the widest and most general sense in which it can be used in describing buildings as distinguished from a religious association. Therefore the section goes on to add after the word "church" the words "chapel, meeting-house, or premises in Scotland exclusively appropriated to public religious worship." Now, I think that last phrase is a very general description of what is meant by a church which, in the sense to which I have referred, is a building. There are, no doubt, religious bodies who deny the name of church to an unconsecrated building. There are others who might take exception to certain buildings for public worship, but speaking generally and in ordinary language, what is commonly meant by a "church," speaking of the church as a building, is simply in the words of the statute premises exclusively appropriated to public religious worship. Now, the exemption being in favour of such premises only, it appears to me to be perfectly clear on the description which is given to us of such halls as those for which the exemption is now claimed, that they are not such premises. They are not in any sense churches or exclusively appropriated to public religious worship. They are halls which have been erected or hired by certain congregations for charitable and educational purposes which they desire to prosecute, presumably as part of their proper work as Christian congregations, but which they do not think it fit or convenient to carry on within the church itself. It is for that last reason that they find it necessary to have separate buildings for carrying out these useful and charitable purposes. The only question therefore on the construction of the statute is, whether those separate buildings are churches or not, and I quite agree with your Lordship that they are not exclusively appropriated to public religious worship, or appropriated to public religious worship at all. They are therefore in my judgment not churches, and not within the exemption, and I agree that when that has been once determined, it is quite unnecessary to consider what is the effect of the proviso attached to the exemption, which is intended only to save churches or premises exclusively appropriated to public religious worship from being liable to assessment merely because of parts of them being used for Sunday or infant schools. I therefore agree with your Lordship in the way it is proposed to answer the question of law.

The Court answered all the questions in the negative.

Counsel for the First, Second, Third, and Fourth Parties—Sol.-Gen. Dickson, K.C.—Macphail. Agents — Menzies, Blair, & Menzies, W.S.

Counsel for the Fifth Parties—W. Campbell, K.C. — Clyde. Agent—R. Addison Smith, S.S.C.

Tuesday January 15.

SECOND DIVISION.

[Sheriff Court at Forfar.

PEAT *v.* PEAT'S TRUSTEES.

Succession—Annuity—Preference—Income Insufficient to Meet Annuity—Direction to Convey Specific Subjects on Death of Annuitant.

A testator by his trust-disposition and settlement directed his trustees to pay to his widow an annuity of £35 a-year, and after her death to divide the residue of his estate equally among his children. To secure the annuity the trustees were empowered to retain such a portion of the heritage as would yield a rental sufficient for the purpose, or to sell and invest such a sum from the proceeds as might be necessary to yield the annuity. The annuity was increased to £40 by a codicil, which was also subscribed by the testator's wife, who accepted that provision in satisfaction of her legal rights. By a later codicil the testator directed his trustees, upon the death of the survivor of himself and his wife, to convey to each of his children certain specified heritable subjects, thereby disposing of his whole heritable estate. The testator's executry funds were of trifling amount, and were exhausted in payment of debts and expenses. The income of the trust estate was not sufficient to pay the annuity, and the trustees made advances from time to time to make good the deficiency. After the widow's death one of the beneficiaries brought an action against the trustees for decree ordaining them to deliver to him a disposition of the heritable subjects bequeathed to him by the testator.

Held that the annuity was a preferable charge upon the *corpus* of the trust-estate, and that the trustees were not bound to convey to the pursuer the heritable subjects bequeathed to him except upon condition of receiving payment from him of his share of the advances made by them.

Expenses—Taxation as between Agent and Client—Trustees and Beneficiary—Extrajudicial Expenses.

Circumstances in which *held* that the trustees who were successful in an action brought against them by the sole remaining beneficiary were entitled (1) to expenses in the action taxed as between agent and client, and (2) to charge against the trust estate before accounting therefor to the pursuer all other expenses incurred by them during their controversy with him.

James Peat, shipowner in Arbroath, died on 30th August 1890, leaving a trust-disposition and settlement dated 4th August 1873, and four relative codicils, dated respectively 17th December 1877, 20th June 1884,

2nd May 1888, and 19th July 1888, whereby he conveyed his whole estate to certain trustees for the purposes therein specified.

By the fifth purpose of the trust-disposition and settlement the trustees were directed "to make payment to the said Ann Young or Peat my wife, in the event of her surviving me, during all the days of her lifetime and while she shall continue my widow, of a free yearly annuity (without any deduction whatever) of Thirty-five pounds sterling . . . And for the purpose of securing the said annuity my said trustees are hereby directed and empowered to retain unsold such a portion of my heritable subjects as will yield a rental sufficient for the purpose, or if it be found expedient to sell these, then to invest such a sum from the proceeds of my estate as may be necessary to yield the foresaid annuity, and that upon such security as they in their discretion shall think fit, taking the bonds or other securities in their own names for the purposes of this trust."

By the sixth purpose the trustees were directed, after the foregoing purposes were answered, to realise the residue, including the portion held or set apart to meet the widow's annuity, and after deducting therefrom all outlays, charges, and expenses, to divide the same equally among the truster's children.

By the seventh purpose they were directed, in the event of a debt of £125 due to the truster by his son Alexander Peat not being paid, to retain the same, with interest at 4 per cent. out of his share of residue.

By the codicil dated 17th December 1877 the truster increased the annuity payable to his wife from £35 to £40. The codicil further bore that "the said Ann Young or Peat by subscribing these presents accepts of the provisions in her favour contained in my said trust-disposition and settlement and in this codicil as in full and in lieu of all her claims for terce of lands, half or third of moveables, and every other claim she can ask or demand by and through my decease any manner of way." The codicil was duly signed by the truster's wife.

By the codicil dated 20th June 1884 the truster provided as follows:—"In the third place, upon the death of the survivor of me and the within named Mrs Ann Young or Peat, my wife, I hereby order and direct my said trustees at the expense of the trust estate to dispone and convey the several heritable subjects and others after mentioned to my children after named and designed respectively, with entry thereto at the first term of Whitsunday or Martinmas occurring after the death of the survivor of me and my said wife, viz., First, to the within designed Alexander Peat my son, and failing him to his children equally amongst them if more than one, the subjects known as the Salt-Work, lying on the east side of the Newgate of Arbroath." By the same codicil the truster directed his trustees to convey certain other specified heritable subjects to each of his three daughters. The truster thus disposed of his whole heritable estate. By the codicil dated 2nd May 1888 the trustees were directed to retain and pay Alexander Peat's debt of £125 without charging any interest thereon.

The truster's wife survived him, and died on 21st October 1898. His executry funds were of trifling amount, and were more than exhausted in payment of his debts and other necessary expenses. The free yearly revenue of the heritable estate was insufficient to pay the widow's annuity of £40, and the trustees, to meet the deficiency and also certain trust expenses, instead of selling any part of the heritage, from time to time advanced such sums as were required. These advances ultimately amounted to the sum of £104, 17s. 4d. After the death of the truster's widow the trustees conveyed to the truster's daughters the several heritable subjects respectively bequeathed to them, and the daughters repaid to the trustees their respective shares of the said sum of £104, 17s. 4d., and discharged them of their intromissions. On 30th November 1899 the trustees, who were then in a position to wind up the trust, sent the trust accounts and vouchers to the agents of Alexander Peat along with a draft discharge. A correspondence ensued, in the course of which the trustees offered to convey to Alexander Peat the heritable subjects bequeathed to him by the truster, upon payment (1) of £28, 4s. 4d., being his share of the said sum of £104, 17s. 4d., with the addition of £2 of estate-duty; and (2) of £75, being the balance of the debt of £125 due by him to the truster. Alexander Peat disputed the trustees' claim to be relieved of the sums advanced by them to make up the widow's annuity and to defray the expenses of the trust, and objected also to certain charges in the trustees' accounts. He did not dispute that he was bound to repay the £75, or that he was liable for the £2 of estate-duty.

Thereafter he raised an action against the trustees in the Sheriff Court at Forfar, in which he craved the Court to find and declare that the defenders were bound to convey to him the heritable subjects known as the Salt-Work on payment to them of the said sum of £75, and to ordain them to deliver to him a disposition thereof.

He pleaded—"(2) The bequest to the pursuer being a specific bequest, the defenders were not entitled to encroach on the capital of said bequest. (3) On a sound construction of said trust-disposition and settlement and codicils the widow was only a liferentrix of the testator's estate."

The defenders pleaded—"(2) The defenders' administration of the trust having been proper and legal, and they having offered to convey to the pursuer, the said Alexander Peat, the subjects referred to in the said codicil dated 20th June 1884, now forming his share of the residue of the trust-estate, on payment of the said sums of £75 and of £28, 4s. 4d., the defenders are entitled to be assoilzied with expenses."

The Sheriff-Substitute (LEE), by interlocutor dated 1st August 1900, found, *inter alia*, "that upon a sound construction of the whole testamentary writings of the

deceased James Peat, the heritable estate was only charged with the widow's annuity to the extent of the income derived therefrom, and that the defenders are not entitled, before conveying the heritable estate to the pursuer, to demand repayment from the capital thereof of advances made by them to supply deficiencies of income for payment of the said annuity," &c.

Note.—"The intention of the testator clearly was that his widow's annuity should be paid from the income derived from his heritable estate. The specific bequests of the heritable subjects practically put the widow in the position of a liferentrix, and prevented encroachments by the trustees on the capital — *Hutchison's Trustees* v. *Hutchison*, June 4, 1886, 13 R. 915. A different state of matters might have arisen had the widow's necessary maintenance been in question, though I doubt whether even in such circumstances the trustees could have encroached upon the capital of this heritable estate without the authority of the Court. But the question which arose in *Anderson* v. *Grant*, January 28, 1899, 1 F. 484, does not arise here. In that case alimentary payments out of capital were authorised exactly on the principles which would have weighed in holding the ultimate beneficiaries liable as the representatives of the truster or *ex debito naturali* in the aliment of those whom the truster himself was under a natural obligation to maintain. If the widow in this case had required aliment in supplement of her husband's provisions and of her own means, the pursuer's obligation to contribute towards it would have been unanswerable. But this does not appear to have been the case here, and certainly no such case is presented in the defences. The defenders paid the widow her full annuity, not because that was necessary for her aliment, but because on a wrong construction, as it seems to me, of their powers and duties, they considered the widow's annuity to be under the testamentary writings a debt recoverable from the capital of the heritable estate." . . .

The defenders appealed to the Court of Session, and argued—The Sheriff-Substitute had taken an erroneous view of the intentions of the truster. By the terms of the trust-disposition the widow's annuity was clearly a debt payable if necessary out of the *corpus* of the estate. The directions in the codicil of 20th June 1884 did not affect the quality of the widow's rights. The specific bequests of heritage thereby made were no more than a convenient mode of distributing the residue after the primary purpose of the trust, viz., the widow's annuity had been satisfied. Moreover, this was truly a contract right in the widow, for she accepted the provisions in her favour in satisfaction of all her rights—*Kinmond's Trustees* v. *Kinmond*, February 5, 1873, 11 Macph. 381; *Adamson's Trustees* v. *Adamson's Executors*, July 14, 1891, 18 R. 1133; *Mason* v. *Robinson* (1878), 8 Ch. D. 411.

Argued for the pursuer and respondent—The Sheriff Substitute was right. Admittedly the widow's annuity was made a preferable charge upon the estate by the terms of the trust-disposition. But the effect of the codicil of 20th June 1884 was to reduce the widow's annuity to a liferent of the estate, which might yield less than £40. The legacies of heritage given by that codicil were specific legacies preferable to the widow's liferent. No doubt the truster thought the income would be sufficient to pay the annuity, and had not provided for the contingency of its being insufficient. But if the trustees had advanced money on a misapprehension of the widow's rights, they, and not the pursuer, must suffer the loss. — *Jamieson's Trustees* v. *Jamieson*, December 7, 1899, 2 F. 258; *Baker* v. *Baker*, (1858), 6 Clark's H. of L. Ca. 616; *Tarbottom* v. *Earle* (1863), 11 W. R. 680; *Michell* v. *Wilton* (1875), 23 W. R. 789; *Miller* v. *Huddlestone* (1852), 21 L.J., Ch. 1.

LORD YOUNG—I think it is not necessary to call for further argument. It appeared to me on reading the record that the Sheriff-Substitute had taken an erroneous view of the legal rights of the parties, and that impression has been strengthened into a conviction after hearing the arguments on both sides. I am of opinion that the pursuer, the only son of the truster, is as responsible for the debts of the truster as any of the other beneficiaries, the only others being his sisters. They have recognised the propriety of the trustees' conduct in avoiding selling or burdening the trust estate in order to meet the deficiency arising in respect of the widow's annuity. They see no objections to the trustees' accounts, from which it appears that at the winding-up of the accounts there is a sum of £104 owing to the trustees for the advances they made in order to avoid selling or burdening the trust estate. The pursuer's sisters are willing that their share of that sum should come out of their interest. In my opinion the pursuer, whose interest in the trust estate is the salt-works—the legacy of the salt-works—is equally liable for his share of the proper trust expenses, and among these are the advances made by the trustees, his share of which amounts to £28, 4s. 4d. The pursuer says that his mother's annuity ought to have been diminished if the income of the estate was insufficient, and that the sum which the trustees seek to charge against him should be disallowed. I think that is not only a contemptibly mean defence, but I also think that it is untenable in law. In my opinion the annuity was payable to the pursuer's mother, and was properly paid by the trustees, and I think that they acted in a praiseworthy manner in avoiding selling or burdening the estate. I therefore propose that we should sustain the defences and assoilzie the defenders with expenses.

LORD TRAYNER—I agree. It was admitted on the part of the pursuer that if the annuity to his mother was to be regarded as a debt—a burden on the estate—he had no case. I cannot regard it otherwise than as a debt imposed on the general

corpus of the estate. The truster does not give his widow a liferent (which might be more as well as less than £40). What he gives her is a "free yearly annuity."

I take it to be clear that the truster's first purpose was to burden his estate with the annuity of £40, to be paid out of his estate—that is, out of the yearly produce of the estate if it was sufficient, and if not, then out of the *corpus* of the estate. That view is strengthened by the fact that the annuity does not depend upon the expression of the truster's will, but is in a sense matter of bargain. He took his wife's acknowledgment of that provision as the price of her renunciation of her legal rights, and he could not without her consent go back upon that agreement, and I do not think that it was his intention to do so. I am of opinion therefore that we should sustain the defences and assoilzie the defenders.

LORD MONCREIFF—I am of the same opinion. I think the main intention of the truster was that the widow's annuity should be paid preferably out of his estate. The trustees are given power to secure the annuity either by retaining heritage unsold, or by selling part of it and investing the proceeds in some security which would yield a yearly income sufficient to satisfy the annuity. If they had done so, it may be that if the capital or fee of the security had proved insufficient they might not have been able to go back upon the remainder of the estate. But they did not do so; no part of the estate was set aside to satisfy the annuity; and they now seek to charge the general body of the estate which remains in their hands with the deficiency. Their power to do so I think endured even to the end. If there was not enough income to meet the annuity or the trust expenses they could have sold any of the heritable subjects. I regard the third direction in the second codicil as simply a convenient way of disposing of the residue instead of realising the heritage and dividing it. But from first to last I can see no trace of any intention to favour the residuary legatees in preference to the widow, or to the prejudice of the widow's rights under the original deed.

I therefore agree that the appeal should be sustained and the defenders assoilzied.

The LORD JUSTICE-CLERK was absent.

The defenders moved for expenses as between agent and client, and cited *Fletcher's Trustees* v. *Fletcher*, July 7, 1888, 15 R. 862; *Davidson's Trustees* v. *Simmons*, July 17, 1896, 23 R. 1117; *Erentz's Trustees* v. *Erentz's Judicial Factor*, November 12, 1897, 25 R. 53.

The Court pronounced an interlocutor by which they sustained the appeal and assoilzied the defenders. The interlocutor concluded as follows—"Find the defenders entitled to expenses as between agent and client in this and in the Inferior Court, and remit the account to the Auditor to tax and to report: Further, authorise the defenders to charge against the trust estate in their hands, before accounting therefor to the pursuer, all expenses incurred by them since 30th November 1899, and not falling under said remit, as the same may be taxed by the Auditor."

Counsel for the Pursuer and Respondent—W. Campbell, Q.C.—Sandeman. Agents—Armstrong & Hay, S.S.C.

Counsel for the Defenders and Appellants—Salvesen, Q.C.—Wilton. Agent—Henry Robertson, S.S.C.

Wednesday, January 16.

FIRST DIVISION.

[Sheriff Court at Rothesay.

CRAWFORD *v.* SIMPSON.

Process—Appeal—Appeal for Jury Trial—Competency—Time for Appealing—Court of Session Act 1825 (6 *Geo. IV. c.* 120) (*Judicature Act*), *sec.* 40—*Act of Sederunt*, 11*th July* 1828, *sec.* 5.

The Court of Session Act 1825 (6 Geo. IV. c. 120) (Judicature Act), section 40, which authorised advocation from inferior courts for jury trial, did not enact that advocation must be made within any specified number of days after the interlocutor allowing a proof. The Act of Sederunt, 11th July 1828, enacts (section 5) that if "neither party, within fifteen days in the ordinary case, and in causes before the courts of Orkney and Shetland within thirty days, after the date of such interlocutor allowing a proof, shall intimate in the inferior court the passing of a bill of advocation, such proof may immediately thereafter effectually proceed in the inferior court, unless reasonable evidence shall be produced to the inferior judge that a bill of advocation has been presented, or the judge be satisfied that effectual measures have been taken for presenting it."

In an action of damages for seduction and for aliment for an illegitimate child, the Sheriff-Substitute, by interlocutor, dated 17th December 1900, allowed a proof. On 3rd January 1901 the pursuer marked an appeal for jury trial. The defender objected to the competency of the appeal on the ground that it had not been marked within fifteen days after the interlocutor allowing a proof. The Court, *following Davidson* v. *Davidson's Executor*, July 7, 1891, 18 R. 1069; *Williams* v. *Watt & Wilson*, May 28, 1889, 16 R. 687; and *Kinnes* v. *Fleming*, January 15, 1881, 8 R. 386, *dismissed* the appeal as incompetent.

Counsel for the Appellant—W. Thomson. Agents—Gibson & Paterson, S.S.C.

Counsel for the Respondent—A. S. D. Thomson. Agents—Patrick & James, S.S.C.