der for £1000. . . . Explained and averred that in consequence of the wilful, intentional, gross negligence, and disobedience of instructions on the part of the pursuer's agent that action was thrown out on the relevancy." Now, in an action for clearing of character I think it a nice question whether the Court would have enforced the payment of expenses as a condition of allowing the amendment or not. But I quite see the force of Lord Young's opinion, that as between the pursuer and the defender, even though the pursuer's case was thrown away by the fault of his agent, he must pay the expenses of having his record amended.

The Court pronounced this interlocutor:—

"The Lords approve of the Auditor's report on the pursuer's account of expenses: Allow the taxed amount, being £11, 14s. 6d., to be imputed in payment *pro tanto* of the sum of £33, 7s. 9d., being the taxed amount of expenses and dues of extract found due to the defender in the action at the instance of the pursuer against the defender and Peter Campbell, and the said sum of £11, 14s. 6d. having been imputed accordingly by the counsel for the defender, and the pursuer having made payment to the defender of £21, 13s. 3d., being the balance of said sum of £33, 7s. 9d., open up the record in this cause: Allow the new plea tendered by the defender to be added thereto, and the plea having been added accordingly, of new close the record; and having heard parties further in the cause, recal the interlocutor of the Lord Ordinary of 9th January last; adhere to his Lordship's interlocutor of 23rd November last."

The pursuer thereafter paid the expenses in which he was found liable in the previous case against Maclullich, and a proof before answer was allowed.

Counsel for the Pursuer—Party.

Counsel for the Defender — M'Kechnie — Forsyth. Agent—Thomas Carmichael, S.S.C.

Wednesday, March 6.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

WHYTE AND OTHERS (DALGLISH'S TRUSTEES) *v.* DALGLISH AND OTHERS.

Succession — Testament — Construction — Bequest Burdened with Trust for Issue — Vesting — Intestacy.

A truster appointed his trustees to divide the residue of his estate in certain shares among his children, payable as soon as his estate was realised, and upon the death of his wife to divide in like manner the sum set apart for her annuity. The shares of deceasers dying before payment, and without issue, were to be divided among survivors, and the issue of deceasers were to take their parents' share.

By a codicil the testator directed his trustees "to invest the shares of my means and estate falling to my daughters at my death, and at the death of their mother, in case she shall survive me, so soon as the same is realised and can be invested, upon heritable security, taking the rights thereto conceived in favour of such daughters in liferent, for their liferent use allenarly, and to the child or children of their bodies, if more than one, equally among them in fee."

In an action of multiplepoinding at the instance of the trustees, *held* that the provisions to children vested *a morte testatoris*; that the sole object of the codicil was to protect the capital of a daughter's share for possible children; and that it did not result in intestacy on the part of the testator with respect to the share of a daughter dying without issue.

James Dalglish, manufacturer in Glasgow, died on 24th July 1849, leaving a trust-disposition and settlement dated 7th May 1847, by which he disponed to trustees his whole estate, for certain purposes, *inter alia*—(2) For providing an annuity to his widow if she should survive him. (4) "I appoint my said trustees to divide the remainder and residue of my said means and estate into twenty-eight equal parts or shares, four of such parts or shares to be paid to each of my four daughters, and six parts or shares to each of my two sons; and on the death of my said spouse, in case she shall survive me, I direct my said trustees to divide the sum set apart for answering her annuity, and the proceeds of the house and furniture liferented by her, among all my children in the same proportions, said shares to be payable to my said children as soon as my estate shall be realised and converted into cash; which provision in favour of my said daughters shall be exclusive of the *jus mariti* or right of administration of any husbands they may presently have or may afterwards marry, and not subject to the debts or deeds of such husbands or the diligence of their creditors, and the same shall be under their entire control and disposal; and in the event of the death of any of my said children before receiving payment of their shares without leaving lawful issue, the share of such deceaser shall be divided among my surviving children or their issue in the proportions foresaid; and in the event of the death of any of my said children leaving lawful issue, the share of such deceaser shall be paid to said issue equally, share and share alike." By codicil dated 3rd March 1848 he directed and appointed his trustees "to invest the shares of my means and estate falling to my daughters at my death, and at the death of their mother, in case she shall survive me, so soon as the same is realised, and can be invested upon heritable security, taking the rights thereto conceived in favour of such daughters in liferent for their liferent use allenarly, and to the child or children of their bodies, if more than one, equally among them in fee; declaring that said liferent provisions shall be purely alimentary, exclusive of their husbands' *jus mariti*, not attachable for his or their debts, nor assignable by my said daughters. But providing and declaring that my said daughters or any of them may, if so disposed, by a writing under their hands, continue the liferent provi-

sion to their husbands during their respective lifetimes, burdened with the support of the children, and may divide and apportion the fee among their children in such proportions, and under such limitations and conditions, as they think proper to impose."

The truster was survived by a widow, who died 6th September 1876; by one son Robert James Dalglish, who received payment of his share, and four daughters, the capital of whose shares was secured to meet the claims of their issue in terms of the codicil. Robert James Dalglish died without issue on 9th November 1886, leaving a widow in whose favour he executed a general disposition and settlement. Mary Dalglish or Price, one of the daughters, died on 30th November 1865 leaving issue, and Isabella Dalglish or Whitehead upon 31st May 1869, leaving one son.

The capital of the shares of these two daughters were after their respective deaths paid to their children. The annual income of the share liferented by the testator's daughter Margaret Dalglish or Wilson, who was alive, had all along been paid to her, and the annual income of the share liferented by the remaining daughter Jane Dalglish or Bannerman was duly paid to her down to the date of her death, which took place on 22nd January 1888. Mrs Bannerman left a settlement dated 22nd February 1887, by which she appointed certain persons her executors. Certain questions arose regarding the disposal of the share of the estate of the late James Dalglish liferented by Mrs Bannerman, several of the representatives of the late Mr Dalglish maintaining that the share had in consequence of Mrs Bannerman dying without issue become intestate succession of the truster James Dalglish, if it were not governed by the accretion clause in the trust-deed, while her executors maintained that the share vested absolutely in her, and was conveyed to them by her settlement. In consequence of these questions the trustees of Mr Dalglish raised this action of multiplepoinding and exoneration in May 1888 calling these parties as defenders."

Upon 7th July 1888 the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that the claimants Thomas Carrit and others, executors of the deceased Mrs Jane Dalglish or Bannerman, are entitled to be ranked and preferred to the whole fund *in medio* in terms of the first branch of their claim, No. 8 of process, under deduction of expenses, and continues the cause that the amount of said fund may be ascertained: Finds all the parties entitled to their expenses out of the fund *in medio;* appoints accounts thereof to be lodged, and remits the same to the Auditor to tax and report: Grants leave to reclaim.

"*Opinion.*—The scheme of this will and codicil seems to be that there is, first, what is not strictly a residuary destination but a division of the estate unequally—sons receiving larger shares than daughters. And then in the will there follows a proper residuary clause dealing with the case of any of the children dying before receiving payment of his or her share. It appears to me that under the will, apart from the codicil, there cannot possibly be intestacy, because every contingency is provided for.

"Now, the only alteration made upon that scheme by the codicil is this—The testator proposed that, instead of giving the daughters their shares absolutely at his death, settlement should be made in their favour, and he directs that to be done by the trustees as soon as his property is realised and capable of investment. They are to take separate rights heritably secured in favour of the daughters, with a destination which is there described. It appears to me therefore that this case has this analogy with the two cases of *Fulton* in 1880 and *Lindsay* in 1881, that it is a case of a trust for members of the testator's family to be effected not by the direct and immediate dispository act of the testator, but by a conveyance to be afterwards executed by the trustees in conformity with directions given to them. Then it will be necessary to consider what would be the true construction of a conveyance of a heritable security to daughters in the terms expressed in the codicil, taking along with the codicil the leading direction of the will, which is referred to in the codicil.

"Now, there is a series of decisions regarding destinations in liferent and fee, and so far as any particular destination has been interpreted the decisions must receive effect, because this branch of the law has been very authoritatively systematised. I must observe, however, that the meaning put upon the same words of destination varies according to the cause of granting, and the same words receive very different interpretations according as they occur in a deed of purchase or in a deed of gift.

"Again, if it is a question of carrying out a power to settle money, we must find out what are the proper words of destination, and give effect to that power; and we are not necessarily to use the precise words of the power in the deed carrying it into execution. Supposing the destination had been in the very words in the codicil, 'to the child or children of their bodies, if more than one, equally among them in fee.' That, according to the old authorities, would not have vested any beneficiary right of fee in the daughter; she would merely be a liferenter with a fiduciary fee for behoof of her children; and if no children, the fee is undisposed of under the terms of the settlement. That is, as I take it, the case contemplated by the Lord President in his opinion delivered in the case of *Fulton;* the fee is untransferred; and there being no proper residuary clause in Fulton's will the result was that this particular share fell into intestacy. Then it is equally clear that if this had been a case of a title-deed of property purchased by the lady herself, then, according to the destination in the codicil, the daughter would be the fiar, and would hold the fiduciary fee for children, but failing children for herself. In short, it would be a right of fee with a simple destination. But now this is a case of a conveyance to be executed by trustees in such terms as will carry out the testator's will, and while my attention has been called to the observation of the Lord President in *Fulton's* case—that whatever was directed to be done must be held as done—an observation which is of course indisputable—that still leaves open the consideration of the question, what is it that was directed to be done? This question cannot be determined by merely looking at the bare terms of the codicil. The testator's intention must be collected from the will and codicil taken together. This is the principle

I think, of the later decision in *Lindsay's* case, a decision pronounced by the two Divisions sitting together. That case I hold to be entirely consistent with *Fulton*, because the Court were dealing with two different things. In *Lindsay's* case it is true you have not a will and a codicil as we have here, but you have two clauses in the same will, which on a first impression appear to be inconsistent with one another, and therefore the question is much the same as if it had arisen in the construction of a will and codicil which were more or less inconsistent.

"Now, the view of the majority of the Court in the case of *Lindsay*, which view seems to me to be in accordance with the best principle of trust interpretation, is that you are to look at the leading intention in favour of the family, and if there is a leading intention clearly expressed in favour of making an out-and-out gift to the family, and there is in a subsidiary clause a direction to make a settlement, you must frame the settlement in such terms as will prevent the share from going over to another family. So strongly fixed is this principle (that the trustees in framing the deed must ascertain the testator's intention from the whole instrument) that in the two other cases that have been referred to—*Ross's Trustees* and *Lady Massy*—the Court directed the execution of a deed in the form of a destination which was unfamiliar to Scotch conveyancers (a very unusual form of destination), because that only was supposed to be capable of carrying out the testator's wishes. Accordingly I come to the conclusion that in the present case the trustees would not have carried out the testator's directions if they had taken heritable security in the precise terms used in the codicil. It would be their duty to take into account the leading direction of the will itself, which is in no way expressly revoked, and which directs a partition amongst the families, giving certain shares to sons and certain shares to daughters. The security to be taken would have provided that in the case of there being no family the share of the deceaser should be divided amongst the surviving children or their issue. I ought to notice that an argument was founded on the closing words of the codicil—'But providing and declaring that my said daughters, or any of them, may, if so disposed, by a writing under their hands, continue the liferent provisions to their husbands.' I do not found much upon that clause, because it is also capable of being read as a limitation of the fee to the daughters. It would rather be in favour of the daughters having a more limited right than one of fee in the event of there being children of the marriage. But then, in that event, the children were to get the fee, and it is only in that case that it is thought necessary to give the wife a power of continuing her liferent to her husband. These words do not seem to me to militate against the theory that in the event of failure of issue the daughter is to have the reversion of the fee.

"The result is that I sustain the claim of Mrs Bannerman's executors."

Ralph Whitehead, the only son of Mrs Isabella Dalglish or Whitehead, one of the defenders, reclaimed, and argued—By the terms of the codicil, as altering the provisions of the 4th clause of the principal deed, the truster Mr Dalglish intended that a bare liferent should be given to his daughters, and that if anyone of them died without issue, then her share should revert to his trustees, and be divided among the other children either according to the accretion clause, or as intestate succession—*Fulton's Trustees* v. *Fulton*, Feb. 6, 1880, 7 R. 566. That case was identical with the present with the exception that here there was a residuary clause, but if the share was not carried by that clause, then it fell into intestacy according to the rule laid down in that case. The case of *Lindsay*, on which the other side relied, was very special, and different from this case in another respect, as there was there only one deed, while here there were two which were inconsistent with each other.

The respondents (Mrs Bannerman's executors) argued—The truster had given the fee of a certain number of shares of his estate to his daughters, these therefore vested in them *a morte testatoris*, although the period of division of part of the estate was not till Mrs Dalglish's death. The direction in the codicil did not take the fee away from the daughters; it only provided for the protection of their possible children. There was no issue of this marriage, therefore the clause in the codicil was inoperative. Mrs Bannerman's share had vested in her, and was at her disposal. The principle of the case had been already decided in the case of *Lindsay's Trustees* v. *Lindsay*, Dec. 14, 1880, 8 R. 281; *Gibson's Trustees* v. *Ross*, July 12, 1877, 4 R. 1039. Mrs Bannerman took an absolute interest in her share, subject only to the constitution of a trust in the event of her having children, and on her death without issue the property passed to her executors—*Bryson's Trustees* v. *Clark*, Nov. 26, 1880, 8 R. 142; *Howat's Trustees* v. *Howat*, Dec. 17, 1869, 8 Macph. 337; *Bradford* v. *Young*, July 19, 1884, 11 R. 1135.

At advising—

Lord Lee—The competition which has arisen in this case depends upon the question whether under the trust settlement of the late Mr James Dalglish his daughter Jane Dalglish or Bannerman, who survived him and died without issue, had a vested right to a share of his means and estate. The Lord Ordinary has decided in favour of vesting as at the testator's death, and I am of opinion that the Lord Ordinary's judgment is right.

The settlement is composed of two parts, the original trust-deed and a codicil. These must be read together, and as the codicil does not expressly revoke any of the provisions of the original settlement I think that it cannot be construed as altering the settlement excepting to the extent necessary to give effect to the directions which it contains.

The leading purposes of the trust are, firstly, to provide an annuity of £400 to the testator's widow; secondly, in case of his daughter Isabella being unmarried at his death, to pay to her a legacy of £500 over and above her share of his means and estate at the first term of Whitsunday or Martinmas after his decease; and thirdly, to divide the residue among his children in certain proportions. It is upon the terms of the deed and codicil as regards this last purpose that the question has arisen.

The provision of the deed is as follows:—"In

the fourth place, I appoint my said trustees to divide the remainder and residue of my said means and estate into twenty-eight equal parts or shares, four of such parts or shares to be paid to each of my four daughters, and six parts or shares to each of my two sons; and on the death of my said spouse, in case she shall survive me, I direct my said trustees to divide the sum set apart for answering her annuity, and the proceeds of the house and furniture liferented by her, among all my children in the same proportions and shares, to be payable to my said children as soon as my estate shall be realised and converted into cash; which provision in favour of my said daughters shall be exclusive of the *jus mariti* or right of administration of any husbands they may presently have or may afterwards marry, and not subject to the debts or deeds of such husbands or the diligence of their creditors, and the same shall be under their entire control and disposal; and in the event of the death of any of my said children before receiving payment of their shares without leaving lawful issue, the share of such deceaser shall be divided among surviving children or their issue in the proportions foresaid; and in the event of the death of any of my said children leaving lawful issue, the share of such deceaser shall be paid to said issue equally, share and share alike."

But by the codicil the testator, in virtue of the reserved powers in his deed of settlement, directed his trustees "to invest the shares of my means and estate falling to my daughters at my death, and at the death of their mother, in case she shall survive me, so soon as the same is realised and can be invested upon heritable security, taking the rights thereto conceived in favour of such daughters in liferent for their liferent use allenarly, and to the child or children of their bodies, if more than one, equally among them in fee; declaring that said liferent provisions shall be purely alimentary, exclusive of their husbands' *jus mariti*, not attachable for his or their debts, nor assignable by my said daughters: But providing and declaring that my said daughters, or any of them, may, if so disposed, by a writing under their hands, continue the liferent provision to their husbands during their repective lifetimes, burdened with the support of the children in such proportions and under such limitations and conditions as they think proper to impose."

The testator was survived by his widow (who died in 1876) and also by one son and four daughters. The son's share was duly paid to him, but the capital of the shares falling to the daughters was retained to meet the claims of children under the codicil. One of the daughters Jane Dalglish or Bannerman has recently died without issue, but leaving a settlement, and it is her share that is in question.

It is said as against the claim of her testamentary representatives that the effect of the codicil was to suspend vesting, and that her share has either become undisposed of residue or is disposed of by the survivorship clause of the deed.

My opinion is that the codicil was not intended to result in intestacy on the part of the testator with respect to the share of a daughter dying without issue, and I think that its terms do not support a construction of the settlement which shall have that result. It appears to me that the sole object of the codicil is to protect the capital or fee of a daughter's share for her children, if there should be such children. It is settled by the case of *Lindsay's Trustees*, 8 R. 281, that this is a purpose which is not inconsistent with vesting. In that case there was a direction that the £1000 bequeathed to Catherine Bruce Lindsay should be held so as to give "to herself a liferent only thereof, and to the lawful issue of her body equally among them the fee thereof." But the sum was, in the first place, bequeathed to her as a legacy payable six months after the testator's death. It was held that the direction to secure the fee to children was contingent on the existence of children, and there being none, that her right was free of the direction which was applicable only to that contingency. In short, the principle affirmed by that decision was that where a bequest is merely burdened with a trust for children, that burden falls off if children should not exist. The restriction of the parent's right for behoof of his or her children therefore implies no purpose of creating intestacy.

The case of *Fulton's Trustees*, referred to by the reclaimer's counsel, 7 R. 566, was different in one material respect from the present. It was not clear that the terms of the original bequest were such as to confer a fee upon the daughters, whereas in the present case it was conceded by the Dean of Faculty that under the deed of settlement, had it stood alone, the daughter must have taken a fee *a morte testatoris*. But if that case decided the point which is here raised, and which was also raised in the case of *Lindsay's Trustees*, it must be held to have been overruled by the decision in the latter case, which was a unanimous judgment of seven Judges, including all the Judges who took part in the decision of *Fulton's Trustees*.

With respect to the claims founded on the clause of survivorship in the trust-deed two views are presented. For the claim of the son's representatives is founded on the contention that the clause brings in all the children who survived the testator; while the other claims limit its application to those who survived Mrs Bannerman. My opinion is that the time contemplated in the deed was the testator's death, although the actual division and payment of the sum set apart to meet the wife's annuity was postponed till her death. And it was not disputed that if the deed had stood alone vesting must have taken place at that time. But in this view it is clear that there was no postponement of vesting, and that as Mrs Bannerman was one of the children then surviving, she cannot have been excluded by the destination in favour of survivors.

It was not contended that the terms of the trust-deed in this case gave ground for any argument such as was sustained in the case of *Howat's Trustees*, 8 Macph. 337.

The Court adhered.

Counsel for the Reclaimer—D.-F. Mackintosh, Q.C.—Wallace. Agents—Russell & Dunlop, W.S.

Counsel for the Respondents—Graham Murray. Agents—J. & A. Hastie, W.S.