Court, and that we should sustain the claim of the Baroness and the trustees to the fund *in medio*.

The Court adhered.

Counsel for Baron Gudin—Comrie Thomson—Gillespie. Agents—Mitchell & Baxter, W.S.

Counsel for Baroness Gudin and Others—Low—Moody Stuart. Agent—Donald Mackenzie, W.S.

Wednesday, December 8.

FIRST DIVISION.

AINSLIE'S EXECUTORS *v.* AINSLIE.

Succession—Executor—Trust—Trust (Scotland) Act 1861 (24 *and* 25 *Vict. c.* 84), *sec.* 1.

A testator by holograph will nominated certain persons to be his "executors," and directed them to pay various annuities, to hold his estate during the continuance of a liferent, to sell certain heritage, and generally to manage the estate as a continuing trust. *Held* (1) that the directions of the will showed that these persons were truly appointed as trustees, and that being so, they were gratuitous trustees to whom the Trusts (Scotland) Act 1861 applied; and (2) that a majority of trustees could exercise the power of assumption conferred by that Act.

The deceased James Ainslie, of 11 Melville Crescent, Edinburgh, died on 25th October 1880. He left a holograph testament dated 7th March 1878, by which he nominated certain parties mentioned therein to be his "executors." He directed them to pay annually to his niece till death or marriage, payable half-yearly, £120, and to make payment of another annuity, which lapsed by the annuitant predeceasing him; further, "to divide whatever sum my estate may yield annually between my dear wife Narcissa Ainslie, and my dear niece Jane Suffield Ainslie, thus—to the former, say seven-tenths (say 7/10th), and to the latter three-tenths (say 3/10th), payable half-yearly, the survivor to have the liferent of the whole estate, and at her death my accounts to be closed at as early a date as practicable, and the proceeds divided into five equal shares, to be apportioned" among five persons named. The will further provided that his house, stable, and fixtures should be sold soon after his death, but not before it suited his wife's convenience. He further directed his executors to pay out of his estate legacy and other duties on the bequests to his wife and niece, "and also the whole expenses attending the executory and the annual expenses of management. I direct my executors either to retain and hold the various securities and investments on which my means and estate may be invested at my death, it being my wish, without, however, being imperative on my executors, that the investments and securities chosen by me should remain undisturbed as far as possible, or to realise the same or such part thereof as they may deem necessary or expedient, or to reinvest the same in such way and manner, and on such securities, heritable or personal, as they may deem best, including stock, funds, or securities of the Government of India, debentures or debenture stock, preferential or guaranteed stock, declaring that my executors shall not be liable for any loss that may arise from their retaining and holding any securities or investments on which my means and estate may be invested at the time of my death." He left to each of his executors a legacy of £100.

All the four executors survived the testator and accepted office. One of them died in 1885, and of the survivors two were in delicate health. The remaining executrix was the niece above named. The residue under their charge amounted to £32,000.

In these circumstances the two executors, being a majority, desired to assume certain persons to act along with them in the administration of the testator's estate. A question was raised whether such assumption was competent, and the present Special Case was accordingly presented to have the opinion and judgment of the Court upon this question. The first parties were the majority of the executors. The second party was Miss Jane Suffield Ainslie, the niece.

The first parties maintained (1) that although called executors by the testator, yet the effect of the provisions of the will was to put them in the position, and invest them with the powers of trustees, including the power of assumption conferred by the Trusts Act 1861, and (2) that the majority had that power.

The second party maintained (1) that as the testator had only nominated "executors" by his will, they were not trustees within the meaning of the statute, and (2) in any view, that they could not assume unless there was unanimity.

The Act 24 and 25 Vict. c. 84, sec. 1, provides that "all trusts constituted by virtue of any deed or local Act of Parliament under which gratuitous trustees are nominated, shall be held to include the following provisions, unless the contrary be expressed—that is to say, power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees;" and sec. 3 provides that "a gratuitous trustee shall, for the purposes of this Act, be held to be any trustee who receives no pecuniary or valuable consideration for performing the duties of a trustee, and is under no obligation without special acceptance of such office to discharge the duties of trustee."

The questions upon which the opinion and judgment of the Court were asked, were—"(1) "Whether, on a sound construction of the said last will and testament, the first and second parties are entitled to exercise the powers of assumption conferred on trustees under the terms of the Act 24 and 25 Vict. c. 84, sec. 1? (2) Whether, if the first question be answered in the affirmative, such assumption can be made by a majority of the first and second parties?"

Argued for the first parties—The will being a holograph will the word "executors" must not be taken in too technical a sense; the whole scope of the deed showed that the parties were to act more as trustees than as executors. They were to hold the estate during two lives. They were to deal with heritage, and they were to manage a continuing trust. There was nothing in the statute opposed to the present application.

Authorities—Ersk. ii. 2, 3; *Jameson* v. *Clark*, January 24, 1872, 10 Macph. 399; *Tochetti* v.

City of Glasgow Bank, March 7, 1879, 6 R. 789; Lewin on Trusts (6th ed.), 555.

Argued for the second party—An executor was not by any means the same as a trustee. A trustee was not an executor until after confirmation, and recent statutes carefully kept up the distinction. Had the testator desired to equip the parties with the powers of trustees he could easily have done so, and the Court would not, without good cause shown, do this for him.

Authorities—Ersk. iii. 9, 27; Juridical Styles (last ed.), vol. ii. p. 648; *Macleod's Trustees* v. *M'Leod*, February 28, 1875, 2 R. 481; *Urquhart* v. *Dewar*, June 13, 1879, 6 R. 1026; *M'Leod's Trustees* v. *M'Luckie*, June 28, 1883, 10 R. 1056.

At advising—

Lord President—This question arises under sec. 1 of the Trusts Act of 1861, which statute is applicable in its terms to all deeds under which gratuitous trustees are nominated.

There is nothing in the Act about the conveyance of heritage to trustees. All that is required is, that they should be nominated as gratuitous trustees, and it is their nomination as such which secures to them the benefits of the statute.

It may be taken that the first and second parties here are, if trustees in the sense of the statute, gratuitous trustees, although they are beneficiaries each to the extent of £100, for this bequest was left to each of them as a legacy, and not as remuneration for work to be done.

The question therefore comes to be, whether the parties to this Special Case are trustees under the last will of the testator? No doubt they are called executors in the will, and if it is to be held that being so described excludes the idea of the same parties being trustees, then of course there is an end of this case.

But I do not think that is so, because executors are trustees to this extent at least, that in their fiduciary capacity they ingather and distribute the testator's estate, and it would not be difficult to ingraft on the office of executor duties which trustees only could perform. It comes therefore to this, that before we can determine the true character of these parties we must examine the terms of the deed and see what they are directed by it to do. In the first place, the executors are directed to make and continue to parties named, until their death or marriage, certain annual payments. They are then directed to divide the annual revenue of the testator's estate between his wife and his niece in certain specified proportions, and then follows a provision as to what is to be done with the property after the death of the survivor of the two favoured parties. Then follows a direction as to his house, stable, and all their fixtures, which the testator provides are to be sold soon after his death, but a discretionary power is given to the executors to fix the time.

Now, it is true that there is no special conveyance of this heritable property to the executors, but on the authorities, and especially in the case of *M'Leod's Trustees* v. *M'Luckie*, June 28, 1883, 10 R. 1056, it has been decided that an expression of the testator's will such as we have here, followed by a direction to executors to deal with heritage, is equivalent to a conveyance. Looking, then, to the terms of this will, it is clear that the testator contemplated a continuing management, which was quite inconsistent with the duty of an executor in the strict sense of that word. An executor in the ordinary meaning of the word is one who administers an estate with a view to immediate distribution. If he fails so to distribute the estate within a reasonable time he is a debtor to the beneficiaries. Here the executors are directed to hold and administer this estate, to provide a liferent to the widow and to a certain other *persona prædilecta*, and it is only after the death of the survivor of these two that the estate is to be realised and divided.

Now, I think, looking to the duties these parties have to discharge, if the testator had called them his trustees he would not have misnamed them. Are they, then, because they are designated executors, to be deprived of the benefits of this Act?

That, I think, would be a very narrow construction of a remedial statute, and I am therefore for answering the first question in the affirmative.

Lords Mure, Shand, and Adam concurred.

The Court found that the first and second parties were entitled to exercise the power of assumption conferred on trustees by the Trust Act 1861, and that such assumption could be made by a majority of them.

Counsel for First Parties—Guthrie. Agents—Cowan & Dalmahoy, W.S.

Counsel for Second Party—Lorimer. Agents—Mitchell & Baxter, W.S.

Saturday, November 13.

OUTER HOUSE.

[Lord Fraser.

BOYD (AIRTH'S EXECUTOR) *v.* THE LORD ADVOCATE.

Marriage-Contract—Liferent—Children's Shares—Vesting—Revenue.

A marriage-contract provided that after the death or second marriage of a wife who was liferented in the estate, the trustees should hold the capital and pay the same over to the children of the marriage in equal proportions, on the majority of sons and on the majority or marriage of daughters, and declared that the issue of such children should obtain the share "that would have been payable to their predeceasing parent had he or she survived the period when the succession opened thereto." The husband died survived by his wife and two sons and a daughter. The two sons predeceased their mother. *Held* that the shares of the estate had vested in them, and that inventory duty and legacy duty were payable on both their estates

The antenuptial marriage-contract between the deceased Alexander Airth, wine merchant, Leith, and Mrs Grace Stead or Airth, his wife, dated 12th March 1885, after conveying to the trustees thereunder the whole estate which should be his at his death, and giving the widow, if she survived, a liferent of the whole while she remained his widow, contained the following clause — "(3) After the death or second mar-