after the Sheriff, on 3d July 1867, ordained the pursuer to deliver the books and documents accordingly, within eight days from that date.

The clear duty of the pursuer, under these judicial orders, was to restore the books and documents to Mr Bryson, in England, from whom he had obtained them; but, in place of doing so directly, he made delivery of them to the agents of the defenders, and of Bryson, and of Richardson (Graham & Johnston, W.S., Edinburgh). These parties granted receipts, dated 11th and 13th July, for the documents so received by them "as agents of Bryson and of Richardson and of the Forcett Railway Company,"—the legal procedure which has been mentioned having been conducted by them for these several parties, Of these very same dates, viz., 11th and 13th July, the arrestments *juris. fund. causa* were used by the pursuer in the hands of Graham & Johnstone, of the books and documents which had been just handed over to the arrestees, for transmission to the English parties,—whose property they were, and by whom they had been produced solely for the limited purpose of inspection foresaid.

The claim made in the action in support of which these arrestments were used is for an alleged debt of £16,000 for work done connected with the railway in England; and the question is, Whether jurisdiction has been well constituted by means of arrestments of such subjects as were here attached, and in such circumstances as those in which the pursuer resorted to the diligence?

I am of opinion that jurisdiction has not been thereby well constituted, and that the proceeding adopted for the purpose is an abuse of the privilege by which a creditor may, by arresting the goods of his English debtor, create jurisdiction in the Scotch courts to entertain an action and give decree for the debt if due.

In the first place, I am not aware of any instance of arrestment of this kind being used, of any subject, corporeal or incorporeal, other than such as might be attached by diligence in execution, and capable of being realized for payment of the debt when constituted; and as to the non-arrestability in execution of these books and documents, I entirely concur in the views explained by your Lordship, and in the observations in support of those views.

But, in the second place, I think it sufficient for the decision of this question that the pursuer was debarred in the circumstances from attaching the books and documents in question in the manner here attempted. He had received the documents for a special purpose, and although they were sent from England to enable him with more convenience to inspect their contents, he was under an obligation, when this temporary purpose was served, instantly to return them to England to their proper owner or custodier there. There was a judicial order against him, enforcing this duty of restoration, under which he lay. While they were in his hands they could not be the means of creating jurisdiction in the Scotch Court, and I apprehend as little were they open to be attached for that purpose when placed in the hands of Graham & Johnston as agents, with the view of their being transmitted to England to their constituents. Had the pursuer sent them direct to the English parties by carrier or railway he could not have arrested them in the course of transmission when in the hands of third parties employed in their transmission. But, in principle, Graham & Johnston truly occupied no other position than such middle-men. Having been employed in the proceedings necessary to compel the pursuer to perform his duty of restoration of the subjects, they were naturally recognised as the proper parties to grant a receipt for the books and documents, in order that they might be forwarded safely in terms of the order of Court to their constituents. I hold it to have been incompetent for the pursuer, while with the one hand he delivered over the documents to the agents of the defenders, with the other to lay on a *nexus* to prevent that very transmission to England as ordained by the Court, to accomplish which alone they were placed in the hands of Graham & Johnstone. I think, therefore, that the third plea in law stated for the defenders ought to be sustained.

Such being the grounds of my opinion, I do not think it necessary to enter on the question whether, having regard to the circumstances in which these subjects were brought to Scotland, and supposing them to be such goods as were capable of arrestment of this kind, they could have been attached to found jurisdiction by creditors of the defenders not exposed to the personal bar pleadable against the pursuer? But had this been necessary for the solution of the present case, I would be inclined to hold that the subjects were not so located within Scotland as to have justified their attachment with a view to the creation of a jurisdiction not otherwise competent to a Scotch tribunal.

LORD NEAVES said that this arrestment was inept for the reasons stated by their Lordships. But further, the articles in question were not arrestable. The mode of founding jurisdiction against a foreigner was very familiar in the Admiralty Court. Foreign ship captains who incurred debt in Scotland could only be reached by arresting their ship in the harbour, and thereby founding jurisdiction. The remedy was one suitable only to maritime or mercantile actions, or at all events, only to actions which could be resolved into petitory conclusions, and not in actions of a declaratory kind. If the action was such as did not admit of execution against moveables, jurisdiction could not be founded by arrestment. But the subjects arrested must not be *extra commercium*. They must be saleable, and capable of being poinded.

Agents for Reclaimers—Graham & Johnston, W.S.
Agents for Respondent—Lindsay & Paterson, W.S.

Tuesday, November 8.

FIRST DIVISION.

SPECIAL CASE FOR MRS JANET DEWAR OR MACDONALD AND OTHERS.

Trust—Direct Disposition and Settlement—Interpretation of Writs—Testator's intention. The legal and technical difficulties which might arise under a direct disposition and settlement without a trust are obviated by the interposition of a trust. The strict legal construction of the former deed gives way to the intention of the truster under the latter. Circumstances in which—a settlement having been executed in the form of a direct disposition, with codicil attached, under which serious difficulties would have arisen, and the testator's intention might have been defeated by the

form of words used—it was held that a trust, superinduced upon the original settlement by a second codicil, obviated these difficulties, and gave free play to the testator's intentions.

The parties to this Special Case were (1) Mrs Janet Dewar or Macdonald, widow of the deceased Alexander Macdonald, late door-keeper to the Faculty of Advocates; (2) Mary Macdonald, sister of the said Alexander Macdonald; (3) Cecilia Dewar, sister of the said Mrs Macdonald, mentioned of the first part; (4) Donald Stewart and John Murray, trustees and executors of the said Alexander Macdonald.

The said Alexander Macdonald, and his wife, the said Mrs Janet Dewar or Macdonald, the first party hereto, executed, upon 22d May 1852, a mutual disposition and settlement, whereof the following are the terms:—"We, Alexander Macdonald, of Her Majesty's General Post-Office, Edinburgh, and residing in No. 50 Thistle Street, Edinburgh, and Mrs Janet Dewar or Macdonald, his wife, also residing there, spouses, for the love, favour, and affection which we have and bear to each other, have mutually agreed to grant these presents in manner underwritten; that is to say, I, the said Alexander Macdonald, do hereby give, grant, assign, dispone, and convey, and make over from me and my heirs and successors, to and in favour of the said Janet Dewar or Macdonald, my wife, in case she shall survive me, and to her heirs, executors, or assignees whomsoever, all and sundry my means and estate, both heritable and moveable, of whatever nature or denomination, now belonging or addebted, or which may belong or be addebted to me at the time of my death in any manner of way. . . . and, in like manner, I, the said Janet Dewar or Macdonald, do hereby give, grant, assign, dispone, and convey, and make over from me, my heirs and successors, to and in favour of the said Alexander Macdonald, my husband, in case he shall survive me, and to his heirs, executors, and successors, all and sundry, my means and estate, heritable and moveable, of whatever kind or denomination, now belonging or addebted, or which may belong or be addebted to me at the time of my death in any manner of way . . . and we hereby severally nominate, constitute, and appoint the last survivor of us to be the sole executor and universal legatory of such one of us as shall predecease the other, hereby excluding and debarring all others from that office, with full power to the said last survivor of us to pursue for and enforce and realise our whole estate and others above conveyed, and, if necessary, to give up inventories of and to confirm our moveable estate in common form, and generally to do everything in the premises competent to an executor—reserving always to us and the survivor of us our liferent right and enjoyment of our whole estate and others above conveyed; and declaring that, in the event of any child or children being procreated of the marriage between us, our said whole estate and others above conveyed shall, after payment of our deathbed and funeral expenses, and all our just and lawful debts, on the death of the last survivor of us, be equally divided between such child or children, and their heirs, on attaining majority, share and share alike, in fee; and further, reserving full power to us during our joint lives, or to me, the said Alexander Macdonald, without the knowledge, concurrence, or authority of me, the said Janet Dewar or Macdonald, to alter, innovate, or revoke these presents, in whole or in part, as we jointly (or as he, the said Alexander Macdonald, by himself alone) may think proper."

In pursuance of the reserved power to alter, innovate, and revoke contained in this deed, the said Alexander Macdonald executed four codicils, whereof the first, dated 16th October 1852, is as follows:—"I, Alexander Macdonald, designed in the foregoing disposition and settlement, in the exercise of the power to alter or revoke therein contained, do hereby leave and dispone" the residue of my means and estate, "after the death of the longest liver of myself, and Janet Dewar or Macdonald, my spouse, designed in the foregoing disposition and settlement, in two equal shares, between Mary Macdonald, my youngest sister, presently residing with my mother, and Cecilia Dewar, the youngest sister of my said spouse."

The second codicil, dated 9th September 1861, contained a nomination of trustees in the following terms:—"I, Alexander Macdonald, designed in the foregoing disposition and settlement and codicil, in the further exercise of the reserved power contained in the said disposition and settlement in my favour to alter the same, do therefore hereby assign, dispone, convey, and make over from me, my heirs and successors, to and in favour of Donald Stewart, crier of the Parliament House, and residing in Cumberland Street, Edinburgh, and John Murray, writer, York Place, Edinburgh, and to the survivor or acceptor of them, as trustees for carrying out the purposes of the foregoing disposition and settlement and codicil, with this addition to and alteration thereon, All and whole my heritable and moveable estates, pertaining and belonging, or which may pertain or belong to me at the time of my death, with the whole vouchers and instructions thereof, and all that has followed or may be competent to follow thereon: And for that purpose I further hereby nominate, constitute, and appoint them, the said Donald Stewart and John Murray, and the survivor or acceptor of them, to be my sole executors or executor, with full power to them, or the survivor or acceptor of them, to pursue for, realise, and give up inventories of, and to confirm, my moveable estate, and generally to do everything competent to executors, but that in trust always, and for carrying out the purposes of said foregoing disposition and settlement and codicil, as therein provided, with this addition thereto, and declaring that it is my wish, and I hereby direct and appoint my said trustees and executors, or the survivor or acceptor of them, to hand over to Mary Macdonald, my sister, immediately after my death, my gold watch, chain, and seals, with the sum of £50 sterling in cash, and that over and above the other provisions made by me in her favour."

The third codicil, dated 27th July 1867, disposes of a special subject, which had been acquired since the execution of the original deed, as follows:—"I, Alexander Macdonald, designed in the foregoing disposition and settlement and codicils, but now residing in No. 115 Rose Street, Edinburgh, in the further exercise of the reserved power in my favour contained in the said foregoing disposition and settlement to alter or revoke the same, and having since the date of that deed purchased and acquired the dwelling-house No. 115 Rose Street, in which I at present reside, I hereby assign and dispone to and in favour of Mrs Janet Dewar or Macdonald, my wife, all and whole the said house in No. 115 Rose Street, Edinburgh, being the second or top flat thereof, all as more particularly

specified and described in my rights and titles thereof, together with my household furniture and plenishing therein, all as presently occupied and possessed by me, but that for her liferent use only, and on her death to be assigned and disponed by my trustees and executors to and in favour of Mary Macdonald, my sister, presently residing in Aberfeldy, Perthshire, and to her heirs and assignees whomsoever in fee, and that in addition to or over and above the provision made to her in the preceding codicil, executed by me on the 16th day of October 1852 years."

The fourth and last codicil, dated 4th January 1868, alters the destination of the said special subject conveyed by the third codicil:—"I, Alexander Macdonald, designed in the foregoing disposition and settlement, and codicils following thereon, do hereby revoke and recall the provision of fee of the house No. 115 Rose Street, Edinburgh, made by me by the immediately preceding codicil, dated the 27th July 1867, in favour of Mary Macdonald, my sister therein named, and her heirs whomsoever, and declare said provision to be void and null, and that the said Mary Macdonald, my sister, shall only be entitled to the liferent of said house in the event of her surviving Mrs Janet Dewar or Macdonald, my wife, the heirs whomsoever of the said Mary Macdonald, my sister, being hereby expressly debarred and excluded from all benefit or participation therein, or in my estates, heritable and moveable, in any manner of way whatever, my trustees being bound, as soon as convenient after the death of the survivor of my said wife and sister, to convey to or dispose thereof for behoof of Mrs Catherine Macdonald or Watt, wife of and residing with James Watt, gardener in Oawaru, New Zealand, in liferent, and to her children, equally between them, in fee."

The parties to this Special Case were the beneficiaries under this settlement, with its accompanying codicils, seeking to have their respective rights ascertained, and the trustees, desirous of ascertaining the duties which devolved on them as such. Mrs Macdonald, the first party, claimed the liferent use of the household furniture and plenishing, and the fee of the residue or remainder of the other personal estate of her said husband. Miss Mary Macdonald, the second party, on the other hand, claimed the whole of the said furniture and plenishing after the death of Mrs Macdonald, the first party; and half of the residue of the personal estate in fee after the said first party's death, in addition to a legacy of £50.

Miss Cecilia Dewar, and the trustees, the third and fourth parties, maintained that Mrs Macdonald was not entitled to either the liferent or the fee of the said residue; or, at all events, that she was only entitled to a liferent thereof, and that the fee of that residue belonged to the said second and third parties.

As regards the house No. 115 Rose Street, there was no serious dispute as to its destination in terms of the third and fourth codicils.

The questions for the opinion and judgment of the Court were—

"1. Whether the first party hereto is entitled to the fee of the residue of the personal estate other than the furniture and plenishing in the house No. 115 Rose Street?

"2. If not entitled to the fee, is the said first party entitled to a liferent of said residue, in addition to a liferent of the house 115 Rose Street, and of the furniture and plenishing therein?

"3. If the first party be held entitled only to a liferent of the residue of the personal estate, are the said second and third parties entitled to the fee thereof?

"4. Is the second party entitled to (1) a liferent of the house after the first party's death? (2) the whole of the furniture and plenishing in fee after the first party's death? and (3) half of the residue in fee after the first party's death?"

In the absence of Mrs Watt and her children the Court refused to entertain any consideration of the third and fourth questions. The argument was therefore confined to the first two.

The Solicitor-General (A. R. Clark), for Mrs Macdonald, argued—There can be no doubt that the original deed did give Mrs Macdonald the fee of the residue. The question is, has that fee been taken away; and if so, by what deed? No doubt there is the codicil of 1852, seeming to convey the residue of the estate to Mary Macdonald and Cecilia Dewar. But does that revoke the first deed. I think not, because this codicil gives a fee, not at the granter's death, but only at the death of the longest liver of himself and his wife. This was therefore not a revocation of the original settlement and a new grant, but a substitution of these two ladies to Mrs Macdonald. The codicil of 1861 shews from its language that this was the intention of the testator, while the codicils of 1867 and 1868 deal with a special subject, and do not contradict the original deed.

Rhind, for Mary Macdonald, pleaded that the codicil of 1852 did effect an alteration upon the original settlement, that no mere substitution was intended, but an entirely new destination of the fee of the residue of the estate. He conceded to Mrs Macdonald a liferent of that residue, and to Cecilia Dewar an equal share in the fee, but claimed the other half of the fee upon Mrs Macdonald's death.

Fraser, for Cecilia Dewar and the Trustees, substantially adopted the argument of the second party.

At advising—

The Lord-President—The question which we have to determine is whether Mrs Macdonald is entitled to a fee or a liferent of the residue of her husband's personal estate. Now, looking at the mutual disposition and settlement executed by Mr and Mrs Macdonald in 1852, I am of opinion that if that deed had stood alone, and they had remained childless, and Mrs Macdonald had survived her husband, it would just have given the fee in the residue in question to her. If there had been children of the marriage, there would have arisen some difficulty. By the codicil of 1852 this difficulty is increased by other parties being brought in; it looks, I must say, very much like as if the two ladies were introduced to take the place of children. The codicil of 1861 operates a revocation of the conveyance in the original deed—a necessarily implied revocation, that is to say, because there is a new conveyance to trustees, inconsistent with the direct conveyance from one spouse to the other. The whole difficulty is now removed. There is no longer a conveyance by him to his wife, and by his wife to him, but a conveyance of his whole estate to trustees. There are technical difficulties in the construction of settlements which

do not at all emerge in conveyances to trustees. The difficulties which would have arisen are now therefore swept away. Taking then this trust, which is engrafted upon the original deed, as being now a part of the settlement, and reading the deeds together, I think there is no difficulty in understanding what the wish and intention of the testator was. The trustees are meant to carry out the intention of the settlement and first codicil. Now this intention, as expressed, was simply that if his wife survived him she should have the life-rent of the residue of his estate, but that the fee should be preserved by means of the trust for certain others. Whether this intention presented itself to Mr Macdonald's mind in the technical form of fee and liferent, or whether, being unacquainted with legal terms, he merely conceived the general intention which is so expressed, I cannot tell, but in whichever way it did present itself to him, he is entitled to have it carried into execution by his trustees. I am therefore of opinion that Mrs Macdonald's right is a right of liferent and not of fee.

LORD DEAS—The whole question appears to me to be, whether the widow of Mr Macdonald is entitled to a fee, and if not to a fee, then whether she is entitled to a life-rent. I really don't see much difficulty on either point, though some was attempted to be raised. Now we must deal with these deeds just as if the granter had begun by making a trust-disposition to trustees for certain purposes, and had afterwards executed certain codicils altering slightly the original purposes. The import of his directions to his trustees, as so altered, I hold to be that they are to give the widow the beneficial enjoyment of the property during her lifetime and secure the fee for certain other parties. And this is the whole, I think, which we are called upon to decide.

LORD ARDMILLAN—The first codicil must be read as part of the original settlement. The only difficulty created is through the absence of an appointment of trustees. That difficulty is removed by the creation of the trust in the next codicil. This trust clearly enables the trustees to administer the settlement and first codicil together, and this they are bound to do. When there are no legal and technical difficulties in the way, it is the duty of the Court to interpret deeds in their natural construction; and this I think your Lordships have done.

LORD KINLOCH—I have come to the same conclusion with your Lordships. We must read the original deed and the codicils together; and if we do so then we have a trust constituted, and the fee of the property conveyed to the trustees for certain trust purposes. What are those ends and purposes is the true question before us. Now I think that under the fair and reasonable construction which we are bound to put upon such deeds, there are no real difficulties in the case. I think that the truster's intention was, that if there should be children of the marriage the wife should have a life-rent and the children the fee of the property. If, on the other hand, there should be no children of the marriage, then under the first codicil he provided that his wife should have a life-rent and certain other parties the fee. This is the natural construction of the truster's intentions. It was argued to us that these provisions of the truster were not provisions of life-rent and fee, but were provisions of substitution—that the truster's intention was that the wife should have full power of disposal during her life either onerously or gratuitously, but that failing such disposal the substituted heirs should succeed. Substitution, I need not say, is not readily presumed in moveables; and upon a fair consideration of the whole deeds, I do not think that such substitution is intended here.

On the first two questions the Court found and declared the first party not entitled to a fee, but entitled to a life-rent of the residue, in addition to a life-rent of the house 115 Rose Street, and of the furniture and plenishing therein. To the third and fourth questions the Court declined to return an answer in the absence of Mrs Watt and her children, who had a material interest to be heard in the premises.

Agents for Mrs Macdonald—G. & J. Binny, W.S.

Agent for Mary Macdonald—Robert Menzies, S.S.C.

Agent for Cecilia Dewar and Macdonald's Trustees—John Galletly, S.S.C.

Wednesday, November 9.

SECOND DIVISION.

FORBES *v.* WATT.

Lease — Construction of Duration. A tenant who possessed the farm of A under a lease which terminated at Whitsunday 1787, obtained in December 1784 a new lease of the farm, to commence at the expiry of the present lease, and to subsist for two periods of nineteen years, and a life, to be nominated on the thirty-eighth year of the lease, *i.e.*, in 1825. In January 1785 the tenant obtained a lease of the adjoining farm of B, to begin at Whitsunday 1785, and "to endure for the same space of time as the tack now granted on the" farm of A. The two farms were worked together, and a nomination of a life was made in the thirty-eighth year of the lease of A, *i.e.*, in 1825, and the tenant and his successors continued to possess the lands. *Held*, in an action of ejectment, that the phrase used meant that the two leases should exist together, and terminate at the same time; and not that they should both occupy the same portion of time, and the one accordingly terminate two years before the other; and consequently that the nomination in 1825 was valid in both cases.

Amendment—Court of Session Act 1868. *Held* that it was not intended by the above Act that a pursuer could amend his summons at the end of his case, so as to raise a different question from that originally intended.

This was an action of declarator at the instance of Mr Forbes, proprietor of the lands of Haddo and others, against the trustees of the late Charles Watt, tenant of the farm of Mains of Crombie, which belonged to the pursuer. The action contained conclusions to the effect—(1) that the pursuer was heritable proprietor of the farms of Mains of Crombie and Tillyfaff and certain crofts adjoining thereto; (2) that the defenders had no valid lease of the said farms and crofts; (3) that they