughters shall be payable exclusive of the *jus mariti* or right of administration of any husbands they may marry, and shall not be liable for the debts or deeds of their husbands, and in the event of the death of any one or more of my said children before the said residue becomes payable, the share which would have been payable to such deceaser shall accress and belong to his, her, or their lawful children, share and share alike, and should any one or more of my said children die without leaving lawful issue, the share which would have been payable to such deceaser shall fall to and be payable to the survivors in equal shares, and in the event of there being only one of them surviving, the other three having predeceased without leaving lawful issue, the whole of said residue shall be payable to such survivor." There was no special clause as to vesting.

The codicil was as follows:—"I desire that the portion falling to my son William James Bell should not be handed over to his own care, but that he should only draw from my trustees the interest thereon weekly. If, however, at any time my trustees consider it would be for his true benefit to hand over to himself what might then be his share, I hereby empower them to do so."

The testatrix was predeceased by her husband.

After the death of the testatrix other trustees were assumed at various dates.

The trustees, in virtue of the discretionary power conferred upon them by the codicil, instead of paying over to William James Bell his share of the residue within twelve months, paid him at various times smaller sums down to 1887, but thereafter declined to make him further advances of capital, and only paid him from time to time his share of the trust revenue.

In 1892 John Gordon Russell, dairyman and fruiterer in Glasgow, obtained a decree against William James Bell for £276, 1s. 9d., and interest, and having used arrestments in the hands of the trustees, thereafter brought the present action of furthcoming against them with a view to obtaining payment from them of the amount for which he had obtained decree against William James Bell.

The trustees pleaded, *inter alia*—"(3) The interest of the common debtor in the estate alleged to be arrested is by the clause in the codicil quoted in the first article of this statement of facts purely alimentary, is so held by the trustees for his behoof, and is not assignable by him, nor arrestable nor attachable for his debts or deeds."

On 29th January 1896 the Sheriff-Substitute (ERSKINE MURRAY) issued the following interlocutor:—"The Sheriff-Substitute having heard parties' procurators, and advised the cause, Finds (1) that under this action, in which the pursuer John Gordon Russell who has got a decree

for £276, 1s. 9d. with interest against W. J. Bell, and has arrested £300 in the hands of the trustees of the late Mrs Mary Flint or Bell, his mother, seeks to make the same furthcoming: Finds on the whole case and in law, for the reasons assigned in the note annexed hereto, that the funds in the hands of the said trustees are not, in the circumstances, arrestable: Therefore assoilzies the defenders: Finds the pursuer liable to them in expenses," &c.

Note.—[*After setting forth the clauses of the trust-disposition and settlement and the codicil above quoted, and stating the facts above narrated.*]—"The trustees in defence plead, *inter alia*, that the fund in their hand is not arrestable, as it is made by the codicil purely alimentary, and is so held by the trustees for William James Bell's behoof, and is not attachable for his debts and deeds.

"Now, in the first place, if this case fall to be decided simply on the well-known principle that the express desire of the testator is to rule, there would be no possible doubt of the result. In the will itself she said that the residue was to be 'paid over' within twelve months to her four children, of whom William James Bell was one. If any one predeceased the time of payment, 'his or her children or heirs were to take his or her place.'

"But in the codicil she changes this altogether, as regards William James Bell. She says, 'I desire that the portion falling to my son William James Bell should not be handed over to his own care; but that he should only draw from my said trustees the interest thereon weekly.' She adds the power quoted above to the trustees, if they should consider it was for his true benefit, to hand over to him at any time what might then be his share.

"The first part of the codicil is not a power but a direction, the expression of the desire of the testatrix. William James Bell's portion is not to be paid over to him as formerly directed. That direction in the will is necessarily recalled. All that is to be paid to him is the weekly interest. This provision takes the place of the provision for payment of his share to him within the twelve months. It makes his share never necessarily payable to him in his lifetime. But it does not cause intestacy; for under the destination-over the share of any one predeceasing was to be paid to his children, &c. This just substitutes the death of William James Bell as the term when payment of the fee would fall to be made to his children, &c. Such, therefore, was indisputably the last will and intention of the late Mrs Bell. The last part of the codicil gives the trustees the power, if they see fit, of handing to him the principal in his lifetime. But this is not, like the first part, a direction; it is only a power. It required to be put into force before it became effectual. They were not to do so unless they saw fit, a matter for the careful consideration which, under the authorities, they were bound to exercise. On this footing therefore, as the trustees held, under the codicil, the share in question of the residue never to be paid (unless in their discretion they saw fit), to William James Bell in his lifetime, it could not be arrestable. The provision could not and did not ever vest in William James Bell. Not only was there no vesting clause, but the only provision in his favour, as to the trustees paying, was *de facto* cancelled by the substitution in the first clause of the codicil.

"Many cases, however, have been quoted as bearing on the question, and it is necessary to review them as briefly as possible, as there is a good deal of contradiction and difference of opinion, and in some measure a conflict of views, between the Court of Session and the House of Lords.

"In the case of *Weller* v. *Ker's Trustees*, 4 Macph. (H. of L.) 9, the House of Lords, affirming a judgment of the Court of Session, held that where the trustees of a testator had power, under the deed, to restrict to a liferent the right of one of the children before his majority, they were entitled to exercise that right, and bound to do so if they considered it proper.

"But the leading case on the subject in the House of Lords is that of *Chambers' Trustees—Smith* v. *Chambers' Trustees* in the Court of Session, and *Chambers' Trustees* v. *Smith* in the House of Lords, 5 R. (H. of L.) 151. In that case a testator directed his trustees to hold the residue 'for behoof of his children equally among them,' with and under the exceptions and modifications to be afterwards stated. Shares of residue made payable six months after death of testator were declared to vest at testator's death.

"Then there was a provision that, notwithstanding the period above mentioned for payment of residue, it should be in the power and option of the trustees to postpone payment of the provisions and give only the interest, or by deed to retain these provisions vested in themselves, or to vest them in other trustees so as to restrict the right of the truster's children to a liferent, and settle fee on issue, &c.

"The trustees made payments to account of his share to J. Chambers. His creditors tried to arrest the balance. After the arrestment the trustees resolved to postpone payment of the residue, and apply the annual proceeds for his aliment; and executed a deed restricting his right to a liferent and settling the fee on his children.

"The House of Lords, reversing the decision of the Court of Session, held that although the fund remaining in the hands of trustees was, prior to arrestment, held in trust for the legatees, who had a vested right thereto, it remained subject to the power conferred by the deed upon the trustees, and that their right to exercise their power was in no way affected by the arrestment, which could only attach the legatee's right as it stood in him, and that the trustees had validly exercised their power. Lord Hatherley says:—'We find a power in the trustees overruling all directions for payment and vesting formerly given;' and points out that the trustees had got by the deed an alternative power

to employ the funds for the legatee's benefit.

"Lord O'Hagan says:—'It is our business to ascertain the real intention of the settlement. The words of the deed give absolute power to postpone.' Lord Blackburn concurs with Lord Shand, who had dissented from the judgment in the Lower Court, and held that the trustees were bound to exercise their discretionary powers. The clause of vesting was only to be taken 'with and under modifications, &c.' There were authorities both in Scotland and England justifying the vesting of a fund subject to being divested in after events (see Lord Shand in Outer House). Lord Blackburn also corrects the Lord President, who had said the fee vested as if no such condition existed, and points out that he has overlooked the difference between a gift through trustees who are mere conduit pipes, and a gift subject to power reserved to trustees to be exercised paramount to the beneficiary and in his despite. Lord Gordon remarked that the provisions vested, but only subject to the conditions of the trust; and that the clauses as to vesting and payment were overruled by subsequent clauses, and that the trustees had power to limit the rights of the beneficiaries. *Weller* v. *Ker's Trustees* was approved of.

"In the Court below Lord Shand (p. 121, same volume) had held that the terms of the deed 'suspended the effect of the previous clauses,' and gave the trustees power to deal with each child's provision at any time up to the time of actual payment—that indeed they not only had the power but were under a duty to exercise discretion and to determine. The vesting was not of an absolute but of a conditional right.

"Now, this case of *Chambers* is directly applicable to the present. Indeed, in the present case the reasons for holding the fund not arrestable are stronger. For in *Chambers* there was only a power to the trustees to cut them down to a liferent. Whereas here the testator herself cuts down her gift to a liferent, and only gives the trustees power, if they see fit, to revive it. Besides, in *Chambers* there was a direct clause vesting at death, though the House of Lords held that the vesting was conditional. Here there is no vesting clause. Vesting can only be spelt out of the provision for payment within twelve months. But as regards William James Bell, that provision is expressly and unmistakably cancelled by the codicil under which the testator desires in effect that no payment of principal is to be made to him in his lifetime. The discretionary power given to the trustees could only take effect when exercised. So the principal never vested, whether conditionally or unconditionally, in William James Bell. Apart from the question of vesting there could be no right to principal in William James Bell at all. So the fund could not be arrested in the hands of trustees.

"But there are a number of cases decided since *Chambers*, not indeed in the House of Lords, but in the Court of Session, on the authority of which it is argued that the fund must be held arrestable. These therefore it is necessary to consider.

"The key-note of this view may be said to be struck in Lord M'Laren's book on Wills, last ed., vol. 2, p. 1196, sec. 223, where he says—'Sometimes trustees are empowered to cut down the right of a beneficiary from that of fee to a protected liferent, the fee being settled on his issue. The exercise of such a power, anomalous as it may appear, has been sustained by decisions of the House of Lords, on the principle that it is a condition of the grant, and it is settled that the power may be exercised after the contraction of debts by the legatee, and so as to render an arrestment of his interest in the trust ineffectual. Such powers must be executed in strict conformity with the deed of constitution, and are never to be extended by implication or construction.' *Chambers*, *Weller*, and the case of *M'Nicol* (to be subsequently considered) are referred to.

"Thus in Lord M'Laren's view the exercise of such a power is 'anomalous.' It must be a condition of the grant. Such powers must be exercised in conformity with the deed of constitution, and are never to be extended by implication. It falls to be remarked that here Lord M'Laren is dealing with cases like *Chambers*, where power is given to the trustees to cut down to a liferent, and not to a case like the present, where the testatrix cuts it down herself. In the present case, as the only provision in the deed for payment to William James Bell is recalled by the codicil, the condition of the grant is that it is only one of the interest paid weekly, that is, only a liferent. There is no question whatever of extension of the trustees' power by implication. Therefore the present case, even had it been viewed as one not stronger than *Chambers*, would have fallen under Lord M'Laren's admitted exception, and would have been ruled by *Chambers*, but the succeeding cases fall to be considered.

"In *M'Elmail* v. *Lundie's Trustees*, 16 R. 47 (1888), where, in the body of the trust-settlement, provisions for children were made, with various terms of payment, and there was a condition that they were not to 'become vested interests until the respective terms of payment,' and in the case of one son the trustees were to 'hold one share in trust for his use and behoof,' to retain it for such period as they might deem expedient, and to pay it to him in instalments, but in any event the interest, till the whole share was paid up, the Court of Session held that under the terms of the deed J. Lundie's share vested in him at the death of the widow and the realisation of the estate. Here the vesting clause, which had to be read with the others, evidently contemplated vesting of the provisions in J. Lundie himself at a certain date, and the Court had only to consider when that date was. On this ground the Court held that, as the provision had vested, the condition as to payment by instalments was not

sufficient to interfere with it. Lord President Inglis guarded himself by saying, 'We have seen cases where there is a provision that no vesting is to take place till the sums are actually paid over, and where the testator so expresses himself he leaves no room for doubt, and he means that until the money is placed in the hands of the beneficiaries the vesting is suspended.' But this is not such a case. He therefore contemplated cases of suspended vesting. There is no reference to *Chambers* in the opinions of the judges, and indeed it is a curious fact that in the long course of subsequent decisions in the Court of Session that of *Chambers*, even when quoted at the bar, is never referred to by the judges, the only reference being that in Lord M'Laren's book. It is severely ignored.

"In *Christie's Trustees*, 16 R. 913 (1889), where a testator, without a distinct vesting clause, left property to be divided between his three children, and in the case of a daughter, H, provided that the trustees were to retain charge of her share, and that it was not to go into her hands; and, in the case of a son, C, that his share also was to remain in the hands of the trustees for his behoof; the Second Division (Lord Justice-Clerk Moncreiff, Lord Young, Lord Rutherfurd Clark, and Lord Lee) unanimously held that the fee of each of the shares vested at the testator's death, but that the trustees were bound to retain the shares of H and C for their behoof. This was practically giving effect to the rule laid down in Chambers, though that case is not referred to. The Lord Justice-Clerk remarks—'Some of the cases quoted seem to negative the efficiency of such a direction, but I think in almost all these cases it appeared that, in order to prevent the actual money going into the hand of the person to whom the fee was given, it was practically necessary that the Court should set up a trust, and this was held to be beyond the power of the Court. That is not the case here. A trust is already created, and the testator directs the trustees to retain the charge of the shares. In my opinion that is a direction which they can obey.' Lord Young remarks—'I think the donor of money is entitled to appoint a trust for the protection of the donee. The shares are the property of the donees, but are in the hands of the trustees, to be managed by them, and withheld from the donees for their protection.' He limits his view, however, to the point before them.

"In this case, therefore, the Court adhered, so far as the case went, to the view taken by the House of Lords in *Chambers*, that, even where provisions vested in children, they so vested subject to a condition of the trustees retaining possession and doling them out. So far there was no divergence.

"In *Brown* v. *Brown's Trustees*, 1890, 17 R. 517, where it was declared that the shares of each of the testator's children should vest when they attained the age of twenty-five, but provided that half of the remainder of the trust-estate should not be paid over till the marriage or death of the testator's daughter, but retained for her behoof, she receiving the free annual income thereof, it was held by the Second Division (the Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Kinnear), on an application by the whole family, the unmarried daughter included, that they were all entitled to payment of their full shares. The Lord Justice-Clerk drew the distinction between this and the case of *Christie's Trustees*, that in the latter Christie had expressly directed that one of his daughter's shares was not to go into her hands; whereas in Brown's there was only a provision of a larger income in favour of one of them, which she was entitled, if she chose, to give up. Lord Kinnear, following the doctrine of vesting, held that the subsequent restrictions did not limit the absolute gift.

"In *Lawson's Trustees*, 1890, 19 R. 1167, where a testator had directed two-thirds of his estate to be invested and the proceeds to be paid to his two sisters, but authorised the trustees to purchase an annuity for them with the said funds, and made no further disposal of the fee thereof, the Second Division (Lord Justice-Clerk, Lord Rutherfurd Clark, and Lord Lee) held that under the terms of the deed the shares vested in the ladies, Lord Rutherfurd Clark pointing out that unless the ladies were entitled to the fee there was intestacy. Manifestly in this case the intention of the truster was to benefit her sisters and not the heirs *ab intestato*.

"*Miller's Trustees*, 18 R. 301 (1890), apparently, from the rubric, the turning point, was not really so. Here the testator had directed his trustees to hold certain property for his second son till he attained the age of twenty-five, when they were to denude in his favour, declaring that the property should not vest in him till he attained the age of twenty-five or married, with the consent of the trustees, after attaining the age of twenty-one. The son married after twenty-one with the approval of the trustees. The son desired thereupon to have handed over to him the whole of his provisions, and the trustees declining to do so, a case was laid before a court of Seven Judges. Lord Rutherfurd Clark and Lord M'Laren distinctly laid down the view that the absolute fee (which had undoubtedly vested in the young man by his marriage) entitled him to demand the property at once, and that the direction of the testator, being repugnant to the right of fee, was to be disregarded. Lord Young and Lord Trayner as distinctly laid down the opposite view, viz., that the intention of the testator being clearly that the trustees should hold and manage property after the right vested in the beneficiary, that power to the trustees should be held effectual in a question with the beneficiary. They, however, distinguished the case from one with creditors, and to that extent did not express similar views to the judgment of the House of Lords in *Chambers*. The Lord President Inglis and the Lord Justice-

Clerk Macdonald went on the view that this was really a question of the management of the trust, that where a provision had vested the Court would relieve the beneficiary of unnecessary trust-management, but that where there are trust purposes to be served which cannot be secured without the retention of the vested estate in the hand of the trustees, the rule cannot be applied, and the right of the beneficiary must be subordinated to the will of the testator; that the mere maintenance of a trust-management was, however, not a trust-purpose in the above sense, and therefore they repelled the contention of the trustees. Lord Adam concurred with both the Lord President and Lord Rutherfurd Clark. His view, therefore, is not quite clear. But assuming him really to be at one with Lord Rutherfurd Clark, there were only three Judges out of seven who declared that when once a fee was given, a direction in the same deed to trustees to retain was necessarily repugnant thereto, and could not be given effect to, while four Judges held that even where vesting had taken place, if for the carrying-out of clear trust-purposes the trustees had to retain, they were entitled to retain; the rubric, therefore, while correct in one sense, is misleading, the majority thus holding that a vested fee did not prevent the expressed will of a testator, that the trustees should retain where necessary for trust-purposes being given effect to, at least in a question with the beneficiaries. But it seems that a confusion has arisen as to the effect of this judgment, which has led to the decision of subsequent cases on the footing that in *Miller's* case the opinion of the majority was the opposite of what it actually was.

"In *M'Kinnon's Trustees*, 19 R. 1051 (1892), where a testator had directed her trustees to make over the residue of her estate to her son at twenty-five, but with power to the trustees to retain the said residue and pay him the proceeds, and if he died to pay the residue to his heirs, declaring at the same time her intention to be, that the same should vest in her son at the age of twenty-five, and when, the son having become bankrupt, a competition arose between the testamentary trustees and the trustee in bankruptcy, the First Division (Lord President Robertson, Lords Adam, M'Laren, and Kinnear) held that the capital having vested under the deed, and being only in the hands of the testamentary trustees, for administrative purposes, the trustee in bankruptcy must prevail. This was really the first case apparently in clear conflict with the doctrine laid down in *Chambers*.

"In *Wilkie's Trustees*, 21 R. 199 (1893), a testatrix had directed in her second purpose that her furniture, &c., should immediately after her death be delivered to her two daughters; in the third purpose, that the heritage, immediately after her death, should be conveyed to them equally; and in her fourth purpose, that at Whitsunday or Martinmas six months after her death the residue should be divided and paid over among her children, two-thirds to the daughters and the remaining third among the sons. In a codicil she revoked the second and third purposes. She did not revoke the fourth, but directed the trustees, after selling the furniture and the heritable property, to hold it and the two daughters' shares of the residue for the benefit and alimentary use of the two daughters, giving power to the trustees to pay them the capital or interest in such way and manner as the trustees should see fit, without any interference by the daughters or anyone else, the provision being purely alimentary. In the Second Division the Lord Justice-Clerk and Lord Rutherfurd Clark held that as the fourth clause was not revoked, the residue, &c., had vested in the daughters, and the right of fee remained in them, and that the attempt to limit the daughters in the use thereof must fail, being merely attempts to restrain the rights of a fiar in the use of her own property. Lord Trayner, while agreeing that the shares of residue vested *a morte testatoris*, dissented from the conclusion, holding that the will of the testatrix should be given effect to, and that this case fell under the exceptions stated by Lord President Inglis in *Miller's Trustees*.

"In *M'Nicol's Executors*, 20 R. 386 (1893), trustees were distinctly directed to fix and determine whether it would be expedient to give a son uncontrolled possession of his share in the succession, and if not to set it aside, placing it under restrictions, and give him an alimentary liferent, but if they thought it expedient, to pay it over unconditionally. There was a destination-over. The trustees, under a narrative that they considered that the son's share should be placed under restrictions in respect of his imbecility, but that, a *curator bonis* having been appointed, further interference by them was unnecessary, conveyed the share to him absolutely. The First Division held that the trustees had acted *ultra vires*, in respect that, having determined that the share should be placed under restriction, they had conveyed absolutely, holding that in consequence of the restriction the son had right to no more than an alimentary liferent, the children having no right independently of the determination of the trustees. This case shows that it is possible—though very difficult—for a testator to provide against the position of a child unfit to have the disposal of his share of the succession. It will be observed that here there was no question of vesting or paying over till after a decision by the trustees.

"In the case of *Cuthbert*, 21 R. 679 (1894), the testator directed his trustee, after paying a liferent of the residue to his brother Joseph, to hold and apply half the residue for the uses and behoof of Alexander, son of Joseph. Joseph Ritchie died, being, as one of his brother's next-of-kin, entitled to half of undisposed of residue, and leaving everything to Alexander, Alexander having demanded half the residue. The Second Division held that Alexander being the fiar, if not under the will at any rate *ab intestato*, was entitled to his demand. Lord Young, feeling himself bound by the recent

decisions, concurred, while adding, 'My own view, I confess, is that it would be expedient that the owner of property, even with respect of property which he leaves to his heir, should be at liberty by means of a trust to protect the object of his bounty from wasting the property, and that therefore such a trust direction as we have here ought to be effectual, and ought not to be defeated by any technical consideration based on the law of repugnancy. But my views have been overruled, and are contrary to the law as it has now been established by the decisions.' Lord Trayner also held himself bound by the decisions. It is manifest, therefore, that had it not been for the previous decisions above quoted, *M'Kinnon, Wilkie's Trustees*, and perhaps a misconception of the view of the majority in *Miller's Trustees*, the Court would have been equally divided, even though the fee were held to be vested.

"Finally, in *Greenlees' Trustees*, 22 R. 136 (1894), a testator directed his trustees to divide and pay over the residue to all his children equally; the shares to his sons at the first annual balance after his death; but as to his daughters, the trustees to hold these shares in trust for their behoof, and pay the annual proceeds to them, but subject to full powers of disposal on the part of the daughters by any family settlement, and power to the trustees to make advances; with a provision for the succession to children dying before the period of division or dying without issue. The First Division held that the daughters' shares vested *a morte testatoris*, and that they were entitled to immediate payment. It was laid down by Lord M'Laren that where trustees were directed to hold and pay over the income, without any direction as to the capital or reversion (in fact without any destination-over) the trust must only be held a system of administration, adding, 'Of course a testator may begin by dividing his estate into shares, giving one to each member of his family, and may go on to limit that gift and make it clear that he intends that a daughter, for example, shall take no more than a life interest, the fee being given over to her children. But in order that we should prefer such a limitation, it is necessary that the fee should be given to some one, because unless it is given to another person, there is nothing inconsistent with the original gift, if, as in the present case, it is an absolute gift.' Clearly, therefore, Lord M'Laren, while holding that as there was no destination-over, the right had vested in the daughter, and could not be affected by the restrictions, these restrictions might have been effectual had the circumstances been otherwise.

"It will be observed that in a number of the above cases, notably in *Greenlees*, the provisions of the deeds were so inconsistent, that the Court had good reason to disregard them, and in others, that the real intention of the testator was given effect to.

"But on the whole, in the last five years there has been an increasing tendency in the Court of Session to hold, in absolute opposition to the case of *Chambers* in the House of Lords, that where the right to a provision has once vested in a beneficiary it is impossible for the beneficiary to be hampered by any restrictions imposed by the testator, whether in the will or in a codicil. The idea of a vested right remaining subject to the power conferred by the will on the trustees, as was laid down in *Chambers' Trustees*, has been negatived. The distinction there laid down as to a gift subject to power reserved to trustees, and the doctrine laid down by Lord Shand, and approved of by the House of Lords, that vesting can be, and in that case was, not of an absolute but of a conditional right, have alike been cast aside. There is therefore, an absolute conflict on this point between the House of Lords and the Court of Session. If to find a ground of decision the question of principle is referred to, it seems to be all on the side of the House of Lords, for they stood on the old and well-acknowledged principle of Scottish law, that the clear intention of the testator is to prevail. Some of the recent cases in the Court of Session have been decided in a mode absolutely at variance with the express will of the testator. Even a supposed contradiction has been got at only by reading into the word 'vesting' a fixed meaning which the highest legal court of this country had declared it not to possess. It seems therefore, that the gradual change from the doctrine laid down in the Court of Session by Lord President Inglis, Lord Justice-Clerk Moncreiff, Lord Shand, Lord Young, and many other Judges of eminence, to that which has recently been enunciated, is a falling-away from the good old principle of the law of Scotland, that the testator's intention is to rule, and the substitution in its place of a recently fixed interpretation of the word 'vesting' in a sense which clearly the testators never intended.

"But, nevertheless, the question must arise, what in these circumstances is the duty of the Judge of an inferior court? Is he to follow his immediate superiors, or look above them to the highest court of all? On the whole, it seems that if the course of decisions in the intermediate court, subsequent to that of the higher court, is clear and persistent, and not a mere single judgment (perhaps decided without consideration of that of the Superior Court), the Judge below is bound to follow his immediate superiors. Therefore if it were to be held in the present case that the fee of the provision ever actually vested in William James Bell, the Sheriff-Substitute would have considered himself bound to hold that the pursuer was entitled to prevail.

"But for the reasons formerly assigned, the Sheriff-Substitute has been unable to hold that the fee of the provision ever vested in William James Bell. In this case, unlike that of *Greenlees*, there is a destination-over, and no want of a fiar for whom the trustees are to hold. The only direction from which vesting might not be inferred having been contradicted and

altered by the codicil, nothing remains on which vesting can be based. The present case contains, therefore, much stronger grounds than that even of *Chambers* in favour of the trustees being preferred to the arrester. To this view, therefore, the Sheriff-Substitute has given effect."

The pursuer appealed to the Sheriff, who by interlocutor dated 20th November 1896 adhered, adding the following

Note.—"In determining the nature and extent of rights arising under testamentary deeds it is always necessary to attend carefully to the language of the particular deed or deeds on which the question in each case depends. The Sheriff-Substitute has entered at length into an examination of a number of decisions in which questions similar to that in the present case have been dealt with in the Court of Session and the House of Lords. The historical summary of these decisions given in his note is very instructive, although I would guard myself against being held as accepting his conclusion that there is a conflict on a general question of law between the judgments of the House of Lords in the two cases he mentions, and the subsequent course of decision in the Court of Session. One would rather endeavour as far as possible to reconcile the judgments of those high tribunals, and see whether any apparent conflict may not be attributed to a difference between the provisions of the particular deeds the construction of which was in question. It is, I think, with some such object in view that in the recent case of *White's Trustees* v. *White*, June 20, 1896, 33 S.L.R. 665, decided since the date of the Sheriff-Substitute's interlocutor, Lord Moncreiff in the Second Division has stated what he considers the ratio of the decisions pronounced in the House of Lords and in the Court of Session respectively. He does not apparently regard the decisions as inconsistent. He says, 'The ratio of these decisions (*i.e.*, of the House of Lords) I take to be that there, as here, there was not an unconditional gift of fee, that where such a discretionary power is conferred on trustees, it is to be read as a condition of the bequest, and operates suspension of vesting until the share is actually paid over to the beneficiary, even although a time of vesting is named in the deed. . . . Where again there is an unconditional gift of fee and no ulterior destination dependent on the exercise or non-exercise of the power, directions or powers given to trustees to manage or withhold the provisions beyond the period of vesting will, except when necessary for trust purposes, be disregarded as inconsistent with the right of fee.'

"In the present case my opinion is, that the Sheriff-Substitute's judgment is right, and that it is in no respect inconsistent with the decisions of the Court of Session to which he refers. I think that the fee of the provision destined by the original trust-settlement of 2nd September 1870 in favour of William James Bell cannot be held ever to have been vested in him. Whatever was given to him by that deed was taken away by the subsequent codicil of 30th August 1880. The words used in the codicil by the testatrix are given in the Sheriff-Substitute's note, and I do not think it necessary to repeat them. The language is not very formal, and the codicil was probably written without the assistance of a legal adviser. But the meaning seems to me plain, that the fee given by the original deed was cancelled, that the beneficiary was restricted to receiving weekly from the trustees the interest of the portion the testatrix had previously destined to him, and that the trustees were only empowered at any future time to pay to him what might then be his share, should they consider that to be for his true benefit. With regard to any destination over in the event of the trustees not considering it desirable to exercise the power thus given to them, the provisions of the original deed would become operative."

The pursuer appealed to the Court of Session, and argued—By the third purpose of the trust-disposition and settlement an absolute right of fee vesting *a morte testatoris* was conferred upon William James Bell. Vesting was not affected by the provisions in favour of the issue of children, or the provision in favour of the survivors or survivor in the event of a child or children dying without issue. Such provisions were not "destinations over" effectual to prevent vesting *a morte testatoris—Byars' Trustees* v. *Hay*, July 19, 1887, 14 R. 1034, *per* Lord Rutherfurd Clark at page 1037; *Wilkie's Trustees* v. *Wight's Trustees*, November 30, 1893, 21 R. 199; *Greenlees' Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136; *Wilson's Trustees* v. *Quick*, February 28, 1878, 5 R. 697, *per* Lord Adam at page 702. Nor were the words "before the said residue becomes payable" effectual to postpone vesting. See *M'Elmail* v. *Lundie's Trustees*, October 31, 1888, 16 R. 47, *per* L.P. Inglis and Lord Mure. If the words of gift were such as to confer an absolute right of fee vesting *a morte testatoris*, then mere words of restriction without a revocation of the fee, or words conferring the fee, or at least giving a power to trustees to confer the fee, on a new line of fiars, whether contained in the same deed or in a codicil to it, were ineffectual to limit the absolute right of the person to whom the fee had been given, the words of limitation being regarded as repugnant—*Greenlees' Trustees* v. *Greenlees*, *cit.*; *Wilkie's Trustees* v. *Wight's Trustees*, *cit.*, especially *per* Lord Rutherfurd Clark at page 203; *Ritchie's Trustees* v. *Ritchie*, March 16, 1894, 21 R. 679; *Mackinnon's Trustees* v. *Official Receiver in Bankruptcy in England*, July 19, 1892, 19 R. 1051; *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301; *Lawson's Trustees* v. *Lawson*, July 17, 1890, 17 R. 1167; *Duthie's Trustees* v. *Forlong*, July 17, 1889, 16 R. 1002. The codicil on which the trustees founded here contained no revocation of the gift of fee, and no words conferring the fee, or giving trustees power to confer the fee, on a new line of fiars. The trustees had therefore no right to refuse payment of the capital of William James Bell's

share. At least they had no such right in a question with his creditors—See *Mackinnon's Trustees* v. *Official Receiver in Bankruptcy in England, cit.*, and *Wilkie's Trustees* v. *Wight's Trustees, cit., per* Lord Trayner at page 203, who though dissenting from the judgment in that case reserved his opinion as to what he would have held in a question with creditors. The pursuer was therefore entitled to prevail in the present action of furthcoming. The case of *Chambers' Trustees* v. *Smiths*, April 15, 1878, 5 R. (H.L.) 151, and November 9, 1877, 5 R. 97, was distinguished from the present, because in that case there was a power given to the trustees to settle the fee on a new line of fiars. So also in *White's Trustees* v. *White*, June 20, 1896, 23 R. 836, the fee, in the event of the trustees withholding payment of capital as empowered, was disposed of by conferring it in that event on the children of the beneficiary. That case was therefore also distinguished from the present. Such an ulterior destination of the fee was essential if the primary gift of fee was to be effectually limited by a discretionary power given to trustees.

Argued for the respondents—Nothing vested in William James Bell till payment was made to him. (1) The testatrix' direction in her trust-disposition, as modified by the codicil, and reading the two deeds together, was that he should not receive payment until and unless the trustees thought fit. When the right of a beneficiary was based upon a direction on a certain event, nothing vested until the occurrence of that event—*Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142, *per* L. P. Inglis at page 145. (2) Further, there was here a survivorship clause referring to the period of payment. That postponed vesting until payment. (3) This case was ruled by the decision in *Chambers' Trustees* v. *Smiths, cit.* Upon the principle laid down in that case vesting was suspended in virtue of the trustees' discretionary power, which was an inherent condition of the gift until payment was actually made. Indeed, this case was stronger than *Chambers*, because the direction to the trustees to withhold payment was embodied in a codicil instead of in the deed itself, which showed a change of mind in the testatrix. (4) There was no real conflict between the case of *Chambers* and the cases in the Court of Session referred to by the pursuer. The rule was, that where on the one hand a gift of fee was given, but subject as an inherent condition of such gift to a discretionary power in trustees, the fee did not vest till the trustees had made payment, or vested subject to defeasance by them until payment, but that where on the other hand there was a repugnancy between the different provisions of the will, an unlimited, absolute, fully-vested right having been given, and at the same time an attempt made to restrict it, mere words of restriction, or provisions as to trust administration, used in that attempt, could not prevail against an unequivocal vested gift of fee. *Chambers, cit.*, was typical of the former class, and *Miller's Trustees* (where the rule was stated by L. P. Inglis, at page 305) of the latter. This case belonged to the class of which *Chambers, cit.*, was the type. *Greenlees' Trustees* v. *Greenlees, cit.*, proceeded on the ground that there was an unequivocal gift of fee fully vested. See by way of contrast *Muir's Trustees* v. *Muir's Trustees*, March 19, 1895, 22 R. 553. In *Ritchie's Trustees, cit.*, vesting was clear, the restrictions were mere administrative directions, and the beneficiary was entitled to succeed *ab intestato*. In *Wilkie's Trustees, cit.*, vesting had clearly taken place, and that being so the Court disregarded mere provisions as to postponing payment. In *Mackinnon's Trustees, cit.*, the fee was to vest at twenty-five, and the trustees were not entitled to retain after the beneficiary attained that age. In *Lawson's Trustees, cit.*, vesting had plainly taken place, and in the other view intestacy resulted. *Duthie's Trustees, cit.*, was an illustration of the rule that an absolute right of fee cannot be given with one hand, and its enjoyment restricted with the other. All these cases were distinguished from the present. Here there was no vesting. In this case no intestacy would result if the trustees' view were adopted, because the result of the will and codicil read together was that if W. J. Bell died without receiving payment of the capital it would go to his issue, whom failing the survivors of his sisters. But even if there was no destination-over here there might be a fiduciary fee or even intestacy. (5) If it were held that these cases applied to the present, then they were inconsistent with *Chambers, cit.*, and that case as a House of Lords decision must prevail. (6) Even in the view that there was vesting here, such vesting was recalled when the trustees determined to pay out no more of the capital. See *Chambers, cit.*, alternative view of Lord Hatherley, at page 155. This view was probably inconsistent with the Court of Session decisions cited, but these cases could not stand in conflict with a decision of the House of Lords. (7) Apart from authority the contention of the trustees was plainly in accordance with the intention of the testatrix, and must therefore receive effect.

At advising—

Lord Moncreiff—In this action of furthcoming the pursuer, a creditor of William James Bell, having obtained a decree against the latter for £276, 1s. 9d., called upon the testamentary trustees of Bell's mother to make forthcoming to him out of the funds in their hands a sum sufficient to satisfy the debt.

The defence which the Sheriffs have sustained is that the funds in the trustees' hands are not in the circumstances arrestable, no absolute right of fee in the capital of the share in which he is interested having vested in William James Bell.

I think the question we have to decide is one of very great difficulty, the difficulty arising, not from any doubt as to the truster's intention, but from the course of recent decisions to which we were re-

ferred. Although with considerable hesitation, I am of opinion that the judgment of the Sheriff is sound, and should be affirmed, because I am satisfied that no absolute right to the capital of the share in question, in so far as not yet paid over, is vested in William James Bell, and that accordingly the trustees are not bound to make the balance of that share still in their hands forthcoming to the pursuer.

Under Mrs Bell's settlement of 2nd September 1870, had it stood alone, right to a share of the residue would have vested in William J. Bell on the death of his mother, if, as I understand, she survived her husband. The scheme of the settlement was that the shares of residue should be payable at the death of the longest liver of the spouses, but that if any of the children should die before the residue became payable their share should go to their lawful children, and failing children to the survivors of the immediate children of the truster. The effect of this, I take it, was to suspend vesting until the time fixed for payment.

But ten years after the execution of the settlement, viz., on 13th August 1880, the truster having apparently become satisfied that her son William was not fit to be entrusted with the share of residue destined to him, executed a codicil which materially altered the original will as regarded his share. That codicil is very shortly expressed, and was evidently not prepared by a law-agent, but its meaning is sufficiently clear. The first and leading direction is as follows:—"I desire that the portion falling to my son William James Bell should not be handed over to his own care, but that he should only draw from my trustees the interest thereon weekly." This I read as a virtual revocation of the direction in the will that a share of residue should be paid to her son William if alive at her death. She now directs that it shall not be paid to him, but that he shall only draw the interest weekly.

Following upon this direction power is given to the trustees in certain circumstances to pay over to him the capital of his share. It is thus expressed—"If, however, at any time my trustees consider it would be for his true benefit to hand over to himself what might then be his share, I hereby empower them to do so."

The question which we have to decide is whether the directions contained in the codicil operate suspension of vesting which would otherwise have taken place, or whether they are merely an ineffectual attempt to annex restrictions to a fully vested right of fee. I am of opinion that the former is their true character and effect—that in virtue of those directions the trustees, if they think fit, are entitled to withhold payment of the capital during the whole of William's life, and that until they actually pay it over to him he has no vested right in it. I sympathise with the Sheriff-Substitute in his perplexity as to which class of decisions he should follow. But I am of opinion that this case belongs to the class of which *Smiths* v. *Chambers' Trustees*, 5 R. 97 and (H. of L.) 151, a decision of the House of Lords, is the leading example, and that the judgment appealed against does not necessarily conflict at least with the principle upon which the cases of *Miller's Trustees*, 18 R. 301; *Wilkie's Trustees*, 21 R. 199; and *Greenlees' Trustees* 22 R. 135, were decided.

The case of *Smith* v. *Chambers' Trustees* seems to be directly in point. By the last purpose of his settlement Dr Chambers directed, as to the residue of his estate, that it should be paid and conveyed to the children of the marriage equally among them (with the exception of one son, William Chambers) "and with and under the exceptions and modifications to be afterwards stated." The shares were to be payable six months after his decease in the case of such children as were major, and it was declared that the whole provisions in favour of his children should vest in those surviving him on his death. Then came the following discretionary powers which were conferred upon his trustees (5 R. 98)—"And notwithstanding the periods above appointed for the payment of the shares of the residue of my means and estate, I provide and declare that it shall be lawful to and in the power and option of my trustees, if they see cause and deem it fit, to postpone as long as they shall think it expedient to do so, the payment of the provisions or shares of residue hereinbefore provided as aforesaid in the case of all or any of my children . . . and to apply the interest or annual produce of the same during the period of the postponement to or for behoof of such children . . . or by a deed under their hands to retain the said provisions or any of them vested in their own persons, or to vest the same in the persons of other trustees (whom they are hereby authorised to appoint) . . . so that my children, or any of them, as the case may be, may draw and receive only the interests or other annual proceeds of their respective provisions during their joint lives, or for such time as my trustees may fix, and that the capital may be settled on or for behoof of such children . . . and their lawful issue, on such conditions and under such restrictions and limitations and for such uses as my trustees in their discretion may deem most expedient, of which expediency and the time and manner of exercising the powers and option hereby given they shall be the sole and final judges."

While part of the share of James Chambers, one of the truster's sons, was still in the hands of the trustees it was arrested by his creditors; but founding on the powers conferred upon them the trustees refused to pay it over and resolved (after litiscontestation) to pay James Chambers the interest only. Lord Young, who was Lord Ordinary, held that under this deed the provision in favour of James was subject to modification by the trustees in exercise of the powers conferred upon them, and that the declaration as to vesting was equally dependent upon the exercise of those powers. He accordingly held that it was within the powers of the trustees to

retain the share of residue falling to James Chambers, and employ the interest of the same as an alimentary fund for his behoof. The Inner House, by a majority, recalled this judgment, holding that the clause of modification imported merely a resolutive condition, and that the creditor's arrestment having been laid on prior to the purification of the condition, attached the fund. Lord Shand dissented, holding that the condition suspended vesting, that there was no vesting of an absolute and unconditional right, and that the trustees might, at their discretion, postpone payment and restrict the interest of James to a liferent.

The House of Lords reversed the decision of the Court of Session, holding that the trustees were entitled to withhold payment of the capital and apply it for behoof of the legatee in such manner and at such time as they thought fit.

The learned Lords regarded the interest of the beneficiary as a qualified or conditional fee. Lord Hatherley says—"Stopping here, we find a power in the trustees overruling all directions for payment and vesting before given, and directing them during postponement to apply the interest for behoof of the children. This must mean that the child is to have no control over the fund at all when the trustees resolve on postponement."

Lord O'Hagan says—"In this way the settlor provided that his purposes should be carried into effect, and the result was that the beneficiaries took an estate vested in them, and if the trustees thought proper, to belong to them absolutely at the periods indicated, but it was a qualified estate to be enjoyed by them only on the conditions and at the times which the trustees in their uncontrolled discretion might appoint."

Lord Blackburn also seems to take the view that the beneficiary took a qualified fee subject to divestiture in the discretion of the trustees; but that neither he nor his creditors had right to demand payment so as to defeat the directions and purposes of the settlor. The present case is somewhat stronger in this respect, that instead of the right of fee being vested subject to divestiture in the discretion of the trustees, the testatrix has herself restricted her son's interest to a liferent giving her trustees the power, if they think fit, to restore it to one of fee.

It will be observed that in the case of *Chambers' Trustees* not only was there at the outset in the deed an express direction to pay each child a share of the residue six months after the decease of the testator, but it was declared that the shares should vest at the death of the testator. The result, however, of the decision of the House of Lords was, that what appeared to be an unconditional gift of fee was held effectually modified and controlled by the discretionary powers conferred upon the trustees.

If I held that an unconditional right of fee has vested in W. J. Bell, I should feel bound, in deference to the decision of the Court of Seven Judges in *Miller's Trustees*, to hold that the restrictions are ineffectual. But in that case it was admitted that the fee was fully vested; so also in the cases of *Greenlees' Trustees* and *Wilkie's Trustees*. In all these cases the restrictions were disregarded as attempts to cut down or derogate from a fully vested right of fee.

Without attempting to reconcile all the decisions which were cited to us, I may say that I think the apparent conflict between the two classes of decisions is due to the different views which may be taken on the terms of any particular settlement as to whether right to the fee of a provision has or has not fully and unconditionally vested in a beneficiary. But I do not understand it to be disputed that if, upon a sound construction of a settlement an absolute right has not vested, and the funds still remain in the hands of the trustees, such restrictions imposed by the truster must receive effect.

Here the original will must be read as modified by the codicil. The codicil having been executed after an interval, I think the presumption against vesting is fully stronger than if the directions contained in it had occurred in the will itself, because they were introduced to meet a change of circumstances and a consequent change of mind on the part of the testatrix. The codicil is undoubtedly repugnant to the original settlement, but as it contains the latest expression of the will of the testatrix it *pro tanto* supersedes the former.

The appellant's counsel was quick to note and very properly commented upon the absence from this settlement of an important element which is to be found in the deeds in the cases of *Chambers' Trustees* and *White's Trustees*, June 20, 1896, 23 R. 836. In both of those cases express directions were given by the trusters as to the disposal of the fee of the shares in question in the event of the trustees deciding not to pay them over to the beneficiaries. In the codicil of 30th August 1880 there is no fresh direction as to disposal of the capital of W. J. Bell's share, and this struck me from the first as creating some difficulty. But the importance of such a direction consists in its affording a complete indication of the truster's intention that vesting shall not take place until payment; and although owing to the absence of such a direction this case is perhaps not so clear as the cases of *Chambers' Trustees* and *White's Trustees*, I think that the intention of the truster is sufficiently expressed to receive legal effect.

Reading the codicil with the will, I think the truster's intention is this—the residue is to be divided into four shares; three of the shares are to be paid to her daughters within twelve months after her death; as regards her son, W. J. Bell, the fourth share is to be retained by the trustees and the interest only to be paid to him weekly, the trustees, however, being empowered, if they think it for his advantage, to pay over to him part or the whole of the capital; and lastly, in the event of W. J. Bell dying before the capital becomes payable, being in his case the time when the trustees choose, if they ever do so, to pay it over to him, right to it shall pass to his issue, if he have

any, or failing issue to his surviving sisters. This I believe to be the proper construction of the two writs read together; and by so reading them I think we shall give effect to the true intention of the truster without doing undue violence to the language used.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

"Dismiss the appeal and affirm the interlocutor appealed against: Therefore of new assoilzie the defenders from the conclusions of the action, and decern: Find the pursuer liable in expenses in this Court," &c.

Counsel for the Pursuer and Appellant—Shaw, Q.C.—Munro. Agents—Douglas & Miller, W.S.

Counsel for the Defenders and Respondents—Dundas. Agents—Mackenzie & Black, W.S.

Wednesday, March 10.

FIRST DIVISION.

[Glasgow Dean of Guild Court.

WADDELL *v.* WHYTE.

Burgh — Street — Height of Buildings — Glasgow Police Act 1866 (29 *and* 30 *Vict. cap. cclxxiii.*), *secs.* 290 *and* 291.

Section 290 of the Glasgow Police Act 1866 enacts that every proprietor who intends to lay out or form any street shall make application to the Dean of Guild for warrant to do so, stating in his application what is the maximum height of the buildings to be erected. It further provides that it shall not be lawful for any applicant, without the authority of the Dean of Guild, to erect in the street any building other than a dwelling-house the front wall of which shall exceed the width of such street by more than one-fourth part thereof. Section 291 enacts that the applicant shall acquiesce in and fulfil any conditions imposed by the Dean of Guild with reference to the height of the buildings relatively to the width of the street.

Held that these sections impose no perpetual limitation upon the height of the buildings in the street, for which, thereunder, the Dean of Guild has granted a lining, and consequently that it is competent for the Dean of Guild to grant warrant to an applicant under section 364 of the statute for the erection of buildings other than dwelling-houses 70 feet high in a public street 60 feet in width, on the laying-out of which 24 years previously it was proposed by the applicant to erect buildings only 60 feet high.

Robert Davidson Waddell, sausagemaker, Glasgow, applied to the Dean of Guild Court of that city for warrant and decree of lining for the erection of business premises in the place of certain existing buildings on the west side of Napiershall Street and north side of North Woodside Road.

John Whyte, Master of Works of the city of Glasgow, lodged objections, in which, after citing section 290 of the Glasgow Police Act 1866, he averred that the petitioner's authors had in 1872 obtained warrant from the Dean of Guild to lay out certain streets, including Napiershall Street; that Napiershall Street was lined as a public street 60 feet in width; that in the petition presented by the petitioner's authors it was stated that the maximum height of the buildings intended to be erected on the line of Napiershall Street was 60 feet; and that the buildings proposed to be erected by the present petitioner were shown on his plans as 70 feet in height. He accordingly maintained "that it is not in the power of the Dean of Guild to grant warrant for the erection of buildings higher than those authorised in the original lining of said streets," and that the petition should be dismissed.

The petitioner in answer referred to the statute, averred that the buildings for which warrant was granted in 1872 were dwelling-houses, whereas the building proposed to be erected by him was not a dwelling-house, and maintained that the objections were irrelevant.

The Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 290, enacts—"Every proprietor who intends to lay out or to form any street shall make application to the Dean of Guild for a warrant to do so, and every proprietor who has already laid out or formed any street on which no building has been erected shall make application to the Dean of Guild for a warrant to sanction such street, and in either case the proprietor shall state in his application whether such street is intended to be a public street or a private street, and what is the maximum height above its level of the buildings intended to be erected, and shall produce along with such application a plan and longitudinal section of such street, and a plan with cross sections at right angles to such street, of the lands adjoining the same, and the Dean of Guild shall cause the Master of Works and any other person whom he considers interested to be cited, and allow them time to examine the said plans and sections, and lodge answers or be heard with respect to the application." There follows a proviso that the magistrates may issue a warrant declaring such street to be a public street, "but it shall not be lawful for the proprietor of any land or heritage adjoining any street which is laid out or formed, without an application to the Dean of Guild, to erect thereon any dwelling-house the front walls of which shall exceed in height the width of such street, nor