have acquiesced. In the present case there had been no delay in taking the appeal, and the exceptions were attended with difficulty; interest, acordingly, would not be allowed.

Agents for Pursuers—Henry and Shiress, S.S.C.

Agents for Defenders—White-Millar & Robson, S.S.C.

Friday, March 20

CREDITORS OF THE LOCHFINE GUNPOWDER CO. (LIMITED), PETITIONERS.

Liquidation—Winding-up of Company—Companies Act 1851, *sec.* 147—*Removal from Office.* In this petition for winding-up, subject to supervision of the Court, certain creditors appeared and craved removal of the liquidators already appointed, but the Court held that no sufficient ground of removal had been alleged.

This petition was presented by creditors of the Lochfine Gunpowder Company (Limited), At a meeting on 22d January last, it had been unanimously resolved that the business of the company should be voluntarily wound-up. At a subsequent meeting this resolution was confirmed, and Mr George Shand, writer, Denny, and Mr James Weir, commercial traveller, Airdrie, were appointed liquidators. These gentlemen proceeded to realise the funds, with a view to distribution. Various actions and diligence, however, were threatened against the company, and accordingly this petition was presented, under section 147 of the Companies Act 1862, craving the Court to make an order directing that the voluntary winding-up of the company shall continue, but subject to the supervision of the Court, and with such liberty for creditors, contributories, and others to apply to the Court as the the Court thinks just. Answers were lodged for Martin, Turner, and Co., creditors of the company, objecting to the company being wound up under the present liquidators, and craving the Court to order a meeting of the creditors, to ascertain their views as to the appointment of liquidators by whom the winding-up might be carried on. Similar answers were lodged by two other creditors. Counsel were heard on the petition and answers.

Balfour for petitioner.

A Moncrieff and D. Marshall for respondents.

At advising—

Lord President—I don't think the respondents have made out a case either for removing the liquidators or for appointing additional liquidators. The power of the Court to remove liquidators is under the 141st section of the Act; but it contemplates it being done only "on due cause shown." No sufficient cause has here been shown forremoving the gentlemen who were appointed unanimously to the office of liquidators; and as to the appointment of additional liquidators, that is an unnecessary expense to incur in so small a concern. It does not appear that there is so much complication in the winding-up of this company that greater skill must be possessed by the liquidators than may be presumed to be possessed by these gentlemen, one of whom held the position of traveller to the company while it carried on business, and the other of whom is a writer and bank agent. As a matter of judicial discretion, I am against interfering.

Lord Curriehill—If this proposal were to remove the present liquidators, or appoint additional liquidators, I should be against that course. The present proposal seems rather to be that we should appoint a meeting of creditors, that they may express their views. I am against allowing this. I think that no case has been made out for interfering with the liquidation.

Lord Deas—I am of the same opinion. Nothing has been stated to authorise the removal of the present liquidators, or the calling of a meeting of creditors, which would be attended with expense and trouble to all parties. No ground has been suggested at all, except that a certain number of creditors would prefer some one else. If they see ground for thinking that the interests of the creditors are not attended to, they may come, and if they are able to state some tangible ground for removal, they may be listened to then.

Lord Ardmillan concurred.

Agents for petitioner—Maclachlan, Ivory, & Rodger, W.S.

Agents for respondents—Cheyne & Stuart, W.S., A. R. Morison, S.S.C., and W. G. Roy, S.S.C.

Friday, March 20.

SECOND DIVISION.

GREIG *v.* MACKENZIE, ETC.

Heritable and moveable—Trust—Succession. Circumstances in which a beneficiary's interest in a trust fund was declared to be moveable, and held to be *quoad* succession in a question with the beneficiary's representatives.

This is a multiplepoinding brought by Mr George Greig, W.S., sole surviving accepting trustee and executor of the late Miss Margaret Mackenzie. The fund, *in medio*, consists of the free proceeds of a house in Princes Street, Edinburgh. There are three claimants on the fund—Mrs Teresa Margaret Mackenzie, &c., John Alexander Cochran Mackenzie, and Miss Helen Teresa Mackenzie.

The late Miss Margaret Mackenzie, of Princes Street, Edinburgh, died on 4th November 1847, leaving a trust-disposition in favour of certain trustees, of whom the raiser, Mr Greig, is now the surviving acceptor.

By this disposition, Miss Mackenzie conveyed to her trustees her whole property, real and personal, and particularly her house in Edinburgh, No. 143 Princes Street. She authorises her trustees to collect all debts due to her so soon as they should think fit; "and they are likewise hereby authorised and empowered, at such period or periods as they may think most advisable for fulfilling the foresaid purposes, to sell and dispose of, and convert into cash, the whole estate, heritable and moveable, belonging to me at the time of my death, excepting always the articles hereinafter specially bequeathed by me, or such articles as by any writing under my hand I may direct my said trustees to make over and deliver to any person or persons, and that either by public roup or private sale, or in such other manner as my said trustees shall think proper, and to invest the proceeds thereof as they may consider advisable, so far as may be necessary to carry into effect the purposes of this trust."

By the third direction of the trust, the trustees are instructed to pay to the sister of the testatrix, Mrs Bayley, the rents and annual produce of the subjects in Princes Street, "so long as the said subjects should remain unsold," and the deed afterwards proceeds:—"Declaring always hereby, that

either in the event of my selling the foresaid subjects in Princes Street above disponed previous to my decease, or in the event of my said trustees selling the said subjects in virtue of the powers hereinbefore given to them previous to the death of the said Mrs Christian Mackenzie or Bayley, then I hereby direct and appoint my said trustees to pay to her the whole yearly interest or produce of the price to be received for the said subjects and others, after deducting the expenses of and connected with the sale, as a substitute for the foresaid rents, and that at the terms and with interest, all as above specified."

The fee of the right so given to Mrs Bayley in liferent was provided to four nieces of the testatrix, including the late Miss Teresa Mackenzie, "but in the event of any of them predeceasing me, my said trustees are hereby directed and appointed to divide the share of such deceaser or deceasers equally among the survivor or survivors of them." The whole four nieces survived the testatrix.

By an after clause in the deed, the trustees were authorised, if they thought fit, in place of selling the Princes Street house, to convey it to the parties interested in liferent and fee respectively. And then follows the clause:—"Declaring farther hereby, that in the event of the said Mrs Christian Mackenzie or Bayley predeceasing me, and in the event of the foresaid subjects and others in Princes Street not being sold by me during my own life, the said subjects and others shall be sold by my said trustees with all convenient speed, and the price received therefor shall be divided equally, share and share alike, among the said Teresa Mackenzie, Grace Mackenzie, Charlotte Mackenzie, and Catherine Mackenzie, my nieces; but in the event of any of them predeceasing me as aforesaid, my trustees are hereby directed and appointed to divide the share of such deceaser or deceasers equally among the survivors or survivor of them: And declaring farther, that in the event of the said subjects and others in Princes Street having been sold by me during my own life, the price received by me therefor shall be divided by my said trustees amongst my said nieces, or the survivors or survor of them as aforesaid, in the same manner, and on the same footing, as is hereinbefore directed, in the event of the said subjects and others being sold by my said trustees themselves."

The trustees, in 1853, sold the house at the price of £900.

The liferentrix, Mrs Bayley, survived till May 1865, when the right to the fee opened. But one of the four nieces, the fiars, Miss Teresa Mackenzie, had died on 10th July 1864, unmarried and intestate. Prior to her death she had acquired by assignation a right to her sister Catherine's share, and to a certain portion of her sister Charlotte's.

The question which now arises regards the succession of Miss Teresa Mackenzie; and the question is, whether at her death her right of fee in the Princes Street property and its price was heritable or moveable.

Miss Teresa Mackenzie, at the date of her death, was domiciled in England.

The Lord Ordinary (KINLOCH) held that at the death of Miss Teresa Mackenzie her right in the trust-fund, which forms the fund *in medio*, was a moveable right, and descended to her successors in personal property according to the law of England. His Lordship, after expressing his opinion that the testatrix did not intend to leave the House *in forma specifica*, says:—

"On the facts before stated, the Lord Ordinary is of opinion that the right was moveable in the person of Miss Teresa Mackenzie. And it must not be forgotton, that the question throughout regards the succession of Miss Teresa Mackenzie; that is to say, regards the succession of the beneficiary, not of the testatrix. It is true that the beneficiary succession will or may to a large extent be ruled by the testator's instructions; the general principle being that the testator's directions will fix the character of the property. But a case may undoubtedly occur of a discretion so committed to trustees that the exercise of that discretion one way or other may accordingly affect the right in the beneficiary's person. The Lord Ordinary entirely subscribes to the view expressed by Lord Neaves in the case of *The Crown* v. *Hamilton*, 22d February 1865, D. 18, 636, though the point directly at issue was one, not of succession, but of legacy-duty:—'If a testator not merely gives a simple power to sell, but confers on his trustees an absolute and ample discretion whether they shall sell or not, he thereby makes the character of his succession dependent on the resolution to which his trustees may come in the exercise of that discretion. A simple power to sell is not enough. It may be given to meet emergencies and to afford facilities, in certain events, connected perhaps with the mere payment of debt, without its being the wish of the testator that it should be exercised, and while it may be his desire that it should not be exercised except on necessity or compulsion. But where a testator confers on trustees a full and free discretion to sell or not, he does more than give a simple power. He imposes on the trustees in the outset or course of their proceedings, the duty of considering in what way they should exercise that discretion; and if thereupon they resolve to sell, it seems to me that the succession comes to assume that form in accordance with the will of the testator himself. By giving the discretion, he virtually directs the trustees to deliberate; and if, upon deliberation, they think it best to sell, he virtually directs that their resolution should be carried into effect, and that the estate should be sold. There is thus, I think, under the fair construction of the statute, a direction to sell when there is a direction to consider as to a sale, and do what they think best, supposing always that a sale is the course which the trustees adopt.'

"In the present case, there is given to the trustees, in the fullest and most express terms, a discretion as to selling the Princes Street house whenever they should think this expedient. Not only so, but, as already stated, the testatrix evidently contemplated that the interest of the fiars should be met in no other way than by a sale, and this was indeed the natural mode of effecting a division amongst several beneficiaries. The optional retention of the house had only regard to the interest of the liferentrix, and even in this view the retention was discretionary. The sale made by the trustees in the year 1853 (twelve years before the liferentrix died) was, in the view of the Lord Ordinary, not the mere exercise of a power, it was, in a fair and reasonable sense, the fulfilment of a direction. The sale was a thing fully in accordance with the instructions of the testatrix, and rightly followed these out. The effect, as the Lord Ordinary thinks, was to give to this property thenceforward the character of moveable property by force of an operation performed under the will of the truster. And when Miss Teresa Mackenzie died,

eleven years afterwards, her right to a share of the invested price was, in the Lord Ordinary's estimation, a moveable right, and must be so dealt with in every question as to her succession.

A subordinate question arose out of the fact that the trustees, in investing the price, invested £300 out of the realised sum of £853, 7s. on heritable security. Miss Teresa's heir in heritage claims right to at least this portion of the fund. The Lord Ordinary is of opinion that the mode of temporary investment cannot be held to affect the moveable character of the converted subjects. The realised price of the subjects formed a moveable property, and how it was invested for security was a mere accident, not varying the legal character of the right. Here the principle intervenes, that the trustees could not by the form of the security affect the character of the succession.

The Lord Ordinary was given to understand that when the character of the right, whether heritable or moveable, was fixed, there remained no other topic of controversy. The parties were agreed that the domicile of Miss Teresa Mackenzie, at the time of her death, was in England, and that any personal property then belonging to her fell to be disposed of according to the English law of succession applicable to that description of property."

John Alexander Cochrane Mackenzie reclaimed.

H. Smith for him.

John Hunter in answer.

At advising—

Lord Justice-Clerk—The question to be determined under this reclaiming note is, whether the proceeds arising from the sale of a house in Princes Street, carried through by the trustees of the late Miss Margaret Mackenzie, constitute in the succession Miss Teresa Mackenzie a beneficiary entitled to a portion of these proceeds, heritable or moveable estate. The sum realised by the sale was invested by the trustees partly in heritable and partly in personal security. The heir of Miss Teresa Mackenzie claims the fund *in medio* upon the footing that the actual conversion of the subject into money did not alter its proper character of heritage, and that it must be held heritable in the question of her succession; or, alternatively, that if the sale by the trustees altered the character of the subject, their investment of £300 of the price upon heritable security operated a second change, and caused it to transmit to that extent to him. Miss Teresa Mackenzie acquired right to the shares of two sisters, so that the result will affect more than her own portion of the succession. The position of the claim of the heir to these acquired rights rests on the same ground, and may be considered as to be dealt with in the same manner.

The question depends upon the nature of the right as it stood in the person of the deceased Teresa Mackenzie when she died, and that question depends upon the terms of the trust-deed. The truster conveying all her estate, heritable and moveable, to her trustees, directs as usual, in the first place, payment of her debts and funeral charges. In the next place, the trustees "are authorised and empowered to collect debts and grant discharges, and they are likewise authorised and empowered, "so soon after my death as they shall think advisable, to collect and uplift the whole outstanding debts (heritable and moveable) due to me;" "and they are likewise hereby authorised and empowered, at such period or periods as they may think most advisable for fulfilling the foresaid purposes, to sell and dispose of, and convert into cash, the whole estate, heritable and moveable, belonging to me at the time of my death;" "and that either by public roup or private sale, or in such other manner as my said trustees shall think proper, and to invest the proceeds thereof as they may consider advisable, so far as may be necessary to carry into effect the purposes of this trust."

The deed confers power and authority; it does not, in this direction, in terms appoint a sale to be carried through, but it contains provisions which I consider as making a sale, except on one contingency which did not happen, necessary to effectuate the truster's intention. The truster proceeds to secure a liferent in the person of her sister Mrs Bayley in the house in Princes Street. She is to receive the rents of her house while unsold, and the interest of the amount of the proceeds realised by the sale if sold, The truster, after conveying certain legacies comes to give special directions as to the house in Princes Street. The eighth clause directs that, "with a view to the speedy winding-up of this trust, my said trustees are hereby authorised, in the event of my selling the said subjects in Princes Street, particularly above disponed, previous to my death, or, in the event of their selling them in virtue of the powers hereinbefore committed to them, to invest a sum equal to the price received for the said subjects (after deducting the expenses of and connected with the sale), in bank stock, or on good heritable or good personalsecurity, taking the rights thereof payable to the said Mrs Christian Mackenzie or Bayley, in liferent, for her liferent use allenarly, and to Teresa Mackenzie, Grace Mackenzie, Charlotte Mackenzie, and Catherine Mackenzie, daughters of the said deceased Thomas Mackenzie, my brother, equally in fee, share and share alike, and *pro indiviso;* but in the event of any of them predeceasing me, my said trustees are hereby directed and appointed to divide the share of such deceaser or deceasers equally among the survivors or survivor of them. And further declaring hereby that my said trustees shall be entitled, if they think expedient, in place of selling the said subjects and others in Princes Street, to dispone and convey the said subjects and others themselves to the said Mrs Christian Mackenzie or Bayley, in liferent, for her liferent use allenarly, and to the said Teresa Mackenzie, Grace Mackenzie, Charlotte Mackenzie, and Catherine Mackenzie, and in the event of any of them predeceasing me as aforesaid, to the survivors or survivor of them, in fee equally as aforesaid," declaring that if the liferentrix should predecease, the house should be immediately sold, and the proceeds divided in equal shares. The case of a sale by herself is contemplated, and then in the ninth clause she directs and liferents that her said trustees are, "as soon after my death as the situation of the trust will allow, to make an interim division of the remainder of my funds and estate, excepting always the foresaid subjects and others in Princes Street, or the price thereof, to be disposed of as aforesaid, and also excepting whatever sum my said trustees in their discretion may think necessary to retain, in order to cover the future expenses of the trust, and any casualties which may arise, equally share and share alike, among the said Teresa Mackenzie, Grace Mackenzie, Charlotte Mackenzie, and Catherine Mackenzie, my nieces; but in the event of any of them predeceasing me as aforesaid, my said trustees are hereby directed and appointed to divide the share of such deceaser or deceasers equally among the survivors or survivor of them as aforesaid."

It is very obvious that it was not the wish of the truster that this house was to be preserved as a possession for the beneficiaries to enjoy in its actual condition. She contemplated the sale by herself; she made it absolutely imperative if her sister, the intended liferentrix, should predecease her. She pointed to a sale by the trustees during the liferentrix's life as one of two alternative courses to be followed in the event of the trust being stopped, by being brought to a sudden termination, and, unless I misread the deed, she looked upon its value in the form of money, and as a share of a realised sum as reaching her beneficiaries on the alternative of a conveyance in the lifetime of her sister not being carried out, the beneficiaries were to get shares in money. On this latter ground, I think that the fund must be held moveable. The trust following its course according to the truster's direction implied a conversion, without which the money could not be realised and divided.

The trust under the eighth clause might be brought to an abrupt conclusion. It might be terminated while the liferentrix lived. It might go on to be followed out by continuing the trust administration till the liferentrix's death, and then the ninth clause would come into operation, and that, as I read it, the estate being first converted, would leave the produce to be paid over as a share of money. The balance "of funds and estate" in the hands of the trustees is to be divided in shares to legatees. The residue is to be given to Miss Teresa Mackenzie as *a legacy.* I do not see any expressions under which the house could, under that general clause, be disponed *in forma specifica.* If the final division was meant to embrace the house, it was in the shape of a money balance of residue payable to a residuary legatee. If otherwise, the house would not pass under the ninth clause at all; and as I read the eighth it is not applicable, except during the life of the liferentrix, and on the particular contingency of the trustees resolving to bring the trust to a termination at a period before the liferentrix's death. The nature of the provision is clear. If the liferentrix should predecease her, the realisation is to be immediate, if she survived her the trustees might bring the trust to an immediate close; and in that case, and as a mode of providing for the interests of the liferentrix and fiars, the trustees might realise the subject and take an investment of the proceeds, not in their own names, for they were to cease to act, but in the names of the beneficiaries, or otherwise they might dispone to them the subject itself.

The power to dispone no doubt existed, but it seems to me limited to the special case of the trust being brought to this abrupt termination. That contingency not happening, the trustees were then to realise the whole estate, and divide it. The power to convey the subject was given to them exceptionally, and not in the ordinary administration of a trust, which was, following the course pointed out in the deed, to endure till the liferentrix should die.

The trustees actually sold the subject in 1853. They did so, as must be admitted, in the due execution of the trust; they did so, as it appears to me, in the necessary extrication of the trust purposes—necessary, because the trust having run its course, was to terminate in a money distribution. In this view, Teresa Mackenzie could not, had she survived the liferentrix, have demanded as of right, either alone or even in conjunction with the other beneficiaries, that the trustees should convey the house to them *pro indiviso.* Her right would be that of demanding them to give her a share in a money balance of the estate. Therefore, and on the view that realisation of this house by a sale was necessary for carrying out the trust, if the trust should endure during the whole lifetime of the liferentrix, I hold that the fund was moveable.

The case, except in so far as relates to the eighth direction, falls, as it occurs to me, under the authority of the case of *Angus,* reported in the fourth volume of Shaw. The absence of a special direction to sell, and the ultimate division into shares, are very similar, and the *rationes decidendi* of Lord Gleenlee and of the Lord Justice-clerk directly applies.

Separatim, as the party claiming this fund is not the beneficiary herself, but the representative of the beneficiary, and as by the sale the house had been converted into money, in the exercise of powers duly conferred, and the act of sale recognised and adopted by the deceased beneficiary, the proceeds must be viewed as moveable in the question as to her succession. The sale was effected in 1853. In 1861 (cond. 10), Miss Teresa Mackenzie acquired, by assignation from her sister Miss Catherine Mackenzie, right to her sister's interest, under the settlements of Miss Margaret; and, in particular, [*quotes*]. This plainly recognises and adopts the act of sale; and so does the sister who assigns her share. Yet the contention of her heir is, that both her own share and that of the sister shall be held as heritable in the question of succession. Not only what she actually regarded as a well-converted money fund, but a money fund purchased by a money payment. The previous acquisition of Miss Charlotte's interest was made while the subject remained unsold, and conveys a right to the subject or its proceeds. Catherine assigns this. On these grounds, I hold that the subject must be taken as affected by the sale, and that, as the fund was *de facto* moveable, and apparently with the assent of the defender, it is to be dealt with on that agreement. I am not quite prepared to hold that where a truster gives an option to trustees to sell heritage or not, according to their discretion, that they can, by that exercise of discretion, give the estate to the heir, or the proceeds to the executors of the truster. There are great difficulties in the way of applying the doctrine announced in the case of *Hamilton* to questions of succession. It would give a great power to trustees, by an act of mere discretion, to give in their option the succession to heirs or executors. I think that such a rule has not yet been adopted in the regulation of succession, and before adopting it, I should desire maturely to consider so general and important a doctrine. I am glad, in the view I take of the case, not to be compelled to decide that question. I rest my judgment on the special grounds stated. There is a question as to the trustees' investment of a part of the fund, but I do not accede to the proposition stated for the heir. The mere temporary investment of the fund by the trustees, of which it does not appear that any of her beneficiaries knew anything, cannot affect the question in one way or another. On this point I entirely adopt the reasoning of the Lord Ordinary.

The other Judges concurred.

Agent for Reclaimer—W. N. Fraser, S.S.C.

Agents for Respondents—Morton, Whitehead, and Greig, W.S.

Agent for Real Raiser—John Smart, S.S.C.