of them as fiduciary fiars. I think the Court should declare their right in this respect; but at the same time, I conceive that the payment to them of the funds should be declared by the Court to be subject to an obligation to hold and administer the fee of these funds as belonging to their children respectively, and in nowise belonging to themselves further than in liferent merely.

There is nothing to prevent this trust from being respected and fulfilled by the six daughters if so disposed. If it is violated by them, or such violation is threatened, there may possibly be remedies competent to the children. In the meanwhile, I think the Court is not concerned with any speculations about the nature or efficiency of these remedies. What the Court has to do, in my apprehension, is to declare the legal trust, and to appoint the money to be paid over, subject to the trust obligation.

I do not think the case varied by the appointment of executors in the settlement with instructions to realise the moveable estate, to divide it into six shares, "and to convey and pay, under the declarations and provisions before and after written, one or more shares to each of my said daughters or their lawful children respectively." I consider this clause merely to direct what is otherwise implied in the settlement, that payment of the funds is to be made to each of the daughters. But it does not follow that the payment is to be made to her as other than fiduciary or trust fiar. The previous part of the deed is not set aside by this direction as to payment, which I consider purely executory. It still, I think, remains true that payment is to be made to the party—for herself in liferent only, as trustee for her issue in fee.

The answer which I desire should be made to the question is, that, as to the heritage, the disposition of the settlement conveys it to the immediate children for their liferent only, and to their issue in fee; and that, as to the moveables, they are to be paid or conveyed in the proportion of one sixth each to the immediate children, subject to the obligation of holding and administering the fee of the fund as trustees for their respective lawful issue.

Agents—Maclachlan & Rodger, W.S., and Murray, Beith & Murray, W.S.

Friday, June 17.

STEUART *v.* EARL OF SEAFIELD.

Review—Judgment—Competency—16 *and* 17 *Vict., cap.* 80, §§ 22 and 24. A suspension of a charge proceeding on a Sheriff-Court decree for £14, 0s. 1d., and £29, 7s. 6d. of expenses of process, *refused*, in respect of sections 22 and 24 of 16 and 17 Vict., cap. 80.

This was a suspension, at the instance of Mr Steuart of Auchlunkart, of a charge given against him by the Earl of Seafield for £14, 0s. 1d., being the amount of the share or proportion due by the suspender of the expense of cleaning out certain marsh burns, ditches, &c., between the properties belonging to the parties; and also £29, 7s. 6½d., being the expenses of the process carried on in the Inferior Court for the purpose of obtaining decree for the sums charged on.

The Lord Ordinary (NEAVES for BARCAPLE) pronounced the following interlocutor and note:—"The Lord Ordinary having heard counsel for the parties, and considered the closed record and whole process; in respect the questions here raised involve truly a review of the judgments of the Sheriff complained of, and that the cause in which the same were pronounced did not exceed the value of £25—Repels the reasons of suspension: Finds the letters and charge orderly proceeded: Recals the interdict formerly granted, and refuses the interdict, and decerns: Finds the suspender liable in expenses.

"*Note.*—This case is brought in the form of a suspension and interdict. But the only question raised relates to the merits of the judgments pronounced in the Court below, and the cause in which they were pronounced did not exceed the value of £25, even including interest on the sum sued for up to the date of decree. It is quite clear that the amount of expenses is not to be taken into view. The suspension, therefore, is excluded by the statute 16 and 17 Vict., cap. 80, and it cannot be made competent by adding a prayer for interdict when the grounds of suspension are not something separate from the subject involved in the original cause—such as subsequent payment, or the like—but are identical with the merits of the judgments as they were pronounced.

"In this way the Lord Ordinary feels himself to be excluded from considering the question, which is the main one raised, whether the suspender was or was not subjected to an excessive penalty for his unreasonable conduct. Neither does it appear to the Lord Ordinary that there is any question of jurisdiction or competency involved that can justify his interference."

The suspender reclaimed.

CAMPBELL SMITH for him.

The SOLICITOR-GENERAL and MARSHALL in answer.

The Court adhered.

Agents for Complainer—Maitland & Lyon, W.S.

Agents for Respondent—Mackenzie, Innes & Logan, W.S.

Wednesday, June 15.

SECOND DIVISION.

CALEDONIAN BANK *v.* KENNEDY'S TRUSTEES.

Letter of Guarantee—Liberation—Principal Debtor—Bank—Current Account. Circumstances in which *held* that a bank was excluded from recovering under a letter of guarantee, in respect the guarantor's representatives had been liberated by time being given to the principal debtor.

This was an action brought by the Caledonian Banking Company for the purpose of enforcing payment of a letter of guarantee, dated in May 1856, granted by the late Lachlan Kennedy, merchant in Nairn, in security of an overdraft granted by the pursuers to Kennedy's nephew, the late Duncan M'Edward. The amount guaranteed was £400, and the amount due by M'Edward to the Bank at the time of his death was £778, 14s. 8d. This amount consisted of the balance of a current account which began to be overdrawn about the date of the guarantee, and was operated on subsequent to Kennedy's death, which took place in

1861, and down to M'Edward's death, which took place in 1863. The defence was—(1) that the guarantee was not a continuing guarantee, but came to an end on 26th March 1857, when M'Edward stood creditor in the account current to the extent of £4, 17s. 11d.; (2) that the pursuer had liberated the guarantor's representatives by giving time to the principal debtor; (3) that they had also liberated them in respect of a transaction whereby, with consent of the Bank's agent at Nairn, who was one of Kennedy's trustees, a sum of £600 was paid to the principal debtor out of Kennedy's estate, and applied by him in reducing the unsecured balance due to the Bank. There were also other defences, but the above were those mainly relied on.

After a proof and voluminous production of documents, the Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and having considered the argument and proceedings, including the proof and minute of admissions, Finds it admitted that the balance resting owing on the account current kept by the now deceased Duncan M'Edward with the pursuers' branch at Nairn amounted on 30th June 1865 to £778, 14s. 8d., as libelled: Finds that the present action has been instituted against the defender, John M'Edward, as executor-dative *qua* next of kin of the said deceased Duncan M'Edward, for said balance, with interest at the rate of 5 per cent. per annum from said 30th of June 1865 till paid, and against the defenders named and designed in the summons as the accepting and acting trustees of the deceased Lachlan Kennedy for £400, as a portion of the said balance of £778, 14s. 8d., with interest at the rate foresaid, from the date of their citation to this action till paid, as resting owing by them under the letter of guarantee libelled, granted by the said Lachlan Kennedy: Finds that the defender John M'Edward has not defended the action: Finds, as regards the other defenders, that they stated in the course of the discussion before the Lord Ordinary that they did not insist in their first two pleas in law; and finds that they have failed to establish their remaining grounds of defence, or any of them: Therefore, in these circumstances, repels the defences, and decerns in terms of the conclusions of the summons; reserving it to the parties to be afterwards heard on the question whether extract of the decree now pronounced against the defenders, Kennedy's trustees, should not be superseded till the principal debtor shall have been discussed, or whether they are entitled to any and what other benefit as regards the execution of the said decree in respect of their position as cautioners: Finds the pursuers entitled to expenses; allows them to lodge an account thereof, and remits it when lodged to the Auditor to tax and report, reserving till after the Auditor has reported the question of what sum should be deducted from the pursuers' expenses, in respect of their amendments on the record, sustained only on payment of some expenses to be afterwards fixed.

"*Note.*—The two first pleas in law for the defenders, Kennedy's trustees, having been withdrawn, or at least not insisted in, as stated in the shorthand writer's notes of the evidence, the first point raised before the Lord Ordinary requiring consideration is that embraced by the defenders' third plea in law.

"Is the guarantee in question to be held, in legal construction, as limited to a single transaction, or as a continuing and standing guarantee? The Lord Ordinary is of opinion that, as the letter of guarantee does not in itself contain any limitation in regard to time, or the number of transactions or operations to take place on the faith of it, and as it expressly bears that the transactions or operations intended to be secured, to the extent of £400, were to take place under an account current, on the principles which were given effect to in the case of *Forbes* v. *Dundas* (4th June 1830, 8 S. 865), and the other cases and authorities there cited, it is, in its legal construction, a standing and continuous one, and must be so dealt with. Nor can the Lord Ordinary see any ground for holding that the terms of the letter of guarantee are to be in any respect controlled or altered by the communications which took place between directors and other officers of the pursuers' bank, *inter se*, on the subject of the overdrafts to be allowed on Duncan M'Edward's account current about the time the guarantee was granted, it not being even shown that these communications were ever seen by Kennedy, the granter of the guarantee, or that they were held by him or any one else as forming a part of the guarantee.

"The next point for consideration arises under the defender's fourth plea in law, which, as explained at the debate, is to the effect that, even supposing the guarantee in question to be a standing or continuous one, it could not bind the heirs, representatives, or successors of the granter Kennedy for any transactions which took place on the account current to which it refers subsequent to Mr Kennedy's death. But whatever difficulty may have been at one time entertained on this point, the Lord Ordinary cannot now, and in the face of the decisions, hold it to be any longer an open one. The last decision on the subject was pronounced in the case of the *British Linen Company* v. *The Representatives of Lord Fullerton* (12th February 1858, 20 D. 557), where it was settled very authoritatively after full discussion, and on a review of all the authorities and prior cases, that a cash credit bond is effectual against the cautioner's representatives for a balance incurred after the cautioner's death, and that it is not the duty of the bank, on the death of the cautioner, to give notice to his representatives. It is true that, in the present instance, the letter of guarantee, differing in that respect from the ordinary terms of a cash credit bond, does not take the representatives of Mr Kennedy expressly bound as well as himself, but the Lord Ordinary does not see that this can affect the principle of liability. The representatives of a party deceased can only become liable in and to the extent of that party's obligation, and to that extent they are liable whether they were in express words taken so bound in the obligation itself or not. The words 'heirs and successors,' or 'heirs and representatives,' in an obligation does not in reality create any liability which would not arise independently of such words. Accordingly, Professor Bell in his Commentaries (vol. i, p. 367), states the law on the point without reference to any such specialty. He says quite generally 'that notwithstanding the death of the cautioner the engagement still subsists against his representative as cautioner, unless he shall by notice terminate his obligation.'

"The next point attempted to be made by the defenders, and it appeared to be that on which they chiefly relied, arises partly under their fourth, fifth, and sixth pleas in law, and was very much to the effect that the pursuers had by their actings

and transactions therein referred to, discharged or lost their claim on the representatives of Mr Kennedy as cautioner under the letter of guarantee in question, and are now barred from insisting in any such claim.

"The allegations, as well as the pleas of the defenders, in regard to this part of their defence, are stated in such a vague and indefinite manner as to make it somewhat difficult to collect their precise bearing and effect. It seems, however, to be made a point by the defenders in their fourth plea that advances were continued to be made to the principal debtor, and operations continued under the account current in question after the death of Mr Kennedy, without notice to them. But this is just one of the points which has been overruled as a defence in such cases as the present by the whole series of decisions of which *Forbes* v. *Dundas*, already referred to, is the last.

"Neither can the Lord Ordinary find that there is anything in the defenders' sixth plea, and relative allegations, or in the proof, to liberate them on the ground of their having distributed and paid away part of Kennedy's trust-estate in ignorance, as they say, of the guarantee in question. If it should turn out that owing to other claims coming against Kennedy's trust-estate, or for any other reason not imputable to the fault of the defenders, they are not in funds sufficient to satisfy the pursuers' claim, they will be entitled to found on that circumstance, and obtain the benefit of it at the proper time, and in the appropriate process. In the meantime, and in the present action, the only decree that could be pronounced, and the only decree that has been pronounced, is against them merely as trustees of the late Lachlan Kennedy, so that the pursuers can only enforce it against them as trustees, and to the effect of obtaining payment out of the trust-estate.

"It seems also to the Lord Ordinary, after a careful examination of the numerous writings founded on by the defenders, that they must be under a misapprehension in assuming, as they do in their sixth plea in law, that Mr M'Rae, therein mentioned, has been taken by the pursuers as their debtor in place of M'Edward, and that the latter has been liberated from his liability. The present claim, arising as it does under Mr Kennedy's letter of guarantee, was excepted from and formed no part of the transaction with M'Rae.

"Finally, the Lord Ordinary has to remark that he has been unable to find any distinct averments by the defenders in the record to the effect that they have been prejudiced by any of the actings of the pursuers in connection with the principal debtor; and, indeed, it is difficult to understand how this could well be, considering that the principal debtor, Duncan M'Edward, was not only left by Mr Kennedy his residuary legatee, but also that by his, Mr Kennedy's, trust-deed and settlement, all claims he had against Duncan M'Edward were discharged. His, Mr Kennedy's, trustees are directed not only to discharge Duncan M'Edward of a particular debt of £1466, 15s. 6d., but 'also of all other debts, rents, interests, board, or other claims which may be resting owing by him to me at the period of my decease.' It appears, therefore, that under this clause of Mr Kennedy's settlement his nephew, Duncan M'Edward, must be held as standing discharged of any claim of relief which might otherwise have been maintained against him in relation to the present question.

"At the same time, the Lord Ordinary has reserved to the parties their right to be yet heard on the question, whether extract of the decree now pronounced against Kennedy's trustees ought not to be superseded till the principal debtor shall have been discussed."

The defenders reclaimed.

HORN and M'LAREN for them.

J. MARSHALL and MACLEAN in answer.

The Court altered; and, proceeding upon the import of the proof, sustained in substance the last two grounds of defence above mentioned, and therefore assoilzied the defenders. Their Lordships were, however, of opinion that the guarantee was a continuing guarantee, as contended for by the pursuers; and, in respect that so much of the controversy in the case had related to that question, they only allowed the defenders the expenses of the proof and the subsequent expenses.

Agents for Pursuers—Adam & Sang, S.S.C.

Agents for Defenders—Scott, Moncrieff & Dalgety, W.S.

Friday, June 17.

LAIDLAWS *v.* LAIDLAW.

Reduction—Will—Execution—Instructions—Opium.

Held (diss. Lord Justice-Clerk), on a proof, that a settlement was invalid which had been executed by an aged and dying man, as his faculties were failing, and he himself partially under the influence of opium; as the deed had not been read over to him for several hours before the execution, if at all; and as it was doubtful whether he could have understood it or had given instructions for its preparation.

Opinions that a will must be the deliberate and intelligent act of the granter at the time of its execution.

This was a reduction of a trust-disposition bearing to be granted on 6th September 1869 by the deceased Thomas Laidlaw, sawyer in Galashiels. He was seventy-three years of age, and had been twice married. His son by the first marriage was the defender in the action; and his three children by the second marriage were pursuers. In 1855 Laidlaw executed a probative conveyance of his whole means and estate to his wife in liferent and the pursuers in equal shares in fee. The second deed was executed on deathbed, and bore to be a conveyance to trustees for similar purposes, save that the liferent was not provided, his wife having died; and the distribution to the pursuers was in different proportions, and postponed till six months after all the debts on the property had been paid. This deed having been executed on deathbed would have been reduced by the defender as heir-at-law, and the clause of revocation in it used to cut down the previous deed. The pursuers, however, brought a reduction of the second deed, owing to the manner in which it was granted. A proof was led during the vacation, in which the following circumstances were deponed to:—On Saturday, September 4th, Laidlaw was taken very ill with spasms of the urethra and retention of urine; and, in spite of efforts for three or four hours by two doctors, no relief was obtained. In consequence, opium in large quantities was prescribed and administered during the Saturday night, and, seemingly, the Sunday and Sunday night. Both doctors said the result had been to produce a narcotised