terms. The examination of the lease, as produced, leads to the inevitable conclusion that it embraced only a house, garden, and pendicle. The appellant says that the pasturage rights were pointed out to him, and that he was told he was to have them; that is the whole statement made, and to give effect to it would be to allow parole evidence to overrule this written lease. I am clearly for dismissing the appeal.

LORD BENHOLME—I concur.

LORD ORMIDALE—The defender proposes to drag in a parole gossiping proof of what was talked of over whisky in public houses. Such a kind of thing would be most hazardous, and the Court could not listen to it.

LORD JUSTICE-CLERK—I concur in the result arrived at by your Lordships, though I am not quite prepared to put it upon the ground adopted by Lord Ormidale. If there was an averment that certain things were pointed out, it appears to me impossible to know what was pointed out except by parole testimony, and had this clearly sustained the statements of the defender, I am not quite prepared to say how far it might have affected the position of matters; but there is no need for any consideration of this point, as the case has failed entirely to prove the defenders' averments.

Appeal dismissed, with expenses.

Counsel for Petitioner (Respondents)—Dean of Faculty (Clark), Q.C., and Keir. Agents—Dundas & Wilson, C.S.

Counsel for Respondent (Appellant)—M'Kechnie. Agent—W. S. Stuart, S.S.C.

I., Clerk.

Saturday, June 27.

SECOND DIVISION.

SPECIAL CASE—HEARN AND OTHERS (CONGREVE'S TRS.).

Succession—Heritable and Moveable—Direction to Entail—Intention—Implied Revocation.

A testator by codicil directed his trustees to sell a highland property and purchase with the proceeds an agricultural estate to be by them entailed on his son and a certain series of heirs. Subsequently he sold the property himself, and thereafter died without revoking the codicil, leaving only moveable property, and not having set apart the proceeds of the sale, but mixing it with his other funds. *Held* that the trustees were not entitled to purchase and entail an estate as directed by the codicil, no heritage having come to them and the direction having been revoked by the act of the testator in selling the property during his lifetime without setting the proceeds apart from his other funds.

Testament — Codicil — Partial Revocation—Specific Legacy.

A testator by a codicil directed his trustees to pay to his daughter a sum of £10,000 to be reduced proportionably if the sale of an estate by them should realize less than a certain sum. Having sold the estate himself at a lower price during his lifetime—*held* that the legacy did not fall, but that the daughter was entitled to the whole £10,000.

This was a Special Case for opinion and judgment of the Court, the parties being as follows:—(1) The trustees of the late John Congreve, Esq., sometime of Flichity, of the *first part;* (2) Mrs Congreve, the widow, of the *second part;* (3) William John Congreve Mackintosh Congreve, the son, and his tutors, of the *third part;* (4) Francis Dora Congreve, the daughter, and her tutors, of the *fourth part.*

John Congreve, Esq., sometime of Flichity, died on the 16th November 1873, survived by his widow, and by two children, William Congreve Mackintosh Congreve, his only son, and Frances Dora Congreve, his only daughter. William C. M. Congreve was born on 19th September 1860, and Frances Dora Congreve on 10th June 1865. By antenuptial marriage settlement, dated 28th April 1859, drawn up and executed in English form, a sum of £6000 was settled by Mr Congreve in trust for payment of the income to himself during his life, and after his death for payment of £100 per annum to Mrs Congreve during her widowhood; and, subject to such payment, said £6000 was to be for behoof of the children of the marriage in such proportions as Mr Congreve should direct, failing which, equally among them, the share of each to be payable on his or her attaining 21 years of age, or in the case of daughters on marriage, and failing children of the marriage, ultimately to Mr Congreve's assignees or next of kin; with power to the trustees, with the consent of the spouses or the survivor, to raise a sum not exceeding one-half of each child's expectancy for its advancement in life; and lastly, the unapplied income is to be accumulated for the children. This sum of £6000 was duly paid to and continues to be held by the separate trustees appointed to carry out the purposes of the marriage settlement. The legal rights of the widow and children are not discharged or renounced in the settlement. In addition to the annuity of £100, Mr Congreve, by bond of annuity, of even date with the antenuptial settlement, bound himself, his heirs, executors, and representatives whomsoever, to pay to Mrs Congreve a further annuity of £200 per annum, in case she should survive him, and while she should remain unmarried; and disponed a portion of the estate of Flichity in security. On the sale of Flichity after mentioned, the security over that estate was discharged, but the personal obligation against Mr Congreve and his representatives continues to subsist. By his trust disposition and settlement, dated 12th November 1864, with codicil thereto, dated 10th February 1870, Mr Congreve conveyed his whole heritable and moveable estate to trustees, in trust for the purposes therein mentioned. He also appointed his trustees executors and tutors and guardians to his children. The purposes of the trust-disposition are (1) For payment of just and lawful debts, &c.: (2) For payment of two specified legacies of £100 each; (3) For payment of any other legacies he might instruct by any codicils or writings under his hand; (4) That the trustees should immediately after the testator's death give to his widow possession of the mansion-house of Flichity and furniture therein belonging to him at the time of his death, free of any rent whatever, until his son should marry or

attain 25 years of age, and thus become entitled to use said house and furniture, when in lieu and place thereof the said widow was to receive £300 to purchase furniture, and £50 per annum in name of house-rent. By the fifth purpose of the trust the trustees are directed, out of the produce of the testator's personal estate, to make payment to any children he might leave, other than the heir who should succeed to the estate of Flichity as after mentioned, of the sum of £2000 sterling each, payable to them upon their respectively attaining the age of 25, or, if females, being married, whichever of these events should first happen. By the sixth purpose of the said deed the trustees are directed, upon the testator's son, William Congreve Mackintosh Congreve, attaining the age of 25 years complete, and in the case of a daughter succeeding, on her attaining said age of 25 years complete or being married, whichever of these events shall first happen, to execute a disposition and deed of entail of his estate of Flichity (but always with and under the burden of an annuity of £200 provided to the said Catherine Ann Mackintosh or Congreve, his wife, in case she should survive him, and while she shall remain unmarried, by bond of annuity dated the 28th, and recorded in the General Register of Sasines at Edinburgh the 30th days of April 1859), in favour of the said William Congreve Mackintosh Congreve, and the heirs whatsoever of his body, whom failing, to a certain series of heirs therein mentioned, including the heirs-female to be procreated of the testator's body. Lastly, by the said deed the trustees are directed to hold the residue and remainder of the testator's estate, heritable and moveable, thereby conveyed, or the prices and produce thereof, in trust for the use and behoof of the said William Congreve Mackintosh Congreve and the heirs whatsoever of his body, and failing the said William Congreve Mackintosh Congreve by his death before attaining the age of 25 years, without heirs of his body, for the use of a series of heirs specified. It is further provided by this purpose of the trust that on said William Congreve Mackintosh Congreve attaining the age of 25 years, or failing him in manner foresaid, or other heir-male or female of the testator's body in the order therein expressed attaining the said age of 25 years, or in the case of females being married, whichever of these events shall first happen, that they, the said trustees, shall forthwith, but not sooner, dispone, convey, and make over to the said William Congreve Mackintosh Congreve, and failing him as aforesaid, in favour of any other heir male or female of the testator's body, in the order therein expressed (the said order being the same as in the destination of the intended entail of Flichity) on their attaining the age of 25 years, or, in the case of females, being married as aforesaid, the said residue and remainder of the testator's means and estate and all the rights and securities thereof vested in the said trustees. Further, the testator confers various powers upon the trustees for the administration of the estate, and reserves power to himself to alter, innovate, or revoke. On the 10th of February 1870 the testator executed a codicil in the following terms:—"I, the within-designed John Congreve, do hereby direct my trustees within named, or the acceptors or acceptor and survivors or survivor of them, to sell my estate of Flichity so soon after my death as they can effect such sale with advantage, and to invest the proceeds of sale in British Government stocks, or in heritable or real securities, until such time as they can find an eligible permanent investment in the purchase of another landed estate with a good house thereon, and yielding a fair agricultural rental; and I direct my said trustees or their foresaids, on my son William Congreve Mackintosh Congreve attaining the age of twenty-five years complete, to convey the said estate, so to be purchased, in strict entail to him, and failing him to the series of heirs mentioned in the within-written trust-disposition and settlement, as applicable to the entail of Flichity therein contemplated; and farther, I hereby direct my said trustees, after the purchase of said estate, and while it remains vested in my said trustees, to allow my wife, the within-designed Catherine Ann Mackintosh or Congreve, the free use of the principal mansion on the said estate, with the gardens, policies, and pleasure-grounds connected therewith; and until such estate is purchased, I direct my said trustees and their foresaids, out of my general estate to allow my said wife the sum of £100 per annum in name of house rent, and also an annuity of £200 per annum in addition to the £300 per annum already settled on her, and when the said trustees come to divest themselves of said estate to be purchased as aforesaid in terms of the destination above written, I direct them to burden the said estate with a like payment of £100 per annum, and also the said annuity of £200 in addition to the said £300 per annum settled on my said wife, said annuity of £100 to be payable during her life to my said wife in name of house rent; and I hereby further direct my said trustees and their foresaids to allow my said wife the free use of all my furniture and household plenishing, including plate, books, and wines, to be used and enjoyed by her for her liferent use allenarly until such time as the said trustees divest themselves of said estate in terms of the said destination, when they shall give over to the disponee of the estate to be purchased as aforesaid, the house, gardens, and policies, as well as the whole of said furniture and plenishing, but in lieu to my said wife of said furniture and plenishing, they shall burden the said estate with the payment to her of the sum of £600; and further, I hereby direct my said trustees or their foresaids to make payment of the sum of £10,000 sterling to such of my children who shall not, in terms of the destination above referred to, succeed to the said estate to be purchased as above directed, payable to them in such proportions and at such times as I shall direct by any writing or direction under my hand, however informal, and failing such writing, then equally share and share alike, payable, if sons, on their attaining the age of twenty-five years complete. and, if daughters, on their attaining said age or being married, whichever of these events shall first happen, but declaring that the provisions of my daughters shall be settled on them only in liferent and on their children in fee, whom failing to revert to the residue of my estate; and it is hereby declared that in the event of my said estate of Flichity being sold for a less price than £55,000, all the provisions under this codicil shall suffer a proportional abatement; and I do hereby alter and revoke the foresaid trust-disposition and deed of settlement, but only in so far as the same is inconsistent with the directions contained in this codicil and not otherwise." In 1871 the testator himself sold his estate of Flichity for £46,000, and also sold

a large part of the furniture of the mansion-house. He did not set apart the price of his estate; but allowed it to be mixed with his general funds, which were found at his death to be invested in a variety of stocks and securities. No part thereof was invested in Government stocks or in heritable securities. The estate of Flichity was burdened with debt at the time of the sale to the extent of £10,940. The amount of the trust-estate is expected to be about £36,000, besides about £3000 of heritable estate in England, and exclusive of the £6000 held by the marriage settlement trustees.

The second party maintained—(1) That in the event of her electing to take her rights under the foresaid trust-disposition and settlement and codicil, she was entitled to an annuity of £200 per annum in addition to the £300 per annum settled on her at her marriage as aforesaid, and also the sum of £100 per annum until an estate should have been purchased, and thereafter to the free use of the principal mansion on the said estate, with the gardens, policies, and pleasure-grounds connected therewith, so long as they remain vested in the trustees, and when the trustees come to divest themselves in terms of the said codicil, to have the said annuities of £100 and £200 per annum made burdens on the said estate in addition to the said £300 per annum settled on her as aforesaid; and further, to the free use of all the testator's furniture and household plenishing, including plate, books, and wine, for her liferent use, until the trustees shall divest themselves of the said estate in terms of the codicil, and then to the sum of £600 in lieu of furniture and plenishing; or otherwise, in the event of its being found that the first parties are not bound to purchase an estate to be entailed in terms of the said codicil, she was entitled to an annuity of £200 per annum in addition to the £300 already settled on her, and also to an annuity of £100 in name of house rent during her life, and to the use and enjoyment of the whole furniture and household plenishing belonging to the testator at his death, including plate, books, and wine.

It was maintained on behalf of the third party—(1) That in the event of its being found that the first parties were bound to invest the free proceeds of the sale of Flichity in the purchase of a landed estate, they were bound, on his attaining the age of twenty-five years complete, to convey the same in strict entail to him and the series of heirs mentioned in the trust-disposition and settlement, and that the provisions with which the said estate should be burdened in terms of the codicil should suffer an abatement in proportion to the amount by which the price obtained for Flichity was less than £55,000; (2) That if it should be found that the direction to purchase such estate had been evacuated by the act of the testator in selling Flichity, the whole provisions of the trust-disposition and settlement, and of the codicil, with the exception of those regarding the powers and liability of the trustees, of those for payment of debts, and of the two legacies above mentioned of £100 each, and of the provision for the disposal of the residue, must be held to have been evacuated likewise, and that the third party was entitled to the whole residue of the estate after payment of debts and of the said two legacies; (3) in the event of its being held that the direction to purchase an estate had been evacuated, but that the other provisions of the trust-disposition and settlement and of the codicil subsist, except in so far as the trust-disposition was revoked by the codicil, it was maintained in behalf of the third party, (1) that the provision of the codicil for payment of £10,000 to the children who should not succeed to the estate to be purchased was not in addition to, but in substitution for, the provision of the trust-disposition for payment of £2000 each to any children the testator might leave other than the heir who should succeed to Flichity; and 2. that the third party was entitled on his attaining the age of 25 to payment of one-half of the said sum of £10,000: that the fourth party was entitled, upon her attaining the said age of 25, or being married, to a liferent only of the remaining half, and that in the event of her dying without having lawful issue, either before or after attaining the age of 25, the fee of the remaining half reverted to the residue of the trust-estate, and would become payable to the third party and the heirs whatsoever of his body, in terms of the provision for disposal of the said residue.

It was maintained on behalf of the fourth party—(1) That in consequence of the testator having himself sold the estate of Flichity, and left no testamentary directions as to the application of the price, the provisions of the trust-deed and codicil, other than those relating to the payment of debts and legacies, fell *in toto*, and that the free residue fell to be dealt with on the footing of intestacy, two-third parts of the personal estate going as legitim and dead's part to the third and fourth parties equally between them, and the remaining one-third part to the second party: (2) That in the event of its being held that the direction in the codicil to buy a landed estate fell, but that the rest of the settlement stood, except in so far as the trust-deed was revoked by the codicil, she was entitled, in terms of, and at the time, and subject to the conditions contained in the trust-deed and codicil (*first*), to the sum of £2000, provided by the fifth purpose of the trust-deed to each of the children of the marriage, other than the heir who should succeed to the estate of Flichity, to the exclusion of the third party; and (*secondly*), to the liferent of the provision in the codicil of £10,000 in favour of the children who should not succeed to the estate therein directed to be purchased, also to the exclusion of the third party, or at least to the latter of these provisions; (*thirdly*), that in the same event, and if the third party was held entitled to share in these provisions, the fourth party was entitled 1, to a sum of £2000, and 2, to the liferent of one-half of the said sum of £10,000, all in terms of the said trust-deed and codicil.

The first parties maintained that the directions of the codicil in regard to the purchase of a landed estate have not been revoked, and that they were bound to fulfil the same.

The claims were stated for the second, third, and fourth parties under reservation of their right to claim legitim or *jus relictæ* if so advised, after the true construction and effect of the trust-disposition and settlement had been judicially ascertained.

The opinion and judgment of the Court was desired on the following questions of law:—"(1) Have the provisions contained in the fourth, fifth, sixth, and seventh purposes of the said trust-disposition, and the whole provisions of the codicil thereto, been evacuated by the act of the testator in selling the estate of Flichity? (2) Does the

provision for the disposal of the residue subsist notwithstanding the said sale, and is the third party entitled, in terms thereof, to the whole residue of the trust-estate, after payment of debts and of the said two legacies of £100 each? (3) If the first question should be answered in the affirmative, are the third and fourth parties entitled equally between them to two-third parts of the free moveable estate as legitim and dead's part, and is the second party entitled to the remaining one-third part *jure relictæ?* (4) If neither of the first two questions should be answered in the affirmative, are the first parties bound to invest the free proceeds of the estate of Flichity in the purchase of a landed estate, and on the said William Congreve Mackintosh Congreve (the third party hereto) attaining the age of twenty-five years complete, to convey the said estate to be purchased in strict entail to him and the series of heirs mentioned in the trust-disposition and settlement, all in terms of the codicil of 10th February 1870? (5) Should it be found that the first parties are not bound to purchase an estate in terms of the codicil, is the fourth party entitled, on her attaining the age of twenty-five or being married, 1, to a sum of £2000 under the fifth purpose of the trust-disposition, and 2, to the liferent of the whole sum of £10,000 provided by the codicil to the children who shall not succeed to the estate thereby directed to be purchased, or to either of the said provisions, to the exclusion of the third party? or, (6) Is the third party, in the same event, entitled to a similar payment of £2000, and to a payment of £5000, being one-half of the said provision of £10,000, or to either of the said provisions? (7) Is the second party, in the event of her electing to claim her rights under the said trust-settlement and codicil, entitled to an annuity of £200 in addition to the £300 per annum settled on her at her marriage, and also to the sum of £100 per annum in name of house-rent until an estate shall have been purchased, and thereafter to the free use of the principal mansion-house on such estate, with the garden, policies, and pleasure grounds connected therewith, so long as they remain vested in the trustees, and when the trustees come to divest themselves, to have the said payment of £100 and £200 per annum made burdens on the said estate, in addition to the said £300 per annum; and further, to the liferent of all the testator's furniture and household plenishing, including plate, books, and wines, until the trustees shall divest themselves of the estate, in terms of said codicil, and then to the sum of £600 in lieu thereof? (8) In the event of its being found that the first parties are not bound to purchase an estate, is the second party entitled, upon electing to claim her rights under the said trust-settlement and codicil, to an annuity of £200 per annum in addition to the £300 already settled on her, and also to the foresaid annuity of £100 in name of house-rent during her life, and to the use and enjoyment of all the testator's furniture and household plenishing, including plate, books, and wine?"

At advising—

LORD JUSTICE-CLERK. [*His Lordship proceeded to narrate the facts of the case.*] It has been contended on behalf of the trustees that the provision as to Flichity contained in the first deed, and as to the estate to be purchased with the money resulting from the sale of Flichity contained in the second deed, must now receive effect by the trustees applying so much of the price obtained by the sale of Flichity during the testator's life (so far as not spent by him), in the purchase of an agricultural estate to be entailed on the series of heirs indicated by the codicil. It is maintained that this is not in the nature of a specific legacy the subject of which has perished, but that the destination still can and should receive effect. On the other hand, it is urged that there exist no grounds upon which the trustees are entitled to carry out the directions contained in the deeds, and as it is imperative that these directions should be carried out specifically, the whole settlement fails and the succession falls into intestacy.

My Lords, I am not able to adopt either of these alternatives proposed to us. This was not an ademption of a legacy in the proper sense; it was not a case in which, after the testator had bequeathed a certain subject, it had so altered its nature as no longer to exist in the form in which it was bequeathed. Even in cases where in consequence of a debtor having paid up a heritable bond, or where by a sale under compulsory powers a subject has altered its nature without the will of the proprietor—even in cases like these, the Court has held that the subject had perished and that the legacy was not due. Here we have a conveyance to trustees by Mr Congreve of both his heritable and his moveable property, with explicit directions what was to be done with each. As the event turns out, he leaves nothing but personal property, the real estate never comes to the trustees at all, the testator having himself sold it during his lifetime. Supposing Mr Congreve had sold only a portion of the Flichity estate, it would be a very strong thing to say that the trustees could have applied a part of the moveables, representing the value of the portion sold, in the purchase of this agricultural estate according to the directions of the codicil. That the testator in this case changed his mind we must necessarily infer, and it is not to be supposed that he thought his death so near at hand. He may have sold Flichity for reasons in no way connected with his testamentary intentions, but merely to increase his income. It is clear that the trustees have no power to apply funds in carrying out the directions of the codicil as to an entail, seeing that they can only do so with the proceeds of the sale of a heritable estate not now conveyed to them at all. But, my Lords, it does not follow that the whole settlement must fall, and the only question remaining is how to work out the arrangement of the provisions for the widow and the daughter. Of course to give the widow possession of the mansion-house as directed is now out of the question, but to give the surrogate for it is in the power of the trustees, and the widow is entitled I think to it. As to furniture, she should be allowed £600 to purchase it. Then, in regard to the daughter.—[*His Lordship read the directions of the deed.*]—Now, that cannot be reconciled with the circumstances which have really taken place, as there was no estate bought and is not to be any, and I think the daughter is entitled to £10,000. The direction as to the proportionate reduction of this £10,000 in the event of Flichity yielding less than £55,000 I am of opinion cannot receive effect, as the sale referred to in the codicil was a sale by the trustees, which has not and cannot take place; the £10,000 accordingly will pass undiminished to the daughter.

Lord Benholme—The material feature in this case, I think, is the first point to which your Lordship has made reference, as to how the trustees are to conduct themselves with regard to the direction in Mr Congreve's will as to the purchase and entailing of an estate. A great deal was said, and an able argument was maintained, that the fact of the testator's having sold Flichity did not much affect the matter, inasmuch as in so selling the estate he was merely doing himself what he by his settlement directed his trustees to do, and thus anticipating the directions of the will. One thing is clear, viz., that it was not Flichity which was to be entailed; *that* in any view was to be sold, and if this sale took place during the testator's lifetime, it was argued that this made no difference. My Lords, this gave me at first a good deal of trouble, but the conduct of the testator in mixing up the price of Flichity with his ordinary funds, and making no distinction between that money and his other personal property, and the fact that a consideration of the whole amount of the succession, shows that there was some diminution, some loss, between the period at which the codicil was made and the date of the testator's death, lead me to the conclusion that Mr Congreve had come to see that the tying up of so large a sum of money in land was not consistent with the large provisions he was at the same time making in favour of his wife and daughter. I have accordingly come to be of opinion that the trustees are not entitled to set aside this large fund, or part of it, to buy an estate and entail it on the son and the succession of heirs as directed by the codicil. As regards the testator's widow and daughter, your Lordship's suggestion meets entirely with my consent and approbation. In the circumstances which have by the act of the testator arisen the trustees have more money free and can make these provisions more readily. I do not think that the testator's intention was to supersede all the other provisions; nay, I am rather of opinion that it was to follow them out.

Lord Neaves—This case is one of some nicety, and I have felt considerable anxiety as regards it, that justice between the parties may be done and the law at the same time preserved entire. I have arrived at the same conclusions as your Lordships. It is manifest that the views of Mr Congreve as to his heritable estate underwent during the course of his life considerable changes. When a younger man he bought Flichity as a residence and for sporting purposes. His first idea was to entail this property on his son and a succession of heirs; then his views underwent an alteration, Flichity was to be sold by his trustees, and an agricultural estate was to be purchased with the proceeds, which in its turn was to be entailed on the same series of heirs; ultimately the testator sold Flichity himself and mixed up the price he obtained for it with his other funds. It is noticeable that a considerable period elapsed after the sale of Flichity before his death, and yet he made no change in his affairs, though the codicil was made in 1870, the sale took place in 1871 and the testator did not die until 1873. It was maintained that in selling Flichity he was only doing in his lifetime what his will contemplated at his death, and that he was in progress, but there is no sign or indication whatever of this. He died without leaving in Scotland anything except moveable property. It appears impossible to hold that the trustees, *qua* executors, can be held bound by the direction of the codicil to purchase and entail. It is not in their power evidently to do that of themselves, and it would be going very far were this Court to say that they might do so. Just as before the testator had wished to purchase an agricultural estate and to substitute this for the sporting Highland property he at first intended to leave to his son, so he may subsequently have come to think that for his family's sake it would be better not to tie up so much money at so small a rate of return.

The next question which occurs is, whether this result affects the residuary clause. I do not think it does, because of all the clauses in a deed of this kind that clause which contains the disposal of residue appears to me possessed of most vitality. The fact that the share of the son falls into residue does not affect the gift of £10,000 to the younger children contained in the codicil. The position of the daughter is unaltered, for the son gets the price of Flichity, gets all his father's property save only this £10,000, and though there is a condition, it does not come into play, as there was no price got for Flichity by the trustees. The £10,000, it is I think clear, is to go to the daughter in liferent and her children in fee.

Lord Ormidale—In this case I think that the disposal by the Court of some of the leading questions will lead to the adjustment of the rest. The first question is how far the altered circumstances between the date of the deed of settlement and that of the testator's death must be held to have affected his succession. There is no doubt that by the original deed and the subsequent codicil he contemplated the sale of Flichity, *not* during his life, but after his decease, by his trustees. But two years before his death he proceeds to sell the property himself, and it is not unimportant to notice that the price realised was only £46,000, or very considerably less than the £55,000 which he seems to have anticipated in his settlements. Now although cases such as *Pagan* v. *Chalmers* were not in many points like the present, yet they serve to illustrate well the principle there adopted by the Court—the ruling principle that in all such cases the intention of the testator is what must be looked at. What was that intention here? Mr Congreve had sold the estate, had been paid the price, and having got the money did not even set it aside or keep it apart from his other funds, but mixed it up with the rest of his means. There is no indication after the sale that he wished his trustees to proceed to carry out the directions of his codicil as to the purchase of an estate, and it may be observed that it was a very different matter to purchase an estate for £55,000, and for the reduced sum he had realised by the sale of Flichity. The next question is what is to be the effect of our holding (1) upon the provision to the son himself under the residuary clause, and (2) upon the provisions under the codicil to the widow and daughter? There is yet another question, as to whether these provisions are cumulative or substitutionary. As to the clause of residue, I entirely concur in the remarks made by Lord Neaves. There is a great deal more difficulty in regard to the provisions made to the daughter than in the case of those to Mrs Congreve, the question of cumulative or substitutionary not arising under the latter; but the very use of the word "*additional*" in the case of the mother's provisions rather would tend to show that the testator intended the £10,000 to be in full of all provision to the daughter, indeed

in England this would be held conclusive. My difficulty proceeds from the fact that the whole codicil is based on the scheme for the sale of Flichity by the trustees; on the whole, however, I think the question must be decided as your Lordships propose, and that the result is at once fair and equitable. The other matters merely require adjustment.

The Court answered the questions as follows:—

"The Lords having heard counsel on the Special Case, are of opinion, and find—

"1. That the provisions contained in the trust-settlement and codicil, in so far as these relate to heritable property, are entirely evacuated by the act of the testator in selling the estate of Flichity during his life; but that in other respects it is not so—subject to the answers to the other questions.

"2. That the residuary clause contained in the trust-settlement remains effectual, and regulates the succession of the testator, and that the third party is entitled to the whole residue as therein provided, subject to the provision to the second and fourth parties.

"3. Find it unnecessary to answer this question.

"4. Find that the first parties are not bound to invest the free proceeds of the estate of Flichity in the purchase of a landed estate, and on William Congreve Mackintosh Congreve attaining the age of twenty-five years complete, to convey the said estate to him and the series of heirs mentioned in the trust-disposition and settlement, all in terms of the codicil of 10th February 1870.

"5 and 6. Find that the fourth party is entitled to the liferent of the whole sum of £10,000, provided by the codicil to the children who shall not succeed to the entailed estate, but not to the sum of £2000 in addition thereto.

"7 and 8. That the second party, in the event of her electing to claim her rights under the said trust-settlement and codicil, is entitled to an annuity of £200 in addition to the £300 per annum settled on her at her marriage, and also to the sum of £100 in name of house-rent, and to the sum of £600 in lieu of the liferent of the furniture and others mentioned in the codicil.

"Find the parties entitled to the expenses incurred by them in this case out of the trust funds, and remit to the Auditor to tax and report, and decern."

Counsel for parties of First and Third Parts—Dean of Faculty (Clark) Q.C., and Kinnear.
Counsel for parties of Second Part—Moncreiff. Agents—Hamilton, Kinnear, & Beatson, W.S.
Counsel for parties of Fourth Part—Lee. Agents—J. & F. Anderson, W.S.

[*I., Clerk.*

Saturday, June 27.

FIRST DIVISION.

COOPER *v.* CULLEN.

Expenses— Witness—Commission.

Circumstances in which the expense of examining a witness in India on commission, who, owing to events which could not be foreseen at the date of the examination, was able to attend and give evidence at the trial, was allowed as a charge against the loosing party.

Observed that it is a question of circumstances whether the expense of a commission to examine a witness resident abroad, who afterwards attends and gives evidence at the trial, is chargeable against the loosing party.

This was an action of damages for breach of promise of marriage, in which a jury returned a verdict for the pursuer, and the case now came before the Court upon the Auditor's report of the pursuer's account of expenses.

An essential witness for the pursuer was her brother, who for a considerable time previous to the action was employed in a mercantile house in India, without the least prospect of returning to this country. A commission was accordingly granted to take his deposition in India. After this commission some delay was occasioned in the case by a change of Lord Ordinary, and during that delay the pursuer's brother was suddenly called home from India by the firm which employed him. He was thus at home at the time of the trial, and was examined as a witness for the pursuer.

The Auditor disallowed the charge of £61 for the expense of the commission to examine this witness in India.

The pursuer objected to the decision of the Auditor, and argued—The expense of a commission to India was under the circumstances a necessary expense, and was certainly an expense of process, and fairly chargeable against the loosing party.

Argued for the defender—Where a party took a commission to examine a witness abroad, he took it at his own risk, and if the witness appeared at the trial, bore the loss.

Authorities—*Napier* v. *Compbell*, March 7, 1843 5 D .858; *M'Lean* v. *Cooper*, Feb. 4, 1846, 8 D. 429.

At advising—

THE LORD PRESIDENT—The question here is whether a loosing party is liable for the expense of a commission to take the evidence of a person who either is abroad or is expected to be so at the time of the trial. I think the question is one of circumstances. In the case of *M'Lean* v. *Cooper*, the Lord President, after consultation with the other Division, disallowed the charge, but at the same time said that he laid down no general rule. Therefore every question of this sort must be looked upon as one of circumstances. I observe, further, in the case of *M'Lean* v. *Cooper* that it was not maintained on the part of the pursuer that the witnesses examined on commission were essential witnesses, and it was probably on that ground that the charge was disallowed. Here the witness was undoubtedly an essential witness, so much so that if he had not been examined I doubt if the pursuer could have obtained a verdict.

At the time when the commission was granted this witness was in India, and had been there for some time in the employment of a mercantile house, and so he could not have been brought to this country for the trial, even if such a course would have been less expensive. So this commission was an absolute necessity to the conduct of the case. The appearance of the witness at the trial was the result of an unforeseen occurrence, the employers