first average statement, there is no difficulty in understanding the principle upon which it was made up. There is, 1st, an ascertainment of the amount of loss to be provided for; and 2d, a calculation of the contribution as allocated upon the ship, cargo, and freight. The cargo was charged upon a contributory valuation of £1,293.

Now, if we were dealing with this average statement alone, and if the pursuers were claiming what they had to pay under it, no doubt the question decided by the Lord Ordinary would have arisen, viz., Whether the underwriters are bound to pay the loss upon a contributory value of £1,293, or so much only of the amount of the loss sustained by the owners of the cargo as effeired to a contributory value of £850 as stated in the policy?

But it appears that what took place afterwards altered matters, because after the allocation by the first average statement the ship and freight were found unable to meet all claims, and the consequence was, that the ship and freight became bankrupt and had to be sold, or at least the ship did, for the freight had all been swallowed up previously. In that state of matters, the German law made the owner of the cargo liable to meet the whole loss, while it gave him the advantage of the proceeds of the sale of the ship, and upon that footing the second average statement was made up. In this country we should not consider it an average statement, because it contains what we should not find in such a document here, but it is so treated in Germany. The clause in the policy is therefore obligatory against the underwriters, to the effect of making them liable for the loss sustained by the owners of the cargo under the second average statement.

What is the second average statement? Simply an account bringing out the amount of the loss which the owners of cargo must meet. That is done by taking the amount of the bottomry bond and all the expenses incurred, and setting against these the proceeds of the sale of the ship. The owner of the cargo is called on to pay the balance. That the value of the cargo is a matter of utter indifference is very apparent. The result is precisely the same whatever value is put upon it, and accordingly the sum which the pursuers claim is just the balance brought out against them which they were made to pay at the port of discharge. No doubt the second statement adopts and incorporates the first for the purpose of showing the actual amount of money laid upon the owners of cargo, because the loss is what they must pay one way or another, whether the first statement is taken into account or not. The result is the same as if there had been no first statement and the bankruptcy had taken place, and the holders of the bottomry bond had gone against cargo at once.

Therefore it appears to me that the question decided by the Lord Ordinary does not occur, and that the pursuers are entitled to recover the amount of the loss sustained "according to foreign statement," as the policy bears. I agree with the Lord Ordinary's judgment although without entering upon the ground upon which he has gone.

LORDS DEAS and MURE concurred.

LORD ARDMILLAN was absent.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the reclaiming note for Archibald Smith and others against Lord Shand's interlocutor of 29th July 1875, with the addition now made to the record, Recal the said interlocutor in so far as it finds the pursuers entitled to expenses: *Quoad ultra* adhere: Find the pursuers entitled to one-half of the taxed amount of the expenses incurred by them in the Outer House, and find them entitled to full expenses in the Inner House; and remit to the Auditor to tax the account or accounts of said expenses, and to report."

Counsel for the Pursuers (Respondents)—Dean of Faculty (Watson) — Balfour — Johnstone. Agents—Macara & Clark, W.S.

Counsel for the Defenders—Trayner—Hunter. Agents—Dewar & Deas, W.S.

Thursday, July 20.

FIRST DIVISION.

[Lord Young, Ordinary.

ALISON AND OTHERS (RENTON'S TRUSTEES) *v.* ALISON AND OTHERS.

Succession—Mutual Deed—Investment, Terms of—Revocation—Accretion.

Two sisters executed a mutual disposition and settlement, whereby each conveyed her whole estate to the other in liferent and to certain beneficiaries in fee, and each appointed the other sole executor. Thereafter the whole funds of the two sisters, which had previously been invested in their respective names, were invested in their names jointly and the survivor. It was averred that this change of investment was made by two gentlemen who had the entire management of the sisters' affairs, on their own motive, as being in conformity with the terms of the joint deed, and without any instructions from the sisters.—*Held* (1) that parole proof that the change of investment was made without the sisters' authority was competent, and (2) the evidence having established that there was no authority, that the joint investments had not the effect of putting the funds so invested beyond the operation of the joint will.

This was an action of multiplepoinding at the instance of Robert Alison, David Renton, and George Murray, trustees under the trust-disposition and settlement of Mrs Margaret Alison or Renton of Oakmount, Lasswade, dated 9th December 1868, against themselves and William Alison and Mary Catherine Alison, in the following circumstances:—

Mr and Mrs Renton were married in 1830, and Miss Alison, a sister of Mrs Renton, lived with them. Mrs Renton and Miss Alison had each about £7000. Mr Renton got possession of the whole of his wife's money and borrowed £5000 from Miss Alison. Thereafter his affairs became embarrassed and he executed a trust deed for

behoof of creditors in favour of the said George Murray, under which all the creditors except Mrs Renton and Miss Alison were settled with. There remained a balance of £5061, of which Mrs Renton, under an arrangement between her and Miss Alison, received £2074, and Miss Alison £2987. At this date Miss Alison was further possessed of funds to the amount of £1675. Mr Renton died on 18th March 1857, and on 19th May of that year Mrs Renton and Miss Alison executed a mutual disposition and settlement, in which they disponed each to the other their whole estate in liferent, and to certain beneficiaries in fee, and each nominated the other sole executor. At Whitsunday 1860 two railway debentures for £1500 fell to be paid up. Both these debentures stood in Miss Alison's name—one belonging entirely to her and the other partly to her and partly to Mr Renton. This £3000 was reinvested in a debenture of the Dundee, Perth, and Aberdeen Railway Junction Company, of which the said Mr Robert Alison was at that time secretary. The investment was taken in the names of the ladies jointly and the survivor. Thereafter the whole funds which the ladies held invested in various stock were transferred from their respective names into their joint names and the survivor, with the exception of £1770, which was invested in the villa of Oakmount, the disposition of which was also taken to the two ladies and the survivor.

Miss Alison died on 24th May 1862. Mrs Renton died on 2d September 1874, leaving the said trust-disposition and settlement by which she conveyed her whole means and estate, heritable and moveable, to the said Mr Robert Alison, James Renton, and George Murray, as trustees for purposes different from and inconsistent with the terms of the joint will.

The said Robert Alison and George Renton were the principal beneficiaries under the joint will, and the said William Alison and Mary Catherine Alison under Mrs Renton's trust-disposition and settlement.

William Alison and Mary Catherine Alison maintained that in the terms of the joint investment the whole funds of the two ladies became the absolute property of the survivor, and were carried by Mrs Renton's deed.

Robert Alison and George Murray maintained that Mrs Renton's settlement only carried her own estate, the joint will being still a valid and subsisting deed in regard to the succession of Miss Alison. They averred that Mrs Renton and Miss Alison had entrusted the entire management of their affairs to them, and that they had of their own motive, without any instructions from the ladies, and indeed without giving them any information on the subject, invested their funds in their joint names and the survivor, as being in their opinion in conformity with the terms of the joint will.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 10*th July* 1875.—The Lord Ordinary having heard counsel for the parties, and considered the record and process: Finds that the fund *in medio* was the sole and absolute property of the late Mrs Renton at the time of her death, and that the succession thereto was to be regulated and dealt with in terms of the trust-disposition and settlement and relative codicil, No. 11 of process: Therefore ranks and prefers," &c.

His Lordship pronounced the following opinion:—

"The leading question in this case regards the operation and effect of the mutual settlement at the death of Miss Alison, the predeceaser of the two testators, on 24th May 1862. It was contended that the terms of the subsequent investments of her money, and of the title taken to the villa of Oakmount implied a revocation by her which she had undoubted power to make. I think this an erroneous contention; for the settlement, being testamentary, must be regarded as her last will, and as speaking in the last moments of her existence. What property she left for her will to carry, or whether she left any, is another question, which the terms of the investments and the title to Oakmount may materially affect; but there is, I think, no question of revocation.

"It is alleged, and I assume truly, that the fortunes of the two sisters were unequal, and that Miss Alison was the richer of the two. I also assume that at the date of the will their fortunes, which consisted of money, were separately invested, and therefore then distinguishable. But having only £5365 between them, and resolving to live together, it is not surprising that they should have made a common purse of it, as they did, and out of it paid for the villa which they bought to live in, and the cost of their establishment. The common purse was made by investing the money which they were respectively able to contribute upon securities, taken in their joint names, with destination to the survivor. The title to the villa was taken to them in conjunct fee and liferent, and to the heirs and assignees of the longest liver. They lived together in this villa on the produce of the joint purse till Miss Alison died, in May 1862. This was quite consistent with the mutual will, as it would have been had they spent all they had, which they were at perfect liberty to do.

"With respect to the price paid for the villa, I think it clear that it was so much money spent by the testators in the lifetime of both, and that the villa itself, in the purchase of which the money was spent, was not at Miss Alison's death subject to her disposition or will, as expressed in the mutual settlement, but passed in absolute property to Mrs Renton, according to the destination of the title. It is, I think, plain that Miss Alison could not, by a settlement subsequent to the title, have disposed of the villa in whole or in part to her sister's prejudice, for her sister's right was absolute and irrevocable by the terms of the title if she survived, and, as I have already observed, the mutual settlement being testamentary, speaks for each testator as at the time of her death without reference to its date. I am, therefore, of opinion that the villa does not to any extent pass under the mutual settlement, but is wholly carried by that of Mrs Renton, whose exclusive property it became by her survivance, as completely as if the disposition had been to herself alone.

"With respect to the money of which the sisters made common purse by the terms of the investments, and the manner in which they used it for five years, it is clear that on Miss Alison's

death it belonged *prima facie* to Mrs Renton, who survived. But it is proposed to subject part of it to the operation of Miss Alison's disposition by the mutual will, by making a separation according to the proportions in which the sisters contributed to its formation, and regarding the larger part as the estate of Miss Alison, who contributed the larger share. In aid of this view, it is alleged, and offered to be proved, that Miss Alison had £4165, and Mrs Renton only £1200, and, farther, that the investments were taken in their joint names, with right of survivorship, by the claimants Alison and Murray, 'as being in conformity with the terms of the said mutual disposition and settlement of which they had been made aware,' but without specially consulting the ladies.

"It would obviously be a difficult and uncertain process to effect a separation of money which had been so amalgamated and used by two sisters as a common fund for five years. I must assume that the sisters knew that the money had been amalgamated, and that all their joint expenditure was met out of it. There is nothing to show that they intended an ultimate separation, and no accounts to enable the Court to make a separation. It does not appear whether their house and personal expenses were wholly paid out of income, or trenched to any extent on capital. The price of the villa must have been paid out of capital. How is this to be apportioned? To hold either that the sisters contributed equally, or in proportion to the original fortune of each, or that either of them paid the whole of it, would be mere assumption without evidence. But a division of the remainder could not be effected without determining this question, which the sisters have left no means of determining. I assume that the fortunes of the sisters were originally unequal, to the extent stated, because though this is not admitted, the fact is alleged to be so, and proof of it offered. But, as five years before the death of the predeceaser they joined them together on securitities *ex facie* of which they were their joint property, in equal shares, with benefit of survivorship, and allowed matters to stand so during the remainder of their joint lives, I think this must be taken to be according to their intention, and that the operation and effect of the mutual will must be judged of accordingly. The will did not restrain them from dealing with their money as they pleased while they both lived, and with regard to all or any of it which they so dealt with as to become their joint property while they both lived—and on the death of either the exclusive property of the survivor—I think it clear that the will of the predeceaser, as expressed in the settlement, has no operation. It is not a question of revocation, for the will at Miss Alison's death stood with respect to any money or property subject to its operation—that is, with respect to all money and property of hers which, had she died intestate, would have passed to her legal heirs. It is clear that had Miss Alison died intestate the whole invested money, as well as the villa of Oakmount, would have passed, not to her legal heirs, but to her surviving sister, and this as the necessary, and I must assume intended, consequence of her own acts. The result is that there is nothing left for her will to take effect upon; but this is an accident, for she might have left other property. It is to be observed that the settlement is not only testamentary but quite general, so that there is here no such question as might arise with respect to a particular estate or property standing on a prior special destination.

"I am therefore of opinion that on the death of Miss Alison Mrs Renton became proprietor of the money as well as the villa, with absolute power to dispose of both; and I arrive at this conclusion with the more satisfaction, because I think it is not only the legal result of what was done, but is in accordance with what was intended. Mrs Renton's subsequent will was her own affair, and her sister probably could not, or did not, anticipate what she might do, but I think it was intended that she might do as she pleased.

"The result is, that the whole fund *in medio* being, in my opinion, the property of Mrs Renton at the time of her death, is carried by her settlement, for there is no question of her power to revoke and alter the prior mutual settlement with respect to her own property."

Robert Alison and George Murray reclaimed.

They intimated that they did not press their claim in regard to the villa of Oakmount.

Argued for them—The mere terms of an investment could not revoke a probative deed, and to say that the money was put beyond the operation of the deed was practically the same thing as to say that the deed was revoked. Even if the terms of an investment, if made deliberately by the testator, could defeat the prior settlement, the investments, in this case being made without the testator's authority or knowledge, were in a totally different position. The reclaimers should be allowed proof of their averments.

William and Catherine Alison argued—The investments having been made by the mandatories of the ladies, were in the same position as if they had been made by them, and the terms of the investment were sufficient to carry the fee of the money invested to the survivor. This was not a revocation of the joint will, but had the effect of putting the funds in this position—that upon the death of one sister they passed by accretion into the estate of the survivor.

Authorities—M'Laren (Wills and Succession) vol. i. p. 262; *Dingwall* v. *Askew*, Feb. 5, 1788, 1 Cox (Chan. Cases) 427; *Taylor* v. *Taylor*, 10 Hare 475; *North British Railway Company* v. *Tunnock*, Nov. 1, 1864, 3 Macph. 1; *Cuthill* v. *Burns*, March 28, 1862, 24 D. 849; *Keddie* v. *Christie*. 11 D. 145.

The Court allowed a proof, and the reclaimers adduced the said Mr Robert Alison and Mr George Murray as witnesses. Robert Alison deponed *inter alia*—"I am half-brother of the late Mrs Renton and Miss Alison. Mr Renton died in March 1857. After his death Mr George Murray, C.A., and I, managed the affairs of Mrs Renton and Miss Alison. Mr Murray paid and received the income and kept the accounts, and I advised in regard to the investments. About ten days or a fortnight after it was made I was informed by these ladies that they had made a mutual settlement. They shewed me the deed. . . . . At Whitsunday 1860 two North British Railway debentures for £1500 each fell to be paid up. These debentures, I believe, both stood

in Miss Alison's name. One of them belonged to herself entirely, and the other, which came from Miss Renton of Eyemouth, belonged partly to herself and partly to Mrs Renton. Mr Murray consulted me in regard to the reinvestment of that £3000. I said I could procure a Dundee, Perth, and Aberdeen Railway debenture at 4½ per cent. Mr Murray approved of that and sent me the money. I wrote out the debenture, and signed it as secretary, along with three of the directors of the company, and sent it to Mr Murray. The interest warrants were made payable to him. I took that debenture, as I had seen the will, in the joint names of Mrs Renton and Miss Alison and the survivor, believing that I did so in terms of the joint will. I mentioned that to Mr Murray. I never consulted Mrs Renton or Miss Alison in reference to the terms of this investment. I said nothing to them about the way in which I was going to invest the money, and they knew nothing about it. I have no doubt that the discharge for the two £1500 debentures, from which the £3000 came, must have been signed by the ladies in whose names they stood, but I had nothing to do with that. The £3000 investment was the first investment I had to do with. Mr Murray made up annual states of the accounts of the ladies' affairs. These accounts were all sent to me, and I was in the habit of giving them to the ladies. They never looked at them, and they said they would not look at them. I therefore gave up taking the states of accounts to them for several years."

George Murray deponed—"I managed to a great extent the money matters of Mrs Renton and Miss Alison. I kept the accounts and also the documents connected with the funds. I received and paid over to them the income as it arose. I did not take charge of the investing of the funds. Mr Alison, who was secretary of the Dundee, Perth, and Aberdeen Junction Railway, and had better means than I had of knowing about investments, did so. I received the dividend warrants and drew the dividends. In uplifting the income of these ladies I did so entirely upon my own signature. I never consulted them on the subject. They never had in their possession the vouchers and writings instructing their means and investments. These were transmitted to me by Mr Alison after he made the investments, and remained with me. I never had in my possession any interest warrants signed by the ladies, they were all blank. I was informed by Mr Alison that Mrs Renton and Miss Alison had made a settlement. I had no communication with the ladies themselves about it previous to the death of Miss Alison. I merely knew that it was a joint will, and the parties who were the beneficiaries under it according to Mr Alison's information. I recollect £3000 being invested by Mr Alison in a Dundee and Perth Railway debenture. I remitted to him the money with which to purchase it. The dividend warrants or coupons in respect of the £3000 debenture were blank, and I endorsed them when I went to the bank. I never shewed that debenture bond to either of the ladies, or communicated its terms to them. It remained in my possession after I received it till the death of Miss Alison. It had not been converted at her death. I never had any communication with the ladies about that investment. I sent my accounts annually to Mr Alison, who I understand would shew them to the ladies. I did not deal with them personally upon that matter. I occasionally paid their income to Mrs Renton personally. Latterly I made payments to a bank account which she opened in Lasswade. I did so just as she required money to meet her general expenses—there was no regular payment. I have no recollection what Mr Alison communicated to me about the will they made, except that he told me it was a joint will, and I understood from him that they were to liferent each other's estate. After 1860 some stocks which were standing in their separate names were transferred into their joint names. I think that was done on the suggestion of Mr Alison, but I got the thing arranged after communication with him. I am not sure if I had any communication with the ladies on the subject of these transfers. I may have got them to sign, but I do not recollect. I gave no suggestion or advice personally in the matter; it was all arranged independently of me."

At advising—

Lord President—The question which we have to decide here is concerned with the effect to be given to a mutual disposition and settlement executed by two sisters, Mrs Renton and Miss Alison, on 19th May 1857. The two ladies were possessed of considerable means, and although not equally wealthy, they resolved to settle their estate by this deed in favour of certain parties therein named. In the first place, they disponed to each other the liferent of the estate, and to Robert Alison and David Renton they disponed the fee, under burden of the payment of certain legacies. One of these was to be paid to Robert Alison, another to George Murray, and a third, consisting of certain articles of furniture, to Robert Alison and David Renton. The two last were payable only on the death of the longest liver. Further, the survivor of the two testators was to be sole executor, and they also reserved power to each other during their respective lives to alter or revoke the deed. Miss Alison died first, in May 1862, and Mrs Renton, the other sister, thereafter revoked the mutual disposition under the power in the deed; and there can be no doubt that her deed is an effectual and good revocation in so far as her estate is regarded. But the question is—as a considerable number of investments were made, the great bulk of which were so destined as to belong to the survivor, whether Mrs Renton had power to re-settle the whole estate, or whether her will is effectual so far only as her own share is concerned?

The first alteration which occurred after the execution of the mutual dispositions was that a portion of the moveable estate was invested in heritable security. In 1862 the villa of Oakmount was bought, and the disposition, taken from the seller of that subject, was granted to Mrs Renton and Miss Alison in conjunct fee and liferent, and to the longest liver of them, and to the heirs and assignees of the longest liver. Now, there can be no doubt that the effect of this conveyance was to take the villa of Oakmount out of the operation of the mutual disposition. In short it was a re-settlement, and about that there can be no serious question.

But as regards the rest of the estate, a question of a different kind arises. It appears that the moveable funds were placed in railway stocks and other similar investments, and the two claimants, George Murray and Robert Alison, acted in these matters as the confidential friends and advisers of the ladies. It is said that these investments were made, not for the purpose of making a change in the settlement of the funds, but with a different object. Yet undoubtedly the terms of the distinations of the sums so invested, if they were to receive their full effect, would have altered the mutual disposition, or rather would have taken these funds out of the operation of that deed, and would have given them to the two ladies jointly and the survivor. That is the legitimate effect of the terms of the destination; and the question which is raised is of some delicacy, and has been made the subject of a proof. At first sight one was a little averse to admit parole evidence of intention in a case of this kind, but when fairly considered I think that difficulty disappears. The investments were taken in the terms which I have narrated, by Mr Murray, and he was substantially responsible for their being so taken. But it is said that he did so without authority, and that the two ladies were not aware that the investments were made in these terms or in such a way as would affect the mutual settlement. Accordingly the question of fact appears to be whether Mr Murray acted with the authority of the ladies. If he acted without it, I do not see how the terms of the investment can affect their succession; and if he acted with it, can the investment of sums of money made in this form defeat the terms of the mutual deed?

But the result of the investigation is that he acted without their authority. If they had been acquainted with business they might have informed themselves of the fact, but they were plainly unaware that anything of the kind had been done. Mr Murray having made the change with his own hand, I do not think that the moneys affected were thereby taken out of the mutual settlement. Looking at Mr Murray's evidence, there is no reason to doubt its perfect accuracy. He thought he was facilitating the operation of the mutual settlement whenever the first deceaser of the two should die, and he had it in view that the survivor was the executor of the predeceaser. It was not an unnatural supposition that the survivor would more readily, by the alteration, reduce into possession the means of the other. That explains probably quite truly and accurately what Mr Murray did.

But whether it does so or not, I am of opinion that the mutual disposition cannot be affected by it, and that the moneys are still under its operation; and that Mrs Renton's last will can carry only what belonged to herself individually. It may be difficult to separate the two estates; but at the same time that matter can hardly affect the legal rights of parties. The disturbing element is the new settlement by Mrs Renton. But for it there would be no difficulty in making a distribution in accordance with the mutual disposition. But the later deed cannot prevent parties under the mutual deed from claiming the respective portions of Miss Alison's estate as bequeathed to them therein.

I am therefore for recalling the Lord Ordinary's interlocutor, and for preferring those who claim under the mutual disposition and Mrs Renton's will, with the limited construction I have placed upon it. We must remit to the Lord Ordinary to fix the fund *in medio*, and in doing so it will be necessary to separate the estates of the two sisters.

Lord Deas—It was not contended in this case, as it has been in some, that a mutual settlement cannot be revoked after the death of one of the parties. That would have been a very difficult proposition to maintain here, looking to the terms of the settlement as to the survivor.

Laying that therefore aside, I am disposed to come to the same conclusion with your Lordship, but I do not rest so much as I understand your Lordship to do upon the parole testimony. We have not the terms and particulars of the investments before us. For instance, we have not seen the Dundee and Perth Railway debenture bond for £3000, and I do not see it alleged that the ladies signed documents connected with it. That being so, I should be very chary of placing much weight upon parole testimony as contradicting the inference to be drawn from the writing in the case. But to this extent I think it is admissible, that Messrs Alison and Murray had a general authority to invest in any way they thought proper so as best to conduce to the annual income on which the two ladies were jointly to live. I do not think it is to be inferred that authority was given to make a new destination. The whole object, except with reference to the heritable property about which there is no dispute, was to get temporary investments, so as to make the income as large as possible, and the parole testimony proves that that was the case.

But, apart from the parole testimony, the circumstances of the case are very strong in favour of the result at which your Lordship has arrived. The two ladies were living together, and although their capital was unequal in amount, they lived and intended to live to the full extent upon it, however it arose. I do not think therefore it was intended by the ladies to change the destination under the mutual settlement by the terms in which the temporary investments were taken, more particularly as by the terms of the joint-settlement the survivor was to be sole executor, and the investments were probably taken to the survivor *qua* executor of the other. Taking these circumstances into consideration, I do not place much dependence upon the parole testimony.

Lord Mure—There is a great deal to be said in favour of the view of this case which has just been taken by Lord Deas. Looking to the terms of the mutual settlement, I think that when the investments were taken to the two sisters jointly and the survivor, it was meant to refer to the mutual settlement. That would be sufficient for the disposal of the question, and Mrs Renton might have held the half to belong to her sister.

On the matter of the parole testimony, I admit the delicacy of allowing it in questious of this sort. In this particular case I concur with your Lordship in the chair, that proof was allowed for a different purpose. Messrs Alison and Murray made the investments, and the investments so made by them gave rise to this question. A mutual settlement cannot be altered by one of

the parties, but the question was, Whether there had not been anything done during the lifetime of the parties which had operated a change? The averment was that Messrs Alison and Renton, of their own motive, without instructions from the ladies, or telling them what they proposed to do, made these investments, as being in conformity with the mutual settlement. Parole evidence to that extent was allowed, and the change has been shown to have been made without any authority whatever.

Lord Ardmillan was absent.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the cause, with the proof for the claimants Robert Alison and others, and heard counsel further on the reclaiming note for them against Lord Young's interlocutor of 10th July 1875, Recal the said interlocutor: Find that the villa of Oakmount, being part of the estate *in medio*, was, by the operation of the conveyance thereof to the now deceased Miss Christina Alison and Mrs Margaret Renton, effectually settled on them in conjunct fee and liferent, and to the longest liver, and to the heirs and assignees of the longest liver, and that the said Mrs Margaret Renton having survived the said Christina Alison, became the absolute fiar of the whole of the said heritable subject: Find that the investment of the funds of the said Christina Alison and Mrs Margaret Renton in the terms mentioned in the record had not the effect of altering the mutual settlement made by these ladies in 1857, or of taking these funds out of the operation of the said mutual settlement, or of affecting the succession to the means and estate of the said Christina Alison, as regulated by the said mutual settlement: Therefore find that the trust-disposition and settlement of Mrs Renton, dated 9th December 1868, and codicil thereto dated 15th April 1874, can receive effect only as a settlement of the villa of Oakmount and of so much of the said invested funds as originally belonged to the said Mrs Margaret Renton, and cannot receive effect as a settlement of that part of the said invested funds which originally belonged to Miss Christina Alison: With these findings, remit to the Lord Ordinary to ascertain and determine the amount of the fund *in medio*, and to proceed further as shall be just; reserving all questions of expenses."

Counsel for Robert Alison and Others (Reclaimers)—Dean of Faculty (Watson)—Low. Agents—J. & J. Turnbull, W.S.

Counsel for William Alison and Others (Respondents)—Balfour—J. A. Reid. Agents—Leburn, Henderson, & Wilson, S.S.C.

Thursday, July 20.

SECOND DIVISION.

[Lord Young, Ordinary.

PULLAR & SONS *v.* POLICE COMMISSIONERS OF PERTH.

Police — Police and Improvement (Scotland) Act 1862, 25 *and* 26 *Vic., cap.* 101, *sec.* 132—*Manufactory.*

Section 132 of the Police and Improvement (Scotland) Act 1862 does not impose upon the Commissioners under the Act the duty of removing the ashes of the fuel consumed in the furnaces of a large manufactory.

This was an action at the instance of J. Pullar & Sons, dyers, North British Dye Works, Perth, against William Macleish, solicitor in Perth, clerk to and as representing the Police Commissioners of Perth. The summons concluded (1) for declarator "that the said Commissioners are bound, in terms of the 'Police and Improvement (Scotland) Act, 1862,' to collect from the pursuers' said works the whole dust, dung, ashes, rubbish, and filth (excepting always stable and byre dung) produced in the pursuers' said works called the North British Dye Works, in the city of Perth, including the ashes of the coal or other fuel consumed in the furnaces of said works, and to remove the same from the said works at such convenient hours and times as the said Commissioners shall think proper;" (2) for decree ordaining the defenders henceforth to collect and remove the whole dust, dung, ashes, rubbish, and filth (except stable and byre dung) produced in the pursuers' works; and (3) for payment of, first, the sum of "£43, 16s. 2d., with interest thereon at the rate of 5 per centum per annum from 31st December 1873 until payment; second, the sum of £68, 11s. 3d., with interest thereon at the foresaid rate from 31st December 1864 until payment; and third, the sum of £31, 15s. 11d., with interest thereon at the foresaid rate from 1st June 1875 until payment, and also of such further sums of money as the pursuers may have expended or may yet expend for removing said ashes on and after said last-mentioned date, as the same may be ascertained in the process to follow hereon, aye and until the said Commissioners shall remove said ashes themselves, or at their expense."

The Police and Improvement (Scotland) Act 1862 was adopted by the inhabitants of Perth in 1865, and the pursuers were assessed by the Commissioners under the Act in respect of their works. By sec. 132 of the Act it is enacted—"The dust, dung, ashes, rubbish, and filth (excepting always stable and byre dung), within the burgh shall be and the same are hereby vested in the Commissioners, who shall have power to sell and dispose of the same as they think proper, and the money arising therefrom shall be applied to the police purposes of this Act; and the Commissioners shall cause all the streets, public or private, together with the foot pavement, from time to time to be properly swept and cleansed, and all the dust, dung, ashes, rubbish, and filth to be collected from such