*Tuesday July* 17.

## SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

## ANDERSON (THOMSON'S FACTOR) *v.* THOMSON AND OTHERS.

*Succession—Trust—Residue.*

A testatrix, after providing certain legacies and annuities, directed her trustee to hold the residue of her estate and distribute it annually between certain persons named. *Held* that this imported a bequest of the fee of the residue.

*Succession—Legacy—Ademption.*

A lady by a testamentary writing given to her law-agent in a sealed packet, to be opened, and which was opened, at her death, "empowered" her said agent "to uplift the deposit-receipt lying with you for £4000, to lodge it in your own name, and to hold it in trust for my mother's brothers and sister, and for their children." Subsequently to the date of the writing, she authorised her agent to uplift the money in the deposit-receipt and invest it in her name on heritable security; and it continued so invested until her death. *Held* (*diss.* Lord Justice-Clerk) that the legacy was thereby adeemed.

This was an action of multiplepoinding and exoneration, brought by Thomas Anderson, writer, Glasgow, judicial factor on the estate of the deceased Miss Jane Thomson, who died on 8th June 1876. The fund *in medio* was the estate left by Miss Thomson, amounting to over £19,000.

The circumstances under which the case was brought were as follows:—On 25th March 1875 Miss Thomson called upon the pursuer Mr Anderson, who then acted as her law-agent, and informed him that she intended leaving home for some time, and left with him a packet enclosed in a sealed envelope addressed to him, and on which was endorsed "to be opened only in the event of my death. (J. T.)" The packet lay in Mr Anderson's hands until Miss Thomson's death, after which it was opened by him, and found to contain a testamentary writing, which was holograph of the deceased, and was in the following terms, viz.:—

"9 *Jane Street*,
"*Glasgow*, 23*d March* 1875.

"Mr Anderson.

"Dear Sir,—As I purpose going from home, I think it right to leave written instructions with you in the event of my death, and request you to carry out the following instructions and arrangements:—I empower you to uplift the deposit-receipt lying with you for £4000, to lodge it in your own name, and to hold it in trust for my mother's brothers and sister, and for their children; farther, to make payment to Miss Annie Glass, Montreal, formerly residing with Mrs John Fraser there, the yearly sum of one hundred pounds during her lifetime—Mr John Fraser, or Mr Ogilvie, M.P. for West Montreal, will receive and expend it on her behalf: And I further instruct you to uplift interest of bonds, feu-duties, and all monies payable to me, and to make payment to my father's family the following sums mentioned:—To Mr Robert Thomson, draper, Dunfermline, the yearly interest of two thousand pounds sterling at five per cent. (£2000 at 5 per cent.), and to my aunt Campbell, wife of James Campbell, Pitlochrie, I give the sum of five hundred pounds as a present (£500 in all), to buy some present, or something in remembrance of my father: And I empower you also to make payment to Miss Howard, 42 Carnarvon St., the yearly sum of twenty-five pounds sterling, and to my servant Isabella Lindsay twenty-five pounds yearly, and to hold the residue of my estate and distribute it annually between the following gentlemen:—Mr Wm. Spencer, 160 Hope Street; Mr Bromhead, architect, 196 St Vincent Street; and Mr James Lindsay, Gualequay Chu, Buenos Ayres, South America, along with the following presents to them—To Mr Lindsay my dining furniture and silver plate, my ivory dressing-case, and solid-silver-fitted travelling-bag, and mother's picture; to Mr Spencer all my jewellery, and the silver-plated travelling-bag; to Mr Bromhead my pictures, piano, music, and ornaments, bronze and china; and the household furniture, the use of in liferent, to my cousins Sophia and Jessie Stuart, daughters of Thomas Stuart, Callander. I hope I have made everything explicit, and mean this to remain as my settlement of my affairs, and to be acted upon and carried out by you in the event of my death; and reserve to myself the power to alter or revoke these arrangements during my lifetime.—I am, Dear Sir, yours very sincerely, JANE THOMSON.
9 Jane Street, Glasgow, 23d March 1875.

The persons called as defenders were the whole persons who were interested in the succession as heirs *ab intestato*, or as beneficiaries under the letter of 23d March, or under a settlement executed by Miss Thomson in 1861 in favour of her mother (who predeceased her), and her heirs and assignees.

A proof was led, and it appeared that the deposit-receipt for £4000, referred to in the letter of 23d March, was dated 5th March 1875. By Miss Thomson's directions the amount thereof was uplifted by Mr Anderson on 23d March 1875, and re-deposited to the extent of £3804, 18s. 6d. in his own name. Mr Anderson had general instructions to look out for and submit securities to Miss Thomson, and on 12th May 1875 she agreed, on his application to her, to lend £3500 of the said sum of £3804, 18s. 6d. deposited in bank on heritable security. This sum was accordingly on 31st May uplifted from the bank and invested to the extent of £3500 in a bond and disposition in security in her favour. It remained so invested till her death.

The important portions of the evidence are given verbatim in Lord Ormidale's opinion.

Robert Thomson, the heir-at-law of the deceased, who had agreed to collate, and Mrs Margaret Thomson or Campbell, being the two next-of-kin of the deceased, claimed (besides the special provisions in their favour contained in the letter of 23d March) the whole heritable property belonging to the deceased, and the whole fee of the residue of the estate, after deducting the £500 to be paid to Mrs Campbell and the specific articles bequeathed by the letter.

Mr Thomson and Mrs Campbell pleaded, *inter*

*alia*—"(1) The legacy of the deposit-receipt, made in the letter of 23d March 1875 by the deceased Miss Jane Thomson, has lapsed, owing to the failure of the subject bequeathed. (2) According to the sound construction of the said letter, Messrs Spencer, Bromhead, and Lindsay are entitled during their respective lives to have annually paid over to them one-third each of the interest of the residue of the deceased Miss Jane Thomson's moveable estate, after satisfying the other bequests and liferent interests provided for in said letter, and they have no further right or interest in the deceased's estate. (3) The general settlement by Miss Jane Thomson, dated 18th February 1861, has become inoperative."

On the other hand, the representatives of Miss Thomson's mother, viz., the various members of the Glass family, claimed the legacy of £4000 in equal parts, and also the fee of the residue of Miss Thomson's estate, heritable and moveable, also in equal parts, subject, however, to the liferent interests of Messrs Spencer, Bromhead, and Lindsay. They pleaded that the legacy of £4000 was not affected by the change of investment; and that, as the capital of the residue was not disposed of by the letter of 23d March, they were entitled to it as conditional institutes or legatees under the settlement of 1861.

Messrs Spencer, Bromhead, and Lindsay claimed the specific legacies bequeathed to them respectively by the letter, and also the capital of the residue, or, alternatively, the annual income of the residue. They pleaded that the legacy of £4000 had been adeemed, and that on a sound construction of the letter they were entitled to the fee of the residue.

The Lord Ordinary pronounced an interlocutor which contained, *inter alia*, the following findings:—

"*Edinburgh, 20th February* 1877.—The Lord Ordinary having considered the cause, Finds that the legacy of £4000 contained in the deposit-receipt mentioned in the testator's will has been adeemed. . . . . Finds that the residue of the estate is divisible in equal shares between and among the claimants William Spencer, Horatio Kelson Bromhead, and James Lindsay.

"*Note.*—The Lord Ordinary has felt much difficulty in this case, and he has pronounced the preceding interlocutor with great hesitation.

"(1) He has come to be of opinion that the bequest relating to the deposit-receipt is specific, and that it has been adeemed in consequence of the contents of the receipt having been uplifted and otherwise invested during the testator's lifetime. The form in which the bequest is made, and the manner in which alone it can be made effectual, seems to him to lead to this result. . . . .

"(3) He is of opinion that the testator meant to dispose of her whole estate. She says that the letter was intended to be a "settlement of my affairs," and, in the opinion of the Lord Ordinary, it must be read, if possible, in such a way as to exclude intestacy. No construction can be put on the clause disposing of the residue which does not do violence to the words. But the Lord Ordinary has endeavoured to construe it as far as possible in conformity with what he considers to be the testator's intention."

The members of the Glass family and the Thomsons reclaimed.

Argued for the Glass family—The legacy of £4000 was pecuniary, not specific—*Lambert* v. *Lambert*, Jan. 16, 1806, 11 Vesey 607, where the direction was to transfer funds. We are entitled to the worth of £4000; that is the amount of benefit intended for the legatees—*Clark* v. *Browne*, July 25, 1854, 2 Small & Giffard, 524. The doctrine of the civil law is, that an intention to revoke must appear—Inst. ii. 20, 12. Nothing depended on the form of the security—Bell's Pr. § 1886; *Pagan*, 1838, 16 Sh. 383; *Chalmers*, 1851, 14 D. 57; *Congreve's Trustees* v. *Congreve*, June 27, 1874, 1 Rettie 1102. There is no express revocation of the settlement of 1861. The annual distribution appointed by the letter clearly related to interest.

Argued for Thomsons—The settlement of 1861 was evacuated by the predecease of the testator's mother—*Findlay* v. *Mackenzie*, July 9 1875, 2 Rettie 907. The letter is not sufficiently expressed to carry the heritable estate—*Pitcairn* v. *Pitcairn*, Feb. 25, 1870, 8 Macph. 604; *Edmond* v. *Edmond*, Jan. 30, 1873, 11 Macph. 348; *M'Leod's Trustees* v. *M'Leod*, Feb. 28, 1875, 2 Rettie 481; *Hendry's Trustees and Others*, May 13, 1871, 9 Macph. 736. There is no rule in Scotland that a gift of interest carries the principal when not specially destined—*Sanderson's Executor* v. *Kerr*, Dec. 21, 1860, 23 D. 227. There was a continuous intention to benefit the mother's relatives.

Argued for Spencer, Bromhead, and Lindsay—There has been ademption—*Jack* v. *Lauder*, July 27, 1742, Mor. 11,357. Pecuniary legacies are held to be often specific, as of a certain sum in a certain bag or chest—Williams on Executors, p. 1160. Ademption is not a question of revocation, but of the existence of the subject—Roper on Legacies, i. 338 and 202; *Barker et ux.* v. *Ragner*, Dec. 6, 1820, 5 Madd. 208; *Gardner* v. *Hutton*, April 2, 1833, 6 Simon 93.

At advising—

Lord Ormidale—The first question which was discussed by the parties at the debate in this case is, whether the bequest of £4000 is a specific one, and if it is so to be held, was it adeemed by the testatrix? The Lord Ordinary, while he has answered this question in the affirmative, says that he has done so with great hesitation.

I concur with the Lord Ordinary.

The question resolves into two branches—(1) Is the legacy a specific one? and (2) Has it been adeemed?

In reference to the character of the legacy, it must be borne in mind that a particular sum of money, as distinguished from others, may constitute a specific legacy. Thus, the bequest of £1000 lent on bond to two persons named, as in *Pagan* v. *Pagan*, January 26, 1838, 16 Sh. 383, or of a sum of money in a particular bag, as in *Lawson* v. *Stitch*, 1 Alk. 508, are specific legacies, while a bequest of a sum of money generally out of the testator's estate is not so. And where a certain sum is given, and the fund in which it is invested is described or pointed merely, the legacy will be demonstrative, as illustrated by the cases referred to in the 2d vol. of Tudor's Leading Cases, 2d ed. p. 241.

Having regard to these distinctions, it appears to me that the legacy in question is a specific one; for it is not merely a sum of £4000 generally, but the £4000 "lying with you," that is, Mr Anderson, to whom the testamentary letter is addressed by the testatrix. The bequest is in this way identified as a particular sum, separated and apart from the testator's estate generally. Nor do I think that it destroys this characteristic of the legacy that the testatrix goes on to instruct Mr Anderson to uplift the £4000, and re-deposit it on a receipt in his own name, and "to hold it in trust for my mother's brothers and sister and their children." I rather think that, in place of doing so, the identity of the sum, as separated and laid apart from the testatrix's general estate is made all the more marked.

Assuming, then, that the legacy must be regarded as a specific one, the question next arises —Has it been adeemed?

About the facts on which this depends there is no dispute. Mr Anderson states them distinctly. His statement amounts to this—that the testatrix had anticipated, so to speak, the direction in her testamentary letter, and at a personal call before she left for the Continent endorsed the deposit-receipt for the £4000, and directed him to re-deposit the money in his own name "in the meantime;" that he did so under deduction of £200, which he retained, as he told her at the time he would do, to pay some outstanding debts of the testatrix; and that on the following day the testamentary writing was sent him by testatrix enclosed in an envelope, which he did not open till after her death.

But in the interval between the time when the testatrix returned from the Continent and her death her important acts in connection with the £4000 occurred, which are founded upon as showing that she had adeemed the legacy. These acts are referred to by Mr Anderson as follows: —"I had a meeting with Miss Thomson on the 12th of May, which must have been shortly after her return from her Continental trip. The following is the account of that meeting entered in my books—'Meeting you to-day (12th May) when you requested us to remit your uncle Mr Robert Thomson £100 per annum half-yearly, and receiving written instructions to that effect; advising as to investment of money in bank; handing you rental and valuation of property Paisley Road, over which £4500 wanted, when you agreed to give £3500 to rank equally with another for £1000.' That referred to the investment of the sum which stood in my name in trust. (Q) Do you remember whether Miss Thomson asked you to invest the money or you proposed to it?—(A) She called, and I proposed it. I did not write to her about that. (Q) What was her object in calling?—(A) It was coming on to term time, and I suppose she called to ask about her property. (Q) Had she called to give you directions about remitting the £100 per annum?—(A) Her object was to get £10 on account of interest due at Whitsunday, and she gave instructions to remit £50 every six months until further notice. The written instructions are below the receipt for the £10, which I now produce. The proposal to invest the money originated entirely with myself, and she agreed at once. She was to get 4½ per cent. of interest, which was a good deal more than was allowed by the bank. I can't say exactly what the bank rate then was. There were no other uninvested funds belonging to Miss Thomson, so far as I am aware, out of which this loan could have been made. After receiving her instructions I cashed the deposit-receipt, and made the advance she agreed to on heritable security. The transaction was really a Whitsunday one, but was actually carried through a few days later, on the 31st of May. The money continued to stand out on heritable security until Miss Thomson's death. It is given up in the inventory."

Now, it will be observed from this statement that the identity and character of the £4000, as shown in the testamentary writing, are entirely changed. It is no longer a sum deposited in bank on a receipt either in the name of the testatrix or of Mr Anderson, and the sum itself has been considerably reduced. £3500 of it has been laid out on heritable security, and the remainder otherwise disposed of. And all this was done by Mr Anderson during the testatrix's life, and in obedience to her instructions, and of course in her knowledge.

With reference to these circumstances, and having regard to the decided cases on the question of ademption, I do not see how the conclusion can be resisted that the bequest in dispute has been adeemed by testatrix. It seems to be firmly established in England, ever since the judgment of Lord Thurlow in the cases of *Ashburner* v. *M'Guire* (2 Br. C. Cases 108) and *Stanley* v. *Potter* (2 Cox 182), that the test of ademption is whether the specific thing bequeathed by a testator continued to exist at his death, or had been converted into something else, and this independently altogether of the *animus adimendi*, a consideration which has been discarded on the ground that it was calculated to create confusion and uncertainty. Accordingly, the principle of ademption appears to have been given effect to in England by numerous cases which are noticed in Tudor's Leading Cases in Equity (2d ed. vol. ii. 43, *et seq.*) And some of these cases approach very closely to the present; for example, in *Green* v. *Symonds* (1 Br. Ch. Cases 129), where the testator bequeathed to C all his books at his chambers in the Temple, and afterwards removed them to the country, it was held that the removal effected an ademption; so in *Gardner* v. *Hutton* (6 Sim 98), where a testator bequeathed a sum of £7000 secured on mortgage of an estate at W, belonging to R Y, and the £7000 with interest having been received after the date of the will by the testator's agent on his account, and immediately after £6000 of it was invested upon another mortgage, on which it remained at the testator's death, it was held to be adeemed.

There are Scotch cases to the same effect. Thus, in the case of *Jack* v. *Lauder*, July 27, 1742, Mor. 11,357, it was held that a testator receiving payment of the contents of a bill which he had bequeathed to a legatee had revoked or adeemed a legacy. So in *Pagan* v. *Pagan*, already alluded to, a special legacy of £1000 lent on bond to E and J was held to be put an end to in consequence of the debtor having voluntarily paid up the bond two years before the testator's death. And in the case of *Chalmers* v. *Chalmers and Others*, November 19, 1851, 14 D. 57, where a testator by his trust-settlement directed one of four houses to be conveyed to each of his

nephews, and thereafter one of the houses having been compulsorily taken by a railway company, and the testator having afterwards died without making any alteration in his settlement, or in any way setting aside the price of the house for his nephew, it was held that the nephew to whom the house had been destined had no claim for its value, the principle of the decision being that the specific thing bequeathed having ceased to exist before the death of the testator, the legacy must be held to have been adeemed.

I think therefore the Lord Ordinary's judgment in regard to the £4000 legacy is right. It may operate considerable hardship on some of the parties, but not greater than in some of the cases to which I have referred, and at anyrate such a consideration cannot be allowed to affect the decision of the Court.

The second and only other contested question which requires now to be decided relates to the residue clause, which is undoubtedly in some respects very awkwardly expressed. I cannot doubt, however, having regard to the Titles to Land Act 1858, and the cases which have since followed upon it, that the clause is habile, and sufficient to carry the residue. The disputed point was not so much that, as whether the persons named in the clause are to be held entitled to the fee or capital of the residue, or merely of the annual interest or income that may accrue from it. Now, when I see that the testatrix expressly directs that the residue of her estate shall be distributed among the persons named by her, although she adds "annually," I feel myself constrained to hold that the fee or capital is to be at once paid over to them, and that the word "annually" must be disregarded as having been used inadvertently by the old lady, and at anyrate without intending thereby to convert into a liferent—an expression, by-the-bye, which she does not use—that which otherwise I think, as I have said, must be held to be a disposal once and for all of the entire residue. I feel strengthened in this conclusion by the consideration that the testatrix directs the residue to be distributed to the persons named by her "along" with certain articles of plate and furniture which were clearly to be given over to them at once, and not merely liferented by them.

I am therefore of opinion that the Lord Ordinary is also right in regard to this matter, the result being that his interlocutor reclaimed against will fall to be adhered to, and the case remitted to him to proceed further as may be just.

Lord Gifford—The questions raised under the holograph settlement or testamentary letter of the late Miss Jane Thomson, dated 23d March 1875, are attended with great difficulty, chiefly owing to the imperfect and doubtful manner in which Miss Thomson has expressed herself in that letter, and to the difficulty of gathering therefrom what was Miss Thomson's real purpose and intention in regard to the final distribution of her means and estate.

For I am of opinion that the questions raised are in substance questions regarding the true intention and meaning of the testator Miss Jane Thomson, and I think that if her true intention can be sufficiently and satisfactorily gathered from the terms of her testamentary letter, then there is no legal obstacle to these intentions being duly and effectually carried out. It appears to me that the leading questions in the case do not depend upon technical rules or upon technical words; but if it can be made to appear what the testator intended to be done with her estate after her death, then that intention falls to receive effect. Perhaps I should except from the generality of this statement the question of the ademption of the legacy, for there is high authority for saying that in questions of ademption of special legacies the rule depends, not on the intention of the testator, but on the form in which the estate is left at the testator's death.

Of course the testamentary intention of Miss Thomson must be learned and gathered solely from her testamentary writings, and I think that in the present case the sole testamentary writing with which we have to do is Miss Thomson's letter addressed to Mr Anderson, and dated 23d March 1875. This letter was placed in Mr Anderson's hands, or rather sent to Mr Anderson by Miss Thomson with a letter dated 24th March 1875, enclosing to him in a sealed packet, only to be opened after her death, the testamentary letter dated 23d March, being the previous day. This document remained under seal in Mr Anderson's custody until Miss Thomson's death, which happened about fifteen months afterwards, on 18th June 1876.

There was, no doubt, a previous disposition and settlement by Miss Thomson, dated 18th February 1861, but as I read the testamentary letter of 23d March 1875, it supersedes all former settlements, and by itself constitutes a complete *mortis causa* settlement of Miss Thomson's whole estate. If I am right in this, the disposition and settlement of 18th February 1861 is altogether suspended and inoperative, and in this view it need not be looked at. It is only in the event of its being held that the testamentary letter of 23d March 1875 does not dispose of Miss Thomson's whole property that there would be any occasion to fall back upon Miss Thomson's earlier testament.

I take, then, the letter of 23d March 1875, and I read it in order to see if it was intended to form a final and complete settlement *mortis causa* of the writer's whole estate. I think it does, and it effectually regulates her whole succession.

The letter begins by stating that Miss Thomson purposes going from home, and it gives Mr Anderson certain instructions "in the event of my death;" but although these expressions might suggest that the settlement was only interim and temporary, in case of accident to the writer during her foreign journey, all doubt on this point is completely removed by a sentence at the end of the letter, where Miss Thomson says—"I hope I have made everything explicit; and mean this to remain as my settlement of my affairs, and to be acted upon and carried out by you in the event of my death." It appears to me that this is equivalent to an express declaration by the testator that the writing is Miss Thomson's last will and settlement, which is "to be acted upon and carried out" by Mr Anderson as a settlement of her whole affairs. If, therefore, the writing does purport to direct the disposal of Miss Thomson's whole estate, I think it must receive effect as a universal settlement.

It is true that the writing does not contain any

dispositive words, or words of conveyance or assignation. It does not convey *in terminis* the whole estate to Mr Anderson as trustee or executor. It is conceived in a different manner. It is in the form of instructions to Mr Anderson, directing him what to do with the estate, and what arrangements he is to carry out after Miss Thomson's death. But if the instructions embrace the distribution of Miss Thomson's whole succession, it is not of the least consequence in what form the will is expressed. It must receive effect according to its true intent and meaning. Now, in reference to the claim of Mr Spencer, Mr Bromhead, and Mr Lindsay, I am of opinion that the letter contains an effectual bequest in their favour of the whole residue of Miss Thomson's estate. The words are—"And I empower you also" (and then after providing for two annuities the testatrix proceeds) "to hold the residue of my estate, and distribute it annually between the following gentleman—Mr William Spencer, 160 Hope Street, Mr Bromhead, architect, 196 St Vincent Street, and Mr James Lindsay, Gualequay, Chu, Buenos Ayres, South America, along with the following presents to them." Of course the only difficulty here is the occurrence of the "annually." Without that word there could be no doubt that the whole residue is disposed of. The opposing claimants maintain that the word "annually" necessarily implies that it was the income or annual proceeds of the residue that was given, and that the capital or fee of the residue was not disposed of at all by the writing, but either falls under the previous settlement of 1861 or belongs as intestacy to Miss Thomson's next-of-kin or heirs-at-law. I cannot accept this contention. What is it that is to be distributed annually among the three gentlemen named? Not the income or annual proceeds of the residue, but the residue itself—"the residue of my estate." These words are hardly susceptible of construction, and when to this is added that the letter is expressly declared "my settlement of my affairs"—that is, of my whole affairs—an entire settlement not a partial one—I cannot interpolate words which would make the testatrix say annual proceeds of residue instead of what she does say—"residue of my estate"—and which would have the effect of destroying the writing as a universal settlement, and of converting it into a very partial settlement indeed. If it is necessary to give a meaning to the word "annually," I think it is sufficiently satisfied by remembering that there were considerable annuities which were provided for, and which are all described by Miss Thomson as "yearly payments." These amount to about £250 per annum, and the testatrix might well contemplate that a considerable sum of residue would fall to be retained in Mr Anderson's hands, which might annually be relieved as the annuitants fell in or as their annual annuities were satisfied. But even if there were no such explanation, I could not hold the use of the word "annually" as restricting an express bequest of residue to a bequest of the mere interest of residue, the effect being to produce intestacy or something equivalent thereto, for in the present question the setting up of the settlement of 1861 would have a very analogous effect. I hold therefore that Messrs Spencer, Bromhead, and Lindsay are equally among them Miss Thomson's residuary legatees.

There is no dispute as to Mr Robert Thomson's annuity of £100 a-year, nor as to the claims of Miss Howard and Isabella Lindsay, or as to the bequests of furniture or specific articles, and the only remaining question, which is, however, to my mind the most difficult question in the whole case, relates to the legacy of £4000 in favour of the brothers and sister of Miss Thomson's mother.

The Lord Ordinary has held that this bequest has been adeemed in consequence of the deposit-receipt, on which the money was originally in bank, having been uplifted and otherwise invested during the testator's lifetime.

With great difficulty, and I do not hesitate to say with the greatest possible reluctance, I feel myself compelled to agree with Lord Ormidale and with the Lord Ordinary that this bequest has been adeemed by the sum in the deposit-receipt having been invested on real security under a bond taken in favour of Miss Thomson herself and her heirs and assignees whomsoever. I feel the authorities both in Scotland and in England—some of which have been referred to by Lord Ormidale—to be too strong to be overcome, although I am perfectly satisfied that Miss Thomson by adopting, on the suggestion of her agent Mr Anderson, the heritable security, had no intention whatever to interfere with or take away the bequest which she had made in favour of her mother's brothers and sister and their issue. I think the ademption so effected produces in this case, and in many other similar cases, results of great hardship, and indeed I may say of great injustice—results which in England seem to have been mitigated to some extent by the 23d section of 1st Vict. cap. 26, which, however, does not apply to Scotland. I would very willingly have held, if I could, that the instruction to Mr Anderson in the testamentary writing of 23d March 1875, of which he knew nothing till Miss Thomson's death in June 1876, was an instruction not merely regarding a deposit-receipt (which of course was a document of a temporary nature, and implying only a temporary lodgment of the fund in bank at low interest till a better investment could be found), but an instruction regarding the fund itself wherever invested, and an instruction which would follow the fund itself wherever it could be traced. I regret more than I can express to be compelled to follow decisions which lay down, as I think, an arbitrary rule—a rule which in the present case is productive, as I cannot help thinking, of injustice, but I feel bound to administer the law and not to amend it.

Lord Justice-Clerk—On the question of liferent or fee in the residue of this estate, I entirely concur in the opinions just delivered. It is not necessary to give any special meaning to the word "annually." I think it probable that some words relating to the disposal of the interest have been omitted. I once made a similar suggestion in an entail case which went to the House of Lords, but that was thought to be not a sufficiently judicial ground of interpretation. But there is no doubt that a bequest of the fee was here intended.

On the question of ademption the authorities are undoubtedly very strong. Was this legacy to be out of a particular fund? In the leading

English case of *Ashburner* v. *M'Guire*, July 18, 1786, 2 Brown's C. C. 107, Lord Thurlow referred to the civil law that it was competent for a man after he had changed the subject-matter of a specific legacy to declare by his conduct that such change was no ademption, and proceeds:—"This has not been adopted by our law. There is no ground to say that after a legacy is extinguished a man by his conduct may revive it; it is contrary to common sense." Now, that is a most unusual rule of construing a testamentary writing—that you are to give effect to something not contemplated by the testator. It is a deviation from the civil law, from which our rules of ademption profess to be taken. Ademption is either revocation or it is nothing at all. There must be evinced an intention to revoke. According to the civil law, if a *res specifica* perished, no doubt the direction of the testator became imprestable, but even in that case there was a remedy. But where the subject had not perished, the intention of the testator undoubtedly prevailed." I read in the Institutes (ii. 20, 12)—"If a testator gives his own property as a legacy, and afterwards alienate it, it is the opinion of Celsus that the legatee is entitled to the legacy, if the testator did not sell with an intention to revoke the legacy. The Emperors Severus and Antoninus have published a rescript to this effect, and they have also decided by another rescript that if any person after making his testament pledges immoveables which he has given as a legacy, he is not to be taken to have thereby revoked the legacy; and that the legatee may by bringing an action against the heir compel him to redeem the property. If, again, a part of a thing given as a legacy is alienated, the legatee is of course still entitled to the part which remains unalienated, but is entitled to that which is alienated only if it appears not to have been alienated with the intention of taking away the legacy." (Sandars' Justinian 228). Lord Thurlow thought that this constant reference to the testator's intention was inconvenient, and he founded a rule on the shape of the particular instrument or investment. The same principle has been given effect to in the Scotch cases of *Pagan* and *Chalmers*, both of which I hold to be inconsistent with reason, and I protest in the name of jurisprudence against any such arbitrary rule being applied in a question of testamentary intention. In this case I doubt whether the legacy is specific or even demonstrative. I think it is a legacy of £4000. It was not the legacy of a particular investment which the testatrix might wish the legatee to enjoy, and it was not the legacy of a deposit-receipt. The sum was the balance of a previous transaction, and it remained in bank only for a few weeks. The trustee under the letter of 23d March is in fact directed to uplift the money on deposit and to hold and invest it. But while I doubt whether this can be called a specific legacy, I am not prepared to dissent from the judgment proposed.

The Court adhered, and allowed the costs of all the claimants to come out of the estate, on the ground that the settlement had been very obscurely expressed.

Counsel for Thomsons — Kinnear — Jameson. Agents—Murray, Beith, & Murray, W.S.

Counsel for Glass family—M'Laren—Asher. Agents—Walls & Sutherland, S.S.C.

Counsel for Spencer, &c.—Trayner—Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

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*Tuesday, July* 17.

## SECOND DIVISION.

[Lord Adam, Ordinary.

### PETITION—SIR WILLIAM MAXWELL.

*Entail—Entail Amendment (Scotland) Act* 1875, *secs.* 11 *and* 12, *sub-section* 3—*Petition.*

An heir of entail in possession applied to the Court under the Entail Amendment Act 1875 for authority to borrow and charge on the estate sums which he had expended on improvements. Pending the proceedings he died, and his son, who was his general disponee and executor, and succeeded him as heir of entail, applied to the Court to be sisted as petitioner in his father's room, in terms of sec. 12, sub-sec. 3, of the said Act. *Held* that he was not entitled to be sisted.

Sir William Maxwell of Monreith, Baronet, on 1st March 1877 presented a petition under the Entail Amendment (Scotland) Act 1875 (38 and 39 Vict. c. 61), and secs. 7 and 8 thereof, for authority to borrow on the security of the entailed estate the sum of £8937, the amount expended on improvements of the entailed estate of the nature contemplated by the said Act, and to grant therefor bond of annual-rent or bond and disposition in security in usual form. The petition was one in which it was not necessary to obtain consents.

During the course of the proceedings in the petition Sir William Maxwell died, and was succeeded in the entailed estate by his only son Sir Herbert Eustace Maxwell. Sir William also left a disposition and settlement in favour of Sir Herbert, whereby he conveyed to him "all and sundry lands, heritages, and heritable subjects, debts heritable and moveable, heirship moveables, goods, gear, and sums of money, and in general the whole means, estate, effects, and property, heritable and moveable, real and personal, of whatever kind or nature, and wheresoever situated, now belonging or that shall belong to me at the time of my decease, excepting only the lands and estate of Monreith, and other lands and heritages held by me under settlement of strict entail, together with the whole writs, evidents, and title-deeds and vouchers and instructions of my said estates, heritable and moveable, real and personal, above conveyed: And I hereby nominate and appoint the said Herbert Eustace Maxwell to be my sole executor."

Sir Herbert immediately after his father's death lodged a minute setting forth the terms of the disposition and settlement, and craving to be sisted as petitioner in the original petition, as general disponee and executor of his father, and also as heir of entail immediately succeeding to him and now in possession of the entailed estate.

The sist was opposed by Mr Latta, the tutor