of, and brought fairly under the notice of a company by means of legal proceedings, it does not take instant and energetic steps to put a stop to the evil complained of, it subjects itself to the liability of being placed under interdict so as to make it liable for anything which may happen afterwards.

I am therefore for adopting substantially what the Sheriff has done, though I think the terms of our interlocutor ought to be somewhat different. I think we ought to recal that interlocutor in whole or in part, and pronounce a judgment which will place the case upon the basis that this company has by its acts since the action was raised subjected itself to a liability to interdict.

Lord Mure concurred.

Lord Shand—In the course of the discussion a number of nice legal questions appear to have been raised, and the Sheriff in his note has discussed them at some length, and proceeded upon a certain view of them. I do not think it is necessary for us to enter into a consideration of any of these questions, as your Lordship has pointed out a simple and more satisfactory manner in which this case can be determined.

This publication—"Scandalous Revelations"—is admittedly a libel, and interdict has been granted against Mr Dewars, the superintendent of the defenders' company for the Dundee district, but the question which we have now to determine is, whether the company also is to be interdicted from issuing this bill to the detriment and loss of the pursuers' company? It was urged at the bar that the whole proceedings in connection with the preparation and issue of this bill were conducted by subordinates, and that when the head officials of the company came to be aware of what was going on they immediately put a stop to the grievance complained of. I can find no reference on record to anything of the kind. On the contrary, the defenders plead that owing to the acts of the pursuers they were justified in what they did.

As to the actings of the London officials, it does not appear to me that they were clear in the matter. No doubt a rule was issued, which was to be appended to each collector's book, prohibiting the circulation by servants of the company of any publications but such as emanated from the head office, and could it have been shown that in direct violation of this regulation these libels had been uttered, then an interdict against the company would most likely have been refused. But from beginning to end the officials of the defenders' company seem to have treated this whole matter with indifference, for when the action was raised all that they appear to have done was to send down this notice against issuing unauthorised publications, while the distribution of these very publications went on just as freely as before. As the London officials of this company took no steps to stop the publication of this libel after its existence was made known to them, I think that the pursuers are entitled to have interdict against the defenders' company.

Lord Adam—I entirely concur.

The Court pronounced this interlocutor:—

"Find that the handbill entitled 'Scandalous Revelations' was prepared and printed in Dundee, and was in the months of November and December 1885 extensively published in and about Dundee by officials of the defenders' company, including the district superintendent John Dewars, who is called as a defender; but find that the preparation and uttering of the said slanderous document before the present action was raised was not directly effected by the defenders' company, or expressly authorised by them, or carried out with their knowledge or assent: But find that since the present action was raised, and the facts above found were brought to the knowledge of the directors of the defenders' company, the said handbill continued to be published and circulated in Dundee and its neighbourhood by the officials of the defenders' company, and that such continued publication was caused by the negligence of the said company and its directors in not sufficiently superintending and controlling their officials in and about Dundee, and preventing them from continuing said publication: Therefore refuse the appeal, and decern."

Counsel for Pursuers — M'Kechnie — C. N. Johnston. Agents—T. & W. A. M'Laren, W.S.

Counsel for Defenders—D.-F. Mackintosh, Q.C. —W. Campbell. Agents—J. & J. Galletly, S.S.C.

Thursday, June 16.

FIRST DIVISION.

DICKSON AND OTHERS *v.* LANG AND OTHERS.

Succession — Legacy — Legacy Exempted from Legacy-Duty.

By trust-disposition and settlement a testator directed his trustees to pay to certain persons "the sum of £2000, to be held by them in trust" for providing and securing certain bursaries, "all in terms of a codicil and deed of foundation, which for purposes of convenience has been separately prepared, and is to be executed by me of equal date herewith, and to which reference is here made." By the said codicil, after reciting the gift in terms of the trust-disposition, he provided a scheme of administration. The codicil contained this clause — "Further, declaring that it shall not be held, from the provision for said bursaries being included both in said trust-disposition and settlement and herein, that any double provision is intended by me, but only one free sum of £2000 shall be applied for said purpose, this deed being intended in supplement of said trust-disposition and settlement, and to aid in carrying out the trust objects." In other parts of his trust-disposition, and in a previous holograph trust-disposition which had been impliedly revoked by the later settlement, the truster had directed his trustees to pay certain legacies "free of legacy-duty." *Held* that the legacy of £2000 fell to be paid under deduction of legacy-duty.

Per the Lord President—that it was competent to refer to the revoked holograph deed in order to discover whether the testator used

the full expression "free of legacy-duty" when he wished to exempt a legacy from duty.

By trust-disposition and settlement dated 7th April, and codicils thereto dated respectively 7th and 9th April 1869, the deceased James Mackie, physician in Greenock, conveyed his whole estate to trustees for the purposes therein specified, and, *inter alia*, he directed his trustees, out of the fund or sum to be set aside to meet an annuity of £300, "payable in advance, and free of legacy-duty," which he had by separate bond of provision dated 22d May 1866 provided to Miss Emily Vaux Jenney, at the first term of Whitsunday or Martinmas after her death, to "make payment to the professors, for the time being, of the Medical Faculty in the University of Edinburgh, . . . which professors, so hereby designated as trustees, are hereinafter styled the 'bursary trustees,' of the sum of £2000, to be held by them in trust in perpetuity, and laid out and invested for providing and securing two bursaries in the said University, to be called 'The Mackie Bursaries,' all in terms of a codicil and deed of foundation which, for purposes of convenience, has been separately prepared, and is to be executed by me of equal date herewith, and to which reference is here made."

By the said codicil and deed of foundation therein referred to, and executed on 7th April 1869, Dr Mackie, after narrating the provision in the trust-disposition, provided as follows—"And now, seeing that, with the view of enabling the bursary trustees the more easily and effectually to carry out my intentions in regard to the said bursaries, I have resolved to execute this codicil and deed of foundation in manner underwritten: Therefore, and without prejudice to the provision in my trust-disposition and settlement before recited, but in corroboration and supplement thereof, I, of new, direct my trustees nominated in my said trust-disposition and settlement, at the term or time therein provided, to make payment to the said professors, for the time being, of the Medical Faculty in the University of Edinburgh, including and excluding as before written, and herein styled the bursary trustees, of the sum of £2000, to be held by them in trust in perpetuity, and laid out and invested for providing and securing two bursaries in the said University, to be called "The Mackie Bursaries," and the bursary trustees shall annually make payment of the interest or annual proceeds of the said sum of £2000 equally to and between two young men attending the medical or surgical classes, or of any of such classes, in the said University, during the winter sessions of the University, such payment to be made on the 30th day of November in each year, or as soon thereafter as conveniently may be, and to continue during two years to each bursar so prosecuting his studies." Prior to the execution of the said trust-disposition and codicils, Dr Mackie had executed a holograph trust-disposition dated 5th August 1867, by which he directed the trustees therein named, *inter alia*, "(*Thirdly*) to pay to Frederick James Fuller the sum of £500, and a like sum to Isabella Mackie Fuller, children of Mr John Fuller of Trinidad, these last bequests, to be paid free of legacy-duty."

James Mackie died on 9th June 1869, and the annuity payable to the said Miss Emily Vaux Jenney was thereafter paid to her in terms of the said trust-disposition and settlement until her death on 12th June 1886.

By the deeds executed in 1869 Dr Mackie did not dispose of the residue of his estate, and an action of multiplepoinding and exoneration was brought by his trustees to settle, *inter alia*, to whom the said residue was payable. In that process the residue was claimed, *inter alios*, by his next-of-kin, and their claim was sustained by the Lord Ordinary (LORD MURE) by interlocutor dated 14th May 1874, which became final. By that interlocutor the University of Edinburgh were ranked and preferred to the sum of £2000 out of the fund or sum set apart by Dr Mackie's trustees to secure the annuity of Miss Emily Vaux Jenney. In that action it was found by interlocutor of the First Division dated 3d March 1874 that the said holograph trust-disposition had been impliedly revoked by Dr Mackie's trust-disposition and settlement of 7th April 1869.

A question having arisen as to whether the legacy of £2000 was payable free of legacy-duty, a Special Case was presented for the opinion of the Court, to which the bursary trustees were the first parties, the next-of-kin of Dr Mackie were the second parties, and the sole surviving trustee of Dr Mackie was the third party

The question of law submitted was—"Are the first parties entitled to payment of the said legacy of £2000 from the estate of the said Dr James Mackie, free of legacy-duty?"

The first parties maintained that on a sound construction of Dr Mackie's trust-disposition and codicil the sum of £2000 fell to be paid free of legacy-duty. They argued that here the codicil was the leading deed. This appeared from the reference in the trust-disposition, and from the nature of the codicil itself. It was the more elaborate deed. Looking to the character of the bequest, moreover, it was plain that it was the testator's intention that as little should be deducted as possible. "Free" must have some meaning, and if it did not mean freedom from legacy-duty, it was impossible to say what its meaning was. There was no direct authority, but the case of annuities was analogous, and in the following cases similar expressions had been held to import freedom from legacy-duty—*Mackie's Trustees* v. *Mackie*, January 15, 1875, 2 R. 312 ("free from all burdens, taxes, and deductions whatsoever"); *Banksdale* v. *Gilliat*, May 21, 1818, 1 Swanston's Rep. 562 ("without deduction"); *Gosden* v. *Dotterill*, December 14, 1832, 1 Mylne & Keen's Rep. 56 ("free from all expense"); *Baily* v. *Boult*, November 13, 1851, 14 Beavan, 596 ("one clear yearly rent-charge or annuity"); *Warbrick* v. *Vasley*, June 27, 1861, 30 Beavan, 241 ("free from any charge or liability"); *Haynes* v. *Haynes*, February 19, 1853, 3 M. & G. Rep. 590 ("clear"); *in re Cole's Will*, July 2, 1869, L.R., 8 Eq. 271 ("clear income or sum").

The second parties maintained that the first parties were entitled to payment of the said sum after deduction of £200, being the amount of legacy-duty at the rate of 10 per cent., payable thereon. They argued that the decisions were contradictory, and the case of an annuity was not analogous, for an annuity must be paid whether the capital yielded a return sufficient to meet it or not. Thus a clear annuity was wholly different from a clear legacy—*Sanders* v. *Riddell*, November 24, 1835, 7 Simon's Rep. 536 ("clear");

Banks v. *Braithwaite*, June 6, 1863, L.J., 32 Ch. 35 ("clear"); *Kinloch's Trustees* v. *Kinloch*, February 24, 1880, 7 R. 596 ("whether income-tax included in 'burdens and deductions'"); *Rodger's Trustees* v. *Rodger*, January 9, 1875, 2 R. 294 ("free"), *per* Lord President. The question depended on the deeds themselves. Had the first deed stood alone there could have been no difficulty. The aim of the clause founded on by the first parties in the second deed was to prevent the possibility of double legacy, not to increase the sum bequeathed.

At advising—

Lord President—Dr Mackie was a physician in Greenock. He received his degree from the University of Edinburgh; and in consideration of that fact he expressed his desire to apply the sum of £2000 in the foundation of two bursaries. The way in which he does that is by providing in his trust-disposition and settlement dated in 1869 that his trustees shall pay over that sum to certain professors who are to be constituted 'bursary trustees'; and the mode in which that is to be done is this—"Out of the fund or sum so laid aside to secure the annuity of the said Miss Emily Vaux Jenney, my trustees shall, at the first term of Whitsunday or Martinmas that shall occur after her death, or as soon thereafter as the said sum or fund can be conveniently got in and realised, make payment to the professors, for the time being, of the Medical Faculty in the University of Edinburgh (including in the number as well professors appointed by the Crown as those appointed by the Senatus Academicus of the said University, and by the Town Council of Edinburgh, but excluding professors appointed by any other authority, and private teachers), which professors, so hereby designated as trustees, are hereinafter styled the 'bursary trustees,' of the sum of £2000, to be held by them in trust in perpetuity, and laid out and invested for providing and securing two bursaries in the said University, to be called 'The Mackie Bursaries,' all in terms of a codicil and deed of foundation which for purposes of convenience has been separately prepared, and is to be executed by me of equal date herewith, and to which reference is here made."

Now, in this provision, which is the fifth provision of his settlement, there is nothing but a simple direction that the trustees shall pay over to his 'bursary trustees' a sum in terms of a codicil to be afterwards executed. It is impossible, therefore, to gather from that clause, any indication of intention on the part of the testator that the sum is or is not to be paid under any deduction,—above all, that it is to be free of legacy-duty. It is to be observed, at the same time, that in the deed itself he narrates a bond in which he makes provision for a payment of "a liferent annuity of £300 per annum, payable in advance and free of legacy-duty." These words are quite distinct and unambiguous, and can mean only one thing. Then there is the reference to a codicil, by which he intended to provide more fully than in the trust-deed for the administration of the fund. This is referred to as deed of foundation, and is for convenience kept separate.

The codicil, therefore, we would expect to contain the scheme of administration and nothing else; and when we come to it we find this to be the case. It recites *ad longum* the original words of gift, and then proceeds:—"And now, seeing that, with the view of enabling the bursary trustees the more easily and effectually to carry out my intentions in regard to the said bursaries, I have resolved to execute this codicil and deed of foundation in manner underwritten: Therefore, and without prejudice to the provision in my trust-disposition and settlement before recited, but in corroboration and supplement thereof, I, of new, direct my trustees nominated in my said trust-disposition and settlement, at the term or time therein provided, to make payment to the said professors for the time being, of the Medical Faculty in the University of Edinburgh, including and excluding as before written, and herein styled the bursary trustees, of the sum of £2000, to be held by them in trust in perpetuity, and laid out and invested for providing and securing two bursaries in the said University, to be called 'the Mackie Bursaries;' and the bursary trustees shall annually make payment of the interest or annual proceeds of the said sum of £2000 equally to and between two young men attending the medical or surgical classes, or any of such classes, in the said University, during the winter sessions of the University, such payment to be made on the 30th day of November in each year, or as soon thereafter as conveniently may be, and to continue during two years to each bursar so prosecuting his studies." Observe the obvious reason for which this codicil is prepared. It is to enable the bursary trustees more easily to carry out the testator's intentions. It is there that the bursary scheme of foundation is. It of new directs the trustees at the term prescribed in the testator's trust-disposition and settlement to make payment to the professors as bursary trustees; and provides that the bursary trustees shall annually make payment of the interest or annual proceeds equally to and between the bursars. The gift is thus made twice over; and the £2000 is given without condition or deduction. It is also important to observe that there is no provision for a definite annual amount; but the bursars are to receive between them equally the annual proceeds. It depends upon the varying amount of income arising from his investment what each bursar gets.

So far, there is no difficulty; nor does it appear that it will cost the testamentary trustees more than £2000 to carry out this provision. But the clause upon which the whole argument proceeds, the purpose of which obviously is to prevent the error of supposing that the £2000 in the codicil is bequeathed in addition to the £2000 in his trust-deed, stands thus:—"Further, declaring that it shall not be held, from the provision for said bursaries being included both in said trust-disposition and settlement and herein, that any double provision is intended by me, but only one free sum of £2000 shall be applied for said purpose, this deed being intended in supplement of said trust-disposition and settlement, and to aid in carrying out the trust objects." Now, the argument is founded upon the use of the word "free" in this clause. It is very difficult to suppose that that clause was intended to introduce for the first time so important a provision as that the £2000 is to be paid free of legacy

duty, when this is not provided in the trust-disposition or in the previous part of the codicil. Besides, the expression "free sum" is ambiguous, and requires construction. If we had found the words "free sum" in the clause in which the gift is made, it might have been doubted, whether even in that connection they meant free of legacy-duty. If the words "free sum" were there and had been explained in the codicil to mean free of legacy-duty, it would have been different. But the words of gift are entirely free of all ambiguity. It would be against all authority to allow the very ambiguous words of the codicil to mean that the gift of £2000 in the original deed is to be paid free of legacy-duty. I therefore think that there is nothing in this deed to enable us to say that they meant payment free of legacy-duty. The maker of the deed knew what words to use when he wished that to be done; and, further, I think it not incompetent to refer to a deed which is impliedly revoked, and which is holograph, for the purpose of showing that he possessed this knowledge. I am, therefore, for answering the question in the negative.

Lord Mure—I am of the same opinion. In the trust-disposition there are with one exception, no words to indicate freedom from legacy-duty, and accordingly it is upon this codicil that the first parties found. We are asked to read the codicil as part of the trust-disposition; but even so reading it, I think there is not sufficient to show an intention to put the £2000 in any position different from that in which it is put by the trust-disposition. And further, I am led to that conclusion because I see that when the testator intended a payment to be free of legacy-duty he uses that expression. These deeds were executed at the same time, and by the same man of business, and they show that the maker understood how to use the expression "free of legacy-duty," when he desired an annuitant to be relieved of it. On these grounds I do not think "free sum" an expression equivalent in meaning to "free of legacy-duty."

Lord Shand—Had the language of the original deed been identical with the language of the codicil—had it been provided, that is to say, that the testator's trustees should pay over to the bursary trustees the free sum of £2000—I should have thought the question one of nicety, and attended with difficulty. The argument would still have remained, that when the testator wished, he used the full phrase; still it would have been very difficult to give a meaning to "free" other than that of "free of legacy-duty." But the peculiarity of this case, in respect of which it differs from every case cited, is that the expression is not in the clause of gift itself. The provision gives the sum of £2000—it does not say the "free sum"—and the question is whether we are to gather from the language of the codicil the great additional advantage of no less than £200, by virtue of an incidental expression. On a sound construction of the deeds that conclusion cannot be reached. The sole object of the second deed is to provide a scheme of administration. The expression "free sum" is only mentioned incidentally in the provision, that one sum only and not two is to be paid to the bursary trustees. The reasonable construction is that "free" refers to freedom from expense of management of or burdens on the trust, rather than to exemption from so large a burden as legacy-duty. I admit that we must give effect to the intention of the testator, but I do not think it clear that the testator's intention was as contended for by the first parties.

Lord Adam—If the question had arisen on the terms of the trust-deed alone, there could have been no dispute that the gift of £2000 was not free of legacy-duty. Now, it was not the intention of the codicil to enlarge but only to regulate the disposal of that sum. The only object of the clause in the codicil founded on by the first parties is to prevent any possibility of double legacy. There may be many suggestions as to the meaning of "free;" but if the testator had meant that this payment was to be free of legacy-duty he would have inserted a clause to that effect in the proper place.

The Court answered the question in the negative.

Counsel for the First Parties—Low—Lee. Agents—W. & J. Cook, W.S.

Counsel for the Second Parties—H. Johnston—Chisholm. Agents—Gordon, Pringle, Dallas, & Company, W.S., and P. Adair, S.S.C.

Counsel for the Third Parties — Guthrie. Agents—Smith & Mason, W.S.

Friday, June 17.

SECOND DIVISION.

[Dean of Guild Court, Govanhill.

ROBERTSON *v.* THOMAS.

Burgh—Dean of Guild—Jurisdiction—Nuisance—Appeal under 50 *Geo. III.* (*cap.* 112), *sec.* 36.

A petition for a lining was presented in a Dean of Guild Court, and the burgh surveyor for the public interest lodged objections stating that the alterations proposed were of such a nature that they would be a nuisance, that they would cause annoyance and discomfort to the neighbours, danger to the public health, and danger from fire. The respondent also averred that the alterations were in contravention of the Public Health (Scotland) Act 1867, sec. 16, and the General Police Act 1862, sec. 177. The petitioner pleaded that the Dean of Guild Court had no jurisdiction to entertain these objections. The respondent was allowed a proof of his averments. The petitioner then appealed to the Court of Session under the 36th section of the Act 50 Geo. III. cap. 112, which allows appeals from interlocutory judgments of inferior courts, upon the ground, *inter alia*, of incompetency, including defect of jurisdiction. The Court (*diss.* Lord Rutherfurd Clark) *dismissed* the appeal, holding that as the objections, or some of them, did not upon the face of them include matters which were beyond the