"The deed does not contain a power to appoint one of the trustees as law agent. The defenders justify the charge mainly upon the ground that the beneficiaries acquiesced in Mr Scott's acting as law agent for the trust. It is clear, from the correspondence of the truster's widow with Mr Scott, that she was aware he acted in that capacity, and neither she nor Mr H. G. Dickson, the agent whom she ultimately employed to act for her, ever objected to his doing so. The agents for the pursuer, on his getting an assignation to £300 of the arrears of the widow's annuity, also transacted with Mr Scott, as agent, without objection. The question is, Whether these facts constitute such acquiescence by the pursuer or his author as should exclude him from now taking the objection?

"If the Lord Ordinary could hold that the judgment in the case of *Ommaney* v. *Smith*, 16 D. 721, was to the effect that beneficiaries are barred from taking the objection where they have corresponded with the trustee on the understanding that he was acting as law agent for the trust in his professional capacity, he would consider it to apply to the present case. But though some parts of the report tend to such a construction, he is disposed to think that that is not the true import of the judgment. The party there taking the objection was, in the person of his wife, not only a special legatee, but also sole residuary legatee. It rather appears to the Lord Ordinary that the ground of judgment was that, in the special circumstances of that case, the residuary legatee, who had the sole interest in the matter, gave his virtual concurrence to the employment of the defender as law agent. The defender was sole executor of the testator. The husband of the residuary legatee appears to have intervened actively in the administration of the executry estate, and it was held that in doing so he gave his consent to the defender acting as agent. The Lord Ordinary thinks that this is different from the case of a beneficiary who does not interfere with the management of the trust, and against whom it can only be alleged that he has objected to one of the trustees acting as agent, when he may have had no reason to suppose that he would ever have an interest to take the objection. If mere *non repugnantia* is a bar to a beneficiary stating the objection, the rule against trustees making charges for agency will seldom receive effect.

"On these grounds the Lord Ordinary is of opinion that the objection must still receive effect. But Mr Scott is, of course, entitled to his outlay charged in the business accounts.

On the second objection the Lord Ordinary thought inquiry was necessary. "If it is to be held that at any time prior to 31st December 1854, the close of the period under consideration in this reduction, the trustees were acting contrary to their duty in continuing to hold the heritable property, other than the house in Montague Street, and to carry on the trust as they did, charging it with the expenses of management, and borrowing money from their factor at five per cent. to pay Mrs Handyside's annuity, that is a course of procedure which may have caused loss to the estate. If that shall prove to have been the case, the pursuer may have a good objection to the charges for expenses of management and interest on advances, which would otherwise have been unobjectionable. But at present there are not materials for determining that question. It must first be ascertained whether the course taken by the trustees has caused loss, and to what extent. The questions whether the trustees acted in violation of their duty by retaining the property unsold, and whether loss has ensued in consequence, are so intimately related that it does not seem proper to decide any point in regard to either of them until further investigation shall have taken place, if that is to be insisted on."

The trustees, defenders in the reduction, reclaimed.

HORN and GIFFORD for reclaimers.

SOLICITOR-GENERAL (MILLAR) and DUNCAN in reply.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders.

Agent for Reclaimers—Andrew Scott, W.S.

Agents for Respondents — Horne, Horne, & Lyell, W.S.

Friday, January 24.

SECOND DIVISION.

WATSON *v.* WILSON AND OTHERS (ALEXANDER'S TRUSTEES).

Adjudication in Implement—Conclusion of Summons. A creditor of a beneficiary entitled to the fee of certain heritable subjects vested in trustees adjudged these subjects in payment; *held* that adjudication in implement at his instance, conconcluding for an heritable and irredeemable conveyance from the trustees was competent.

Strachan v. *Whiteford*, M. "Adjudication" App. No. 7, commented on.

This was an action of adjudication in implement of a decree of adjudication in payment, dated 15th May 1866, obtained by the present pursuer against John Craik, grocer in Penicuik, the only surviving brother and nearest and lawful heir-at-law and of conquest of the deceased Joseph Craik, baker in Dunse, whereby certain heritable subjects in Dunse, to which Joseph Craig was entitled under the trust-disposition and settlement of Mrs Fanny Russell or Alexander, of date 5th August 1830, were adjudged to the pursuer for payment and satisfaction of a debt of £40 due by Joseph, and constituted against John Craik, as his heir, by decree of constitution dated 22d November 1865. The defenders were the trustees of Mrs Alexander, who, in consequence of the endurance of a liferent in the heritable subjects, had not denuded in favour of Joseph Craik. The liferenter died on 24th March 1865, predeceased by Joseph Craik, the fiar, who died intestate on 22d August 1863, and it was not disputed that John Craik, as Joseph's heir, was now in right of the fee. He had not, however, called upon the trustees to denude in his favour, and had allowed the decrees of constitution and adjudication in payment above-mentioned to pass against him in absence. He was not called, and did not appear in the present action. The conclusion of the summons was that the heritable subjects in Dunse, in which the trustees were infeft in virtue of a precept of sasine contained in Mrs Alexander's trust-disposition, "ought and should be adjudged from the defenders as trustees foresaid, and from all others having or pretending to have right thereto, and decerned and declared to pertain and belong to the pursuer and to her assignees and disponees, heritably and *irredeemably*, in implement and satisfaction to her of the said decree of adjudication obtained against the said John Craik as heir foresaid, and obligations therein contained." The pursuer

averred (Condescendence, art. 13), "In virtue of said decree, the pursuer has frequently called upon the defenders, as trustees foresaid, to denude in favour of her, and convey and make over to her the said heritable estate, but they decline to do so, and therefore this action is necessary. The pursuer now comes in place and right of John Craik, the heir of Joseph Craik, the fiar under the said trust-deed." To which the defenders answered (Ans. 13), "Admitted that the pursuer has called upon the defenders, as trustees foresaid, to denude in her favour, and to make over to her heritably and irredeemably the said estate. Admitted that they have declined to do so. It is explained that there are various creditors of the said Joseph Craik other than the pursuer; that expenses have been incurred in the management of the trust-estate, which is now composed solely of the heritable subjects sought to be adjudged in the present action. Explained also that these heritable subjects are of small value, although of considerably greater value than the amount of the pursuer's claim. *Quoad ultra* denied."

The Lord Ordinary (ORMIDALE), by interlocutor dated 16th February 1867, sustained the defender's first plea in law, which was that "the alleged right of the pursuer under the decree of adjudication, of date 15th May 1866, in the subjects libelled being a redeemable right, adjudication thereof heritably and irredeemably in implement of the said decree is incompetent," and dismissed the action. The following note was appended to the interlocutor:—"That the decree of adjudication of 15th May 1866, referred to in the interlocutor, being one for payment and satisfaction of debt, the legal time of which has not yet expired, constitutes nothing more than a right in security was conceded by the pursuer at the debate, and at any rate is clearly established by authority that cannot be impugned—*Cochrane* v. *Bogle & Co.*, 2d March 1849, 11 D. 108, and *Macdougall and Others* v. *Blackie*, 28th Feb. 1863, 1 Macph. 503. That being so, it seems to the Lord Ordinary necessarily to follow that the pursuer has no warrant or authority for converting, as she attempts to do in the present action, her redeemable right into an irredeemable one, and therefore that the action is incompetent. This appears to have been one of the points discussed and decided, as the Lord Ordinary has now decided it, in *Strachan* v. *Whiteford*, 9th Feb. 1776, M. "Adjudication," App. No. 7."

The pursuer reclaimed.

GIFFORD, for the reclaimer, argued—Adjudication in implement is the proper form of action to make real the pursuer's right under the adjudication in payment. The conclusion for adjudication in her favour heritably and irredeemably is the right form of conclusion. If there is a right of reversion, it is in John Craik, and the defenders have no title or interest to oppose the pursuer's claim to an irredeemable conveyance, as they would admittedly be bound to convey irredeemably to John Craik.

MACKAY, for the defenders, replied—The summons concludes for adjudication heritably and irredeemably not only against the trustees, but also against all others having or pretending to have right to the subjects. It was not admitted in the Outer-house that there would be a reversion in favour of any person, and the terms of the summons do not admit of being construed as reserving any reversion. Now the adjudication in payment on which the pursuer founds was undoubtedly a redeemable right. (*Cochrane* v. *Bogle*, 2d March 1849, 10 D. 108.) It is contrary to principle, therefore, that an irredeemable right should now be given to the pursuer in subjects of much greater value than her debt to the exclusion of all the other creditors of Craik. *Stachan* v. *Whiteford* was an authority in favour of this contention. In any event the defenders have a right of retention for the expenses incurred by them in the management of the trust-estate.

At the suggestion of the Court, GIFFORD, for the pursuer, lodged a minute, in which he stated "that she consented that any decree which may be pronounced in the present action should be without prejudice to any other reservation of the whole rights, whether of reversion or of any other description competent to John Craik, heir of the deceased Joseph Craik, both designed in the record, or to any person or persons claiming through the said John Craik."

The Court unanimously recalled the Lord Ordinary's Interlocutor.

At advising—

LORD COWAN—The pursuer in this case is admitted to have led an effectual adjudication in payment against her debtor John Craik. I am of opinion that by this adjudication the *jus crediti* or personal estate of John Craik to the heritable subjects vested in the present defenders, Mrs Alexander's trustees, was conveyed to the pursuer. The question we have now to determine is, Whether adjudication in implement is the proper action for the pursuer to have adopted in order to adjudge the real right in these heritable subjects, and if so, whether the conclusions of this action are in proper form? I have no doubt that adjudication in implement is a competent form of action. The pursuer is by her former adjudication placed in the right of Craik, her debtor, who could have demanded an absolute and irredeemable conveyance from the trustees. The case of *Strachan* v. *Whiteford*, referred to by the Lord Ordinary, has been departed from by more recent decisions as to the point which appears from Lord Hailes' report of the opinions of the judges to have been the main ground of decision. I mean the question whether a general assignation to rents contained in a heritable bond granted by a person not infeft, was a good conveyance of the minute of sale upon which the debtor possessed the lands over which the security was constituted. There does not appear to have been any doubt felt by the judges that adjudication in implement was a competent form of action. The question was whether Sir John Whiteford the creditor who led the adjudication, had a good title to do so. The majority of the Court held he had not, because the personal right of his debtor to the lands had not been conveyed to him. That is now decided to be bad law, but cannot affect the present case, where it is clear the pursuer has validly attached the personal right. With reference to the case of *Strachan*, I entirely concur in Lord Fullerton's observations in the subsequent case of *Macgregor* v. *Macdonald* (9th March 1843, 5 D. 888). Looking at the particular terms of the interlocutor in that case, and the difficulty, or rather impossibility of gathering from the notes of the opinions of the judges the precise ground on which it was pronounced. I cannot hold the judgment as fixing anything but that in that particular case the particular form of adjudication, being an adjudication of the whole right, was improper.

On principle, then, I am clearly of opinion that the pursuer here had acquired a personal right which entitled her to adjude in implement. As to

the conclusion which has been objected to, on the ground that it seeks to have the subjects declared to belong the pursuers heritably and irredeemably, I think that if there had been any irregularity this is a matter of form which might have been amended, and certainly ought not to have been led to the dismissal of the action, which the Lord Ordinary has been done by the interlocutor under review; but further, it appears to me that in a question with the present defenders the pursuer has a right to an irredeemable conveyance, and any right of reversion competent to John Craik, or persons claiming through him, is preserved by the statement in the summons, that the decree now sought is in implement and satisfaction of the former decree, which is declared to have effect only during the not redemption of the subjects. The present judgment, therefore, will vest the lands in the pursuer necessarily under the same qualification as its warrant. On these grounds I think the interlocutor of the Lord Ordinary ought to be recalled.

Lord Benholme—I think this interlocutor cannot stand. The action is an adjudication in implement by a creditor, who was adjudged the personal right to certain lands which stood in his debtor. The trustees, who are the defenders in this action, have no right of reversion in the lands; they may have a right of a different kind, to which I shall afterwards allude—viz., a right of retention; but they can have no right of reversion. The absolute fee is in the beneficiary John Craik, in whose favour they are bound to denude. Now, this fee has been adjudged by the pursuer; and the only way in which she could get her adjudication in payment implemented was, I think, by asking, as is done in the present summons, an irredeemable conveyance from the trustees, leaving open, no doubt, the right of reversion competent to the heir, John Craik, upon payment of the debt. It would not have done to have asked for decree of adjudication in implement under redemption, because such was not the right of Craik, which was adjudged. Nor were the trustees bound by the terms of the trust to give him such a conveyance; on the contrary, they were bound to give him an irredeemable conveyance. I think *Strachan's* case differed from the present. The ground of decision there was, that the creditor had not connected himself with the right, implement of which was sought. He had no disposition of the lands; he had only a bond of annualrent in the old form, entitling him to annual payments furth of the lands. Nor had he adjudged the minute of sale under which his debtor held the land. There was, therefore, a link wanting. In the present case the pursuer has already adjudged the personal right of the debtor, and so supplied the link. I think the decision in *Strachan's* case went mainly on the want of title, as appears from Lord Hailes' Notes, and the gaining party almost admitted that if the title of Sir John Whiteford had been completed, his adjudication in implement would have been good. In the case of *Macgregor* v. *Macdonald*, 9th March 1843, the instrument of which implement was sought, was a heritable bond, and the person against whom the adjudication in implement was brought was the debtor under the bond. That case differed both from *Strachan's* case and the present one. The creditor's right was a redeemable right, and the adjudication in implement concluded for a redeemable conveyance, because the person against whom it was sought was the debtor in whose favour the reversion arose. The debtors here have no reversion, for they are bound to convey absolutely to the person in right of the fee. This explains why the summons of adjudication was in different terms in that case; and I think the present summons, concluding for an heritable and irredeemable conveyance from the defenders, Mrs Alexander's trustees, is libelled in the only way it could have been against them. I am of opinion, however, that the defenders are entitled to take credit in their accounts for any advances they may have made in the management of the trust-estate. They would have had a right of retention for these against the beneficiary, and they have the same right against the pursuer, who comes in his place.

The Lord Justice-Clerk and Lord Neaves concurred, and the following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming note for Jane Watson, against Lord Ormidale's interlocutor of 16th February 1867, recal the interlocutor submitted to review: Find that the pursuer, as vested in the right of the deceased Joseph Craik, or of John Craik, failing his obtaining from the defenders a disposition of the heritable subjects mentioned in the summons by the adjudication led by her against the said John Craik, is entitled to insist in the present process of adjudication in implement, and to obtain decree therein, subject to any claim which may be competently stated and established for retention or payment of sums said to be due to the defenders in respect of advances made by them in the administration of the trust, and decern; and, with these findings, remit to the Lord Ordinary to inquire into the said claims, and to proceed further in the cause as shall be just.

Agent for Pursuer—R. Davidson, S.S.C.

Agent for Defenders—Alexander Howe, W.S.

Friday, January 24.

JURY TRIAL.

(Before Lord Barcaple.)

ANDERSON *v.* GORDON OR ANDERSON.

Jury—Failure to Agree—Discharge. Jury discharged after having been locked up for six hours, the numbers standing 7 to 5.

This case, which was brought before Lord Barcaple and a jury was for the reduction of a will executed by the late James Anderson, farmer and carrier, Golspie, in favour of his wife and a daughter which she had before her marriage. The pursuers were William Anderson senior, formerly residing at Grantown, now at Cullen: William Anderson junior, corn merchant, Cullen; Peter Anderson, cattle-dealer, Grantown; Charles Anderson, meat salesman, Newcastle; Richard Fisher, Cullen; Eppie Anderson, Victoria Street, Edinburgh; and Jane Anderson or Fisher, Newcastle; and the defenders were Catherine Gordon or Anderson, widow of the deceased James Anderson; Jane Farquharson or Barnes, and William Barnes, master mariner, her husband.

The case for the pursuer was that, in the course of February 1865, the deceased James Anderson became affected with "paralysis of the insane;" that he was during the remainder of his life in a state of unsound mind; that, during the month of July 1865, Mrs Anderson and her daughter, taking