property was really bought for the purpose of enabling the purchasers and their fellow members to enjoy the amusement of bowling, and that an agreement was come to that whenever the Club should be able to raise the necessary sum of money, the purchasers should make over the ground to the Club, which, I suppose, would be done by means of a declaration of trust, declaring that the disponees were in future to hold for the Club. Such an obligation, it is said, is constituted by a document quoted on record, to which I need not further refer. In any case, the result of the agreement is sufficiently averred, but that is not a trust, it is an obligation undertaken by the owners of the estate to another body of persons who never were the owners of the estate, and could not declare a trust regarding it. The obligation to convey (if the paper amounts to an obligation) would, of course, be conditional on payment of the price or rental of the green.

I come therefore to the same conclusion as your Lordships, that this is an agreement relating to heritage, and as such can only be established by writ or oath.

LORD KINNEAR, who had been absent from the greater part of the debate, pronounced no opinion.

The Court adhered.

Counsel for the Pursuers—The Dean of Faculty—Clyde. Agents—George Inglis & Orr, S.S.C.

Counsel for the Defenders—Ure, Q.C.—Cook. Agents — Simpson & Marwick, W.S.

Thursday, January 27.

SECOND DIVISION.

ANDERSON *v.* SMOKE.

Trust—Construction—Conveyance to Trustees with Power of Disposal—Resulting Trust for Representatives of Truster.

In 1889 a father placed on deposit-receipt in name of his two daughters a certain sum, and handed them a memorandum for their guidance in administering the sum for behoof of his son Archibald. He desired them to pay this money and the interest on it "to and for behoof of Archibald, at such times and in such ways and sums as I may direct, and failing direction from me, at such times and in such ways and sums as they or the survivor of them may think proper. . . . Should the whole not be disposed of in the lifetime of Archibald, my said daughters may dispose of the balance in any way they should think proper."

The father died in 1892, and Archibald in 1897, both leaving trust settlements. Prior to Archibald's death his sisters had made payment to him from time to time of part of the sum deposited.

Held that no direct gift of the sum had been made in the memorandum either to Archibald or to the two daughters, and that the balance of the sum remaining at Archibald's death formed part of the father's trust-estate.

On 3rd December 1889 John Anderson, Denham Green, Edinburgh, placed on deposit-receipts in the names of his daughters Victoria and Alicia the sum of £1980, and delivered the deposit-receipts to them, one for £1200 with the Chartered Mercantile Bank of India, London, and China, and the other for £780 with the Commercial Bank of Scotland, Limited. He also handed to them a writing in the following terms:—"*Denham Green, Trinity, Edinr., 3rd Dec.* 1889.—Memorandum for the guidance of my daughters Victoria and Alicia in administrating the sums which I have recently placed in their names in trust for behoof of my son Archibald. The sums amount to £1980, being £2000 less £20, remitted by me on the second instant to Archibald at Toronto, of which £1208 is on deposit with the Chartered Mercantile Bank of India, London, and China, and £780 on deposit with the Commercial Bank of Scotland. This money and any interest and dividends arising from it or any part of it I wish them to pay to or for behoof of Archibald, at such times and in such ways and sums as I may direct, and failing direction from me, at such times and in such ways and sums as they or the survivor of them may think proper. I recommend them to keep an account of how the money, principal and yield, is applied, but they are under no obligation to account for it to Archibald or any other person, and Archibald has no right to and cannot claim it or any part of it. Should the whole not be disposed of in the lifetime of Archibald, my said daughters may dispose of the balance in any way they should think proper. They may invest the funds in any way they like, and they shall not be responsible to any one for loss which may arise out of the investment.—JOHN ANDERSON."

On 5th May 1892 John Anderson died leaving a trust-disposition and settlement disposing of his whole property.

In July 1897 Archibald Anderson died leaving a last will and testament disposing of his whole estate. Down to the date of his death his sisters Victoria and Alicia had made payments to him from time to time out of the sum of £1980. At his death the sum still held by them in terms of their father's writing amounted to £1000 or thereby.

Disputes having arisen as to the person or persons to whom this sum of £1000 belonged, a special case for the settlement of the question was presented by (1) the two daughters; (2) Archibald Anderson's trustee; and (3) John Anderson's Trustees.

The question of law was—"To which of the parties hereto does the said sum of £1000 or thereby belong?"

Argued for the first parties—On the death of Archibald they became entitled to the £1000 absolutely, and were not

bound to pay it either to the second or to the third parties. There was no direct gift to Archibald in the memorandum. They were entitled to the sum in terms of the instruction of the testator that after Archibald's death they might "dispose of the balance in any way they should think proper." The cases quoted by the third parties were all cases of testamentary trusts in which property had been left to trustees and executors for the purposes of administration and distribution. The present was not a trust for distribution. The trust was only imposed as regards the amount spent for behoof of Archibald. The word "administrating" referred to Archibald's lifetime

Argued for second party—The sum in question was held in trust for Archibald by the first parties, and vested in him, subject to the power of administration conferred upon the first parties. Archibald had therefore power to test on the said sum, and it was effectually carried to the second party by Archibald's settlement. The direction that the trustees were after Archibald's death to dispose of the balance as they thought proper was repugnant to the gift which had been made to Archibald in the former part of the note, and must be held *pro non scripto*.

Argued for third parties—There was here no direct gift to Archibald, and the gift to the first parties was a trust, and not a power including ownership. The trust was of so indefinite a nature that it could not be carried into effect; it was void from uncertainty. The sum should therefore be handed over to them to administer as part of John Anderson's trust estate—*Sutherland's Trustees* v. *Sutherland's Trustee*, July 6, 1893, 20 R. 925; *Fowler* v. *Garlike*, 1830, 1 Russell & Mylne, 232; *Ellis* v. *Selby*, 1836, 1 Mylne & Craig, 286; *Buckle* v. *Bristow*, 1864, 10 Jurist (N.S.), 1095.

LORD YOUNG—This case has been fully argued. It has appeared to me to be a very clear case. I think that Mr Anderson created a trust for behoof of his son Archibald. He placed in the hands of his two daughters Victoria and Alicia as trustees £2000, less £20, which he had already advanced to Archibald. This sum was to be administered by them "for behoof of my son Archibald." Then he desires them to pay this money "to and for behoof of Archibald at such times and in such ways and sums as I may direct, and failing direction from me, at such times and in such ways and sums as they or the survivor of them may think proper." That is a typical trust, with typical trust directions, the immediate beneficiary being Archibald. The trust might have been exhausted by the truster, during his life, or the trustees, after his death, giving the whole to Archibald, if that had been thought proper or expedient. There was expended on Archibald's behalf part of the fund, and at his death there remained £1000. Now, the direction in the trust-memorandum as to that is, "Should the whole not be disposed of in the lifetime of Archibald, my said daughters may dispose of the balance in any way they should think proper." We had a contention on behalf of the daughters that the direction is equivalent to saying that if any balance remained after Archibald's death the truster made a gift of it to the two daughters. I cannot assent to that contention. The truster made no such gift. All he did was to direct that they as trustees were to dispose as it as they should think proper.

On the other hand, the executor of Archibald has maintained that as no gift of the money had been made to the daughters, they held it on behalf of Archibald, and that the effect of the deed was to make Archibald the owner of the money, and that he as his representative was now entitled to it. I cannot so read the deed. There was no gift to Archibald. The idea of such a thing is barred by the direction to the daughters to pay as trustees to him whatever part of the fund they might think proper, and at his death to dispose of the balance in any way they might think proper.

I think it is a gift neither to Archibald nor to the two daughters. We have here simply a general direction to trustees to dispose of a sum as they may think proper. There is good authority, some of which was quoted, that such a direction is not enforceable, and the consequence is a resulting trust for the heirs-at-law or representatives of the truster under his will, or according to intestate succession if he left no will. These in the present case are the persons designed in the will of Mr Anderson. I think therefore that the £1000 must be handed over to the third parties, who are the trustees and executors of Mr Anderson, to dispose of accordingly.

LORD TRAYNER, LORD MONCREIFF, and the LORD JUSTICE-CLERK concurred.

The Court pronounced the following interlocutor:—"Answer the question therein stated by declaring that the £1000 or thereby in question falls to be paid to the parties of the third part: Find and declare accordingly, and decern."

Counsel for First Parties—The Lord Advocate—Craigie. Agents—Mackenzie & Black, W.S.

Counsel for Second Party—Dundas, Q.C.—Blackburn. Agents—Mackenzie & Black, W.S.

Counsel for Third Parties—Macphail. Agents—H. & H. Tod, W.S.