Thursday, December 18.

SECOND DIVISION.

LIETKE'S TRUSTEES *v.* GRAHAM.

Succession—Minor and Pupil—Trust-Disposition and Settlement—Construction—Continuing Trust—Trustees Appointed Tutors and Curators to Beneficiaries in Pupillarity or Minority — Payment to Tutors and Administrators-at-Law.

A testatrix by trust-disposition and settlement conveyed her whole estate to trustees, and she appointed them to be tutors and curators to such of the beneficiaries as might be in pupillarity or minority after her decease. The purposes of the trust were then set forth, *inter alia*, (2) in the event of her husband surviving, to hold, apply, pay, and convey a certain part of the estate for him in liferent and for the children of the marriage equally in fee, and failing children of the marriage for the children of a brother and of a sister *per stirpes* in fee, declaring that the shares of the children of the marriage should vest at majority only, issue of children predeceasing that period to take their parent's share; (3) in the same event to convey the remainder of the estate to the husband; (4) in the event of the husband predeceasing the testatrix, to hold, apply, pay, and convey the whole estate for the children of the marriage, whom failing the children of the brother and of the sister *per stirpes*, with the same declaration as to vesting of the shares of the children of the marriage. Direction was given to apply the income towards the maintenance and upbringing of the children of the marriage, and power was given if necessary to apply the capital also to that purpose, even during the lifetime of the husband.

The testatrix died predeceased by her husband, and without issue. The children of her brother and sister were at the time of her death still in pupillarity. *Held*, on a construction of the settlement as a whole, that the testatrix did not intend, as regarded the children of her brother and sister, to constitute a continuing trust until they attained majority, and that accordingly the duty of the trustees was forthwith to pay their shares over to their respective fathers as their tutors and administrators-in-law.

Mrs Margaret Lietke died on the 23rd July 1906 leaving a trust-disposition and settlement dated 23rd November 1899, in the following terms—"I, Margaret Bell Graham or Lietke, wife of and residing with Andrew Alfred Lietke, do hereby assign and dispone to and in favour of the said Andrew Alfred Lietke, Robert Graham . . . and John Abercrombie . . . and such other person or persons as I may hereafter appoint, or as shall be assumed to act in the trust hereby constituted, and to the acceptors and acceptor, survivors and survivor, of them, and to the heir of the survivor (the major number accepting, surviving and resident in the United Kingdom, being always a quorum) as trustees and trustee for executing the trust hereby constituted, and to their and his assignees, all and sundry the whole means and estate, heritable and moveable, real and personal, which shall belong to me at the time of my decease, including therein all means and estate over which I may have powers of disposal by will or otherwise, and particularly, but without prejudice to said generality, the share of the estate of my late father Thomas Graham, . . . destined to me by his trust-disposition and settlement: . . . And further, I appoint my trustees, and the survivors and acceptors and survivor and acceptor of them (with quorum as aforesaid) to be my sole executors and executor, and also to be tutors and curators and tutor and curator to such of the beneficiaries under these presents, or any codicil thereto, as may be in pupillarity or minority at and after my decease: But these presents are granted in trust always for the ends, uses, and purposes following, vizt.—(*First*) for payment of all my just and lawful debts, and sickbed and funeral expenses; (*Second*) In the event of my husband surviving me, I direct my trustees to hold, apply, pay, and convey the said share of my father's estate destined to me as aforesaid for behoof of my husband in liferent for his liferent alimentary use only, and the children of our marriage equally among them in fee, and failing issue of our marriage, I direct my trustees on the death of my said husband to hold, apply, pay, and convey said share to and for behoof of and equally between the children of my said brother Robert Graham and the children of my sister Ann Andrews Graham or Donald, wife of David Patrick Donald, engineer in Johnstone, the division being *per stirpes*: Declaring that the shares of my children shall become vested interests in their persons respectively at and only upon their attaining majority, and that if any of them shall predecease said period of vesting leaving issue, such issue shall succeed equally among them, if more than one, to the share their parent would have taken on survivance; (*Third*) In the event of my husband surviving me, I direct my trustees to pay and convey to him in absolute property the residue of my estate, exclusive of my said share of my father's estate; and (*Fourth*) In the event of my husband predeceasing me, I direct my trustees to hold, apply, pay, and convey the said share of my father's estate destined to me as aforesaid, and the residue of my estate, to and for behoof of and equally among the children of our marriage, and failing issue of our marriage, to and for behoof of and equally between the children of my said brother Robert Graham and the children of my said sister Ann Andrews Graham or Donald, the division being *per stirpes*: Declaring that the shares of my children shall become vested interests in their persons respectively at and only upon

their attaining majority, and that if any of them shall predecease said period of vesting leaving issue, such issue shall succeed equally among them, if more than one, to the share their parent would have taken on survivance: And I direct my trustees to apply the annual income and produce of the shares of my estate falling, or prospectively falling, to my children who may be in minority, towards their upbringing, maintenance, or education respectively, or otherwise for their behoof or advantage: And notwithstanding the foregoing liferent provision in favour of my husband and the period of vesting foresaid, I empower my trustees to apply, even during the lifetime and without the consent of my husband, so much of the fee or capital as they in their sole discretion may consider necessary or proper of the shares of my estate, or of said share of my father's estate, falling or prospectively falling to my children who may be in minority, towards their upbringing, maintenance, or education respectively, or otherwise for their behoof or advantage: Which provisions in favour of my husband and children are and shall be in full of all that he or they can claim by or through my decease in respect of courtesy, *jus relicti*, and *legitim*, or any other legal claims competent to them respectively. . . ."

The testatrix was predeceased by her husband and had no issue.

Two of the trustees appointed by her survived her and signed the following minute of acceptance—"We, Robert Graham, and John Abercrombie, the surviving trustees named and designed in the foregoing trust-disposition and settlement, do hereby accept the offices of trustee and executor thereby conferred on us."

In terms of her settlement her whole estate fell to be divided into two shares, one share going to Margaret Alexander Graham, aged eleven years, the child of her brother Robert Graham, the other going to Graham Donald, aged ten years, and Andrew Patrick Donald, aged seven years, the children of her sister Mrs Ann Andrews Graham or Donald.

Certain questions having arisen as to the time, &c., of payment of these shares a special case was presented to the Court, the *first parties* to which were Robert Graham and John Abercrombie, the accepting and surviving trustees under Mrs Lietke's trust-disposition and settlement, the *second parties* being Robert Graham and David Donald, as tutors and administrators-in-law to their respective children.

The following statement is taken from the special case—"Questions have arisen between the parties hereto as to the right of the second parties to obtain payment of (*a*) the shares falling to their respective children, or otherwise (*b*) the income therefrom. The first parties are willing, if they can lawfully do so, to wind up said estate and pay over the same in equal shares to the second parties. The first parties are advised, however, that they cannot safely do so in respect that the office of tutor and curator conferred upon them may be held not a proper tutory or curatory, but an office inseparable from the office of trustee and executor under said settlement and minute of acceptance, and that accordingly they are bound as trustees foresaid to hold said estate until the fiars respectively attain majority. The second parties, on the other hand, maintain that they are entitled, as tutors and administrators-in-law for their respective children, to receive payment of the shares of the capital of the trust estate which vested in the beneficiaries *a morte testatoris*."

The following *questions* were submitted to the Court—"(1) Are the first parties, having accepted the office of trustees and executors foresaid, bound to act as tutors and curators under the said trust-disposition and settlement, or to administer the estate until the beneficiaries respectively attain majority. (2) In the event of the first question being answered in the negative, are the second parties entitled, as tutors and administrators-in-law for their respective children, to immediate payment of (*a*) the capital of the shares falling to their children, or (*b*) of only the income of said shares? (3) In the event of the second question being answered in the negative, are the first parties bound, on the said children respectively attaining puberty, to pay over to them with the consent of the second parties (*a*) the capital of said shares, or (*b*) the income only of said shares?'

Argued for the first parties—Admittedly a stranger could appoint tutors and curators to pupils and minors only with regard to funds conveyed by himself, and only where there was a continuing trust—*Johnston* v. *Johnston's Trustees*, November 16, 1892, 20 R. 46, 30 S.L.R. 97; Fraser, Parent and Child, 3rd edition, p. 240; Bell's Principles, sec. 2071. Here, however, the appointment of the trustees to be tutors and curators to such of the beneficiaries as might be in pupillarity at the date of the testatrix's death, taken along with the direction to "hold," constituted inferentially a continuing trust and a direction to retain and administer the shares of all minor beneficiaries, including the children of the brother and sister, until they attained majority. *Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236, had no bearing on the case of minor beneficiaries. The fact that the trustees had not accepted office as tutors and curators was immaterial. They were willing so to act if ordered by the Court—*Hill* v. *City of Glasgow Bank*, October 24, 1879, 7 R. 68, at 76, 17 S.L.R. 17.

Argued for the second parties—It was plain from the settlement, construed as a whole, that the appointment of the trustees to be tutors and curators applied only to the testatrix's own children, and not to those of her brother and sister. As regarded the latter, accordingly, there was no continuing trust, and nothing to prevent immediate payment to their respective fathers, who were their legal tutors and administrators-in-law—*Dumbreck* v. *Stevenson*, 1861, 4 Macq. 86.

Lord Low—The deceased Mrs Lietke by her trust-disposition and settlement conveyed her whole means and estate to trustees, and further appointed them to be tutors and curators to such of the beneficiaries as might be in pupillarity or minority after her decease. The question in this case is whether any, and if so what effect falls to be given to that appointment in the circumstances which have occurred?

In order to answer that question it is necessary to see what precisely were the provisions of the settlement.

After the usual clause for payment of debts the testatrix directed her trustees, in the second place, in the event of her husband surviving her, to hold, apply, pay, and convey a certain part of her estate for behoof of her husband in liferent and for the children of the marriage equally among them in fee; and she declared that the shares of the children were to vest only upon their attaining majority, and that if any of them should predecease the period of vesting leaving issue, such issue should succeed equally among them, if more than one, to the share their parent would have taken on survivance. Then in the third place, she directed her trustees to pay and convey to her husband, in the event of his surviving her, the residue of her estate in absolute property.

The fourth purpose deals with the event which happened of the testatrix being predeceased by her husband. In that event she directed her trustees to "hold, apply, pay, and convey" her whole estate to and for behoof of and equally among the children of the marriage, and she repeated, in the same terms as those which I have quoted, the declaration in regard to the vesting of the shares in her children and the right of the issue of children predeceasing the period of vesting. Further, she empowered her trustees to apply so much of the capital of the shares prospectively falling to her children who might be in minority, as they might in their sole discretion consider necessary for their upbringing and maintenance or education, or otherwise for their behoof or advantage.

Now if the testatrix had been survived by children, there would have been ample room for the operation of the nomination of the trustees as tutors and curators, because in that case there would have been a continuing trust with large discretionary powers to be exercised for the benefit of the children. In the case, therefore, of there being children of the testatrix, the appointment of the trustees as tutors and curators would have been quite appropriate. As it happened, however, there were no children of the marriage, and to provide for that event, and in the event (which also happened) of her husband predeceasing her, the testatrix directed her trustees "to hold, apply, pay, and convey" her whole estate "to and for behoof of and equally among the children of" a brother and a sister, "the division being *per stirpes*." That is the sole direction in the settlement applicable to the events which have happened, nothing being said in regard to the period of vesting or payment, and no discretionary powers being conferred upon the trustees.

It is plain and is not disputed that, according to the natural meaning of the language used, the trust estate (after payment of debts) vested in the children of the brother and sister *a morte testatoris*, and that the term of payment was not postponed. These children, however, are all in pupillarity, and the question is whether the trustees can be required to pay the estate to the fathers of the children as their administrators-in-law, or are bound by virtue of their appointment as tutors and curators to such beneficiaries as may be in pupillarity or minority, to hold and administer the estate until the children attain majority?

I am of opinion that the trustees are not entitled to hold this estate. It seems to me that there is no room, in the events which have happened, for the exercise of tutorial or curatorial powers by the trustees. It was argued that the appointment of the trustees to be tutors and curators implied that they should hold the estate during the minority of beneficiaries, or in other words that the constitution of a continuing trust should be spelt out of the appointment. I do not think that that is a sound view. In the first place, the settlement shows that when the testatrix intended that there should be a continuing trust she said so in explicit terms; and in the second place I think that the appointment of the trustees to be tutors and curators is sufficiently satisfied by regarding it as being intended to apply only in the event of the testatrix being survived by children of the marriage.

I am therefore of opinion that the first question should be answered in the negative, and branch (*a*) of the second question in the affirmative. If that be done, the remaining questions seem to be superseded.

Lord Stormonth Darling — I agree. There is a broad distinction between the provisions of this will in the event of the testatrix leaving children of her own and in the event (which happened) of her being survived only by nephews and nieces. In the latter case there is no continuing trust, as there is in the case of children of her own, and the nomination of the trustees to be tutors and curators, which in terms applies to all the beneficiaries, has no significance as regards nephews and nieces, and does not invest the words "hold, apply, pay, and convey" with an importance which apart from such nomination they would not otherwise have. It is only on that direction to "hold" that the first parties suggest they may have a duty to act as tutors and curators to the minor beneficiaries. They have not accepted office as tutors and curators, but they say they are willing to exercise the office of tutors and curators if it is thought by the Court that under the will they are bound to do so. I do not think that they are under any such obligation, because they will sufficiently

discharge their duty by "paying and conveying" to the natural guardians of the beneficiaries.

LORD ARDWALL—I am of the same opinion. Our decision does not affect the general law laid down in Bell's Principles, sec. 2071. This is a case of trustees who have either declined to accept or failed to act as tutors and curators to certain pupil beneficiaries. A question remains whether they are not bound to act as tutors and curators *quoad* this particular fund? If this had been a continuing trust, laying on the trustees duties stretching over a period of years until these children attained majority, then I should have been disposed to hold that the duties of the offices of tutor and curator attached to the trustees as regards these particular funds. But there is no case of that kind here. There is no continuing trust. The funds are vested in and payable to the beneficiaries now. I am therefore of opinion that the natural guardians of the pupil beneficiaries —in this case their fathers—are entitled to payment now of the funds which are vested in these beneficiaries, and that the trustees are in safety to make such payment.

The LORD JUSTICE-CLERK concurred.

The Court answered the first question in the negative, and branch (*a*) of the second question in the affirmative, and found it unnecessary to answer the remaining questions.

Counsel for the First Parties—MacRobert. Agents—Thomson, Dickson, & Shaw, W.S.

Counsel for the Second Parties—T. B. Morison, K.C.—Black. Agents—Macpherson & Mackay, S.S.C.

Thursday, December 19.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.

ROBERTSON *v.* JARVIE.

Contract—Building Contract—Architect—Principal and Agent—Extras—Alleged Disconformity to Contract—Finality of Architect — Proof — Averments — Relevancy.

A offered to do certain work for B for a slump sum. The schedule annexed to A's estimate, *inter alia*, provided—"The work to be done . . . to the entire satisfaction of the proprietor or architect, who will be at liberty to make alterations, and to increase, lessen, or omit any part of the work. . . ."

B accepted the offer. On completion of the work the architect certified that A was entitled to a sum which, owing to extras, exceeded the slump sum. In an action by A to recover the balance he averred that the extra work had all been authorised by B's architect, and that his certificate was final. In his defences B denied that the extra work had been authorised by his architect. He also averred that the architect had no power at his own hand to authorise it, and that the whole work executed was in many respects—which he specified—disconform to contract.

Held (1) that as the architect was not, under the contract, made an arbiter, there must be a proof, limited, however, to the question whether the additions and alterations had all been authorised by the architect, as such, and as acting for the defender; but (2), assuming that fact to be proved, that the defender could not—at least in the absence of very specific averments—object to the architect's final certificate, he having been allowed throughout to act as measurer.

Per Lord M'Laren—"I think that there can be no doubt that within the scope of his employment an architect is the proprietor's agent; and if the building contract provides that the work is to be done to the satisfaction of the architect, then any order within the scope of the contract which the architect may give is a sufficient authority to the tradesman to execute the work, because he is entitled to take the order of the agent as equivalent to the order of the principal."

John Neilson Robertson, joiner, Grangemouth, brought an action in the Sheriff Court at Kilmarnock against James Jarvie, restaurateur, Ardrossan, in which he sought to recover £41, 3s. 3d.

The following narrative is taken from the opinion of the Lord President—"In this case the sum at stake is a very small and trivial one, but the pleadings have managed to raise a question of some delicacy as to how the case should be disposed of. The pursuer is a joiner, and he offered for the carpenter work of a house which was being put up for the defender, the defender's architect being Mr James Robertson. The contract is contained in an offer and acceptance. Schedules of offer had been sent out in the ordinary way, and the pursuer on 15th April wrote this letter—'I hereby offer to execute the carpenter, joiner, glazier, and ironmongery works of tenement you propose to erect at Grangemouth, agreeably to plans thereof, to the extent of and as described in the annexed schedule measurement, for the slump sum of £432, 12s. Your acceptance of this offer will be binding on your obedient servant, John Robertson.' To that an acceptance was sent in these terms—'I am instructed by Mr James Jarvie'—that is, the defender—'to accept your offer for carpenter, joiner, &c., works of tenement, East End here, amounting to £432, 12s. sterling.—Yours truly, James Robertson'—namely, the architect. Upon that offer and acceptance the work was done. The architect, it seems, gave certificates from time to time as the work proceeded, and a certain amount of money was paid; but in the end of the day the architect measured the work, and gave a note of his measurement, which ran thus—