is a blank as to this. It is remarkable that the defender himself does not say that he found the horses, including this one, all properly tied up when he went in at 4 o'clock on the Sunday morning. I should have liked to know what took him to the stable so early long before it was light.

On the whole I am satisfied with the judgment of the Sheriffs.

The Court adhered.

Counsel for Pursuer (Respondent)—Guthrie Smith. Agent—J. Gill, Solicitor.

Counsel for Defender (Appellant)—Goudie. Agent—R. Starke, Solicitor.

Saturday, November 22.

SECOND DIVISION.

SPECIAL CASE—DUNSMURE AND OTHERS (DUNSMURE'S TRUSTEES) *v.* ELLIOT OR DUNSMURE.

Succession — Meaning of "Money" in Testamentary Writing.

Held that the word "money" in a testamentary writing falls to be construed as the circumstances of the case require, the Court for that purpose being placed in the position occupied by the testator, and that it may be applied either in its strict acceptation to coined money or bank notes, or to the whole moveable estate of the deceased.

Circumstances where the term "money" in a testamentary writ was held to apply to the universal succession of the testator.

Writ—Meaning of Term "Will."

Circumstances where the term "any other will" was held to cover a marriage-contract.

By antenuptial contract of marriage between Major George Dunsmure and his wife, dated 17th and 18th March 1846, Major Dunsmure made over to trustees £2000 in trust for the conjunct liferent use of the spouses and the survivor, the principal, interest, and proceeds thereof after the death of the survivor to be made over to the child or children of the marriage in such shares as the spouses or the survivor of them should appoint by any writing or writings under their hand, and failing direction, equally, share and share alike, under the declaration that if any of the children should die before the shares falling to them should become payable, leaving lawful issue, then such issue should have right to the share of the parent predeceasing, and in case there should be no children, or if there should be children and they should have all died before the term of payment of their shares without leaving issue, then and in either of these events it was to be competent to Major Dunsmure to dispose of the same by will. There was also an obligation by Major Dunsmure to provide and secure at the first term of Whitsunday after his death the further sum of £2000, the free yearly proceeds thereof to be paid to Mrs Dunsmure during her life, and after her decease to the child or children of the marriage, in such proportions and under such conditions as the spouses or the survivor should have appointed in manner therein mentioned, and failing any such appointment, then among the children equally, under declarations similar to those made with reference to the other £2000. On the other part, Mrs Dunsmure made over to the trustees certain funds which then belonged to her, and also her share of certain funds and property to which she was entitled under her father's deed of settlement, and also funds to which she might succeed upon the decease of her mother, that the trustees might pay the free yearly income to the spouses during their joint lives, and to the survivor afterwards, and after the death of the survivor the funds and property were to be assigned to the child or children of the marriage under powers and rights to the spouses similar to those conferred in the case of Major Dunsmure's funds.

In January 1869 Major and Mrs Dunsmure executed a deed of division and settlement appointing the marriage-contract trust funds to be divided equally among their children George, Elizabeth, and James.

Major Dunsmure died on 24th September 1873 leaving a trust-disposition and settlement dated 6th September previously, whereby he gave to trustees his whole heritable and moveable estate, for the following purposes, *inter alia*—"(1) To pay the free annual income of the truster's estate after payment of debts and implementing his marriage contract obligations to his wife during her life. (2) To settle on his daughter, in the event of her marriage during the lifetime of her mother, the sum of £1000, paying her at the same time £300 for marriage outfit. (3) In the event of his daughter not being married during her mother's life, to pay her a legacy of £1000 on her mother's death, over and above her share of residue. (4) To pay a similar legacy of £1000 upon Mrs Dunsmure's death to each of his two sons; and (5) to divide the residue of the trust estate upon Mrs Dunsmure's death among his three children equally, it being declared that said shares of residue should vest at the truster's death."

Lieutenant George Dunsmure, the eldest son, died on 23d June 1878, having shortly before attained majority. He was married and left a holograph testamentary writing in these terms:—

"I, George Dunsmure, give and bequeath to my wife Beatrice Mary Dunsmure all moneys and goods in my possession at the time of my death. Also any money I am entitled to by my late father's will, or any other will, whether she remain my widow or not.

"Subscribed as under,

"G. DUNSMURE, Lt. 36th Ft.

"Emily Sainsbury, } witnesses.
"Jane Trotter, }

"Signed at Pembroke Dock this 13th day of June 1878."

The whole trust funds under the marriage-contract were in the hands of the trustees. They consisted of (1) the sum of £5368 invested in various securities, and (2) dwelling-house in Coates Crescent, Edinburgh. The funds settled by Major Dunsmure under his trust-disposition and settlement amounted to about £3700, and were held by his testamentary trustees.

Lieutenant Dunsmure's widow claimed to be entitled, subject to the liferent of Mrs Dunsmure, widow of Major Dunsmure, not only to the legacy and share of residue bequeathed to the deceased by his father's settlement, but also to the share

of the marriage-contract funds which would have fallen to him upon the death of his mother. It was maintained against that claim that the will did not carry or affect the deceased's rights and interests under the marriage-contract. She further claimed that in any view she was entitled *jure relictæ* to one-half of the deceased's interest under the marriage-contract.

This Special Case was therefore presented for the opinion of the Court by Lieutenant-Colonel Dunsmure and others, trustees under the marriage-contract of Major and Mrs Dunsmure of the first part; the widow and surviving children of Major Dunsmure of the second part; and Mrs Beatrice Mary Elliot or Dunsmure, Lieutenant Dunsmure's widow, of the third part; and the following were the questions put to the Court:—"(1) Does the said testamentary writing of Lieutenant George Dunsmure contain or operate as an effectual conveyance of his one-third share of the trust funds held under the contract of marriage between Major and Mrs Dunsmure? (2) If it does not operate as an effectual conveyance of the said share, is the party of the third part entitled to one-half thereof *jure relictæ?*"

Argued for the trustees—In order to succeed, the third party must make out (1) that "money" included moveable estate of every kind, and (2) that it was not limited by the expression "in my possession." The fact of the existence of heritage increased the inappropriateness of the terms used if they were meant to include the whole trust estate. The allocation of the words in the second paragraph of Lieutenant Dunsmure's will, as well as their terms, pointed to a restrictive signification.

Authorities—Jarman on Wills, i. 730; *Byrom* v. *Brandreth*, July 23, 1873, 16 Eq. 475; *Prichard* v. *Prichard*, Dec. 8, 1870, 16 Eq. 232; *Lowe* v. *Thomas*, May 30, 1854, 5 De Gex, M. and G. 315; *Auld* v. *Mabon*, Dec. 8, 1876, 4 R. 211; *Fotheringham's Trs.* v. *Paterson*, July 2, 1873, 11 Macph. 848; *Buchanan* v. *Angus*, May 15, 1862, 4 Macq. 374.

Argued for Lieutenant Dunsmure's widow—The purchase of the house by the marriage-contract trustees was an investment, not a conversion. It was never heritage in the person of the testator. The purchase was made under the general powers of the trustees to invest and change investments. The heritable character of the house was in suspense in these circumstances so long as the trust lasted—*Hogg*. The English authorities favoured the view of the trustees, but Scotch law was different, and English judges themselves lamented their rule.

Authorities—*Brandreth* (*supra*); *Lord Fife* v. *Mackenzie*, March 6, 1797, 3 Pat. Apps. 549; *Smith* v. *Donaldson*, June 10, 1829, 7 S. 734; Act 1540, c. 120; *Maule*, June 14, 1876, 3 R. 831; *Hogg* v. *Hamilton*, June 7, 1877, 4 R. 845; *Darling's Executors* v. *Darling*, July 3, 1869, 41 Sc. Jur. 545; *M'Donald* v. *M'Donald's Trustees*, June 17, 1875, 2 R. (H. of L.) 125.

At advising—

Lord Justice-Clerk—There are two questions put to us in this case. The second only requires to be answered if the reply to the first be in the negative. I am, however, inclined to answer the first in the affirmative, and to hold that the expression here under consideration is in the circumstances sufficient to carry all that Lieutenant Dunsmure will receive under his father and mother's marriage-contract. The document was executed by the testator himself when a young man only recently major, and it was immediately prior to his death that he did so. He had been married a few months before that time. We have already had occasion to-day in the case of *Easson** to state a general opinion on the import of the expression "money" in a testamentary deed, and I have already stated my view that in Scotland we are not hampered in any way by previous authority in construing it as we think the circumstances of the case entitle us; it must be taken in the special circumstances of each deed, and the word itself is sufficiently elastic to apply to money in its strict sense alone or to a person's whole moveable estate. The question here is, was it intended to apply to the universal succession? and I have no doubt that it was.

Looking to the second limb of the sentence, Lieutenant Dunsmure was entitled to property under his father and mother's marriage-contract, and the question arises, is this included under the term "will" there used. I think the words were intended to carry everything coming to the testator, whether by a writ of that nature or under any similar deed of settlement.

On these grounds, and referring to my opinion in *Easson's* case,* I think we should answer the first question in the affirmative and find it unnecessary to answer the second.

Lord Ormidale—This case raises a question of the same description, although in somewhat different circumstances, as one of the questions in the case of *Thomson or Easson* v. *Thomson's Trustees* just decided to-day by the Court*. Here, as in that case, it is manifest, I think, that Lieutenant Dunsmure, who had no children, intended to leave all his means and effects to his wife; and if this be so, the form and words in which he expressed himself for that purpose ought not to be too critically dealt with. The great object is to give effect to the testator's intention if that be fairly possible.

What, then, is the true construction and effect of the will or testamentary writing left by Lieutenant Dunsmure? Does the expression "moneys in my possession at the time of my death" comprehend his share of the funds held in trust under the marriage-contract of his father and mother? I rather think not, in respect that such share cannot be held to be moneys in the testator's possession at the time of his death. But while this may be so, the question remains, whether the share referred to may not in a reasonable sense be held to be covered by the expressions also used by the testator—"any money I am entitled to by my late father's will or any other will." The word "will" has an extensive and varied meaning, and is not to be limited to any strictly technical interpretation of it in a case where the testamentary writing under consideration is that of a non-professional person such as the testator in the present instance. It is true that the proportion or share of the funds covered by the marriage-contract which might come to the testator is made to depend on the appointment made by his father and mother or the survivor of them; but is not that saying in other words

* This case will be reported subsequently of the date upon which the interlocutor in it was pronounced.

that it depends on their will, in whatever form it may be expressed; and on this point I would refer to the case of *M'Donald* v. *M'Inroy and Others*, as decided in the House of Lords, 17th June 1875, 2 R. 125. Nor do I think that there is any sufficient ground for making a distinction or exception in regard to the house in Coates Crescent.

I am therefore of opinion that the first question submitted to the Court in the present Special Case ought to be answered in the affirmative; and that renders any answer to the second question unnecessary.

Lord Gifford—Cases like the present depend not only on a critical and careful consideration of the words used by the testator in the writing or writings which constitute his testamentary deed, but also on a consideration of the circumstances in which he stood, the nature of his estate, and his relations to the beneficiaries and others whom he wished to favour by his last will and testament.

The question is, What did the testator mean and intend? How did he mean his property to be disposed of? Has he made only a partial or a universal settlement of his estate? Has he or has he not disposed of residue; or did he intend that a portion of his estate generally called residue should not be disposed of at all by his written will, but should go by the disposition of law to his heirs or next-of-kin as intestate succession? In considering these questions no doubt the first thing to be looked at is the will itself and the exact words of which the testator has made use. But more is needed especially in cases where the testator has written his own will without professional assistance, himself not being a professional man, and using common and familiar language, which is often vague and flexible as to the precise extent of its meaning.

In such cases—indeed I think I may say in all cases—the Court, upon which is laid the duty of discovering the testator's meaning from his deed, is entitled to be put in the same position as that which the testator himself occupied. They should know as far as the testator himself did of what his estate consisted and where it was situated, what were his relations to the legatees and beneficiaries, and generally the circumstances in which he was making his will. Thus only will the Court be able to judge what he probably meant by the words he used, especially if these words have no technical or absolutely fixed meaning and extent, but are popularly used sometimes with a larger and sometimes with a more limited signification.

Now, applying these principles, I am of opinion that the late Lieutenant Dunsmure intended by his holograph will, to leave and bequeath his whole personal estate of every description to his wife. In particular, I am of opinion that the bequest is so expressed as to include Lieutenant Dunsmure's one-third share of the trust funds held under the contract of marriage between his father and mother, the late Major Dunsmure and Mrs Dunsmure seniors.

I do not think that it can be held that the testator by using the expressions "all moneys" and "also any money" meant to confine the bequest to coined money or bank notes in his possession, or even to money in bank lying at call or at his command. I think he used the words "moneys" and "money" in a far wider sense, as comprehending all funds belonging to him, however invested, and all pecuniary claims which he was entitled to prefer and make good. I think this follows from the second expression in the will, where Lieutenant Dunsmure speaks of "any money I am entitled to by late father's will or any other will." I think there can be no doubt that this expression comprehended Lieutenant Dunsmure's share of his father's estate falling under his father's will, of whatever that estate consisted, and however it happened to be invested; and so apparently parties are agreed, for they do not put any question regarding the general residue of Major Dunsmure's estate. But, then, if "money" in the third line of the will means moveable property of every kind, it is very difficult to read the word in a more restricted sense in the immediately preceding line. When the testator speaks of "moneys" in his own possession and "money" which he is entitled to under his father's will, I think it fair to conclude that he is using the word in the same sense, and that in the general and popular sense, as embracing all kinds of property or money's worth. The true contrast, as it appears to me, drawn or implied by the testator in the two clauses of his will, is not between "moneys" considered as coin or ready cash and money considered as investments or claims not immediately available, but the contrast meant is between "moneys" and goods "in my possession," that is, which I have already reduced into possession and which are in my own right and name, and moneys or estate which I have not reduced into possession and which are not in my own name but in the name of my father's trustees, or to which I am entitled "under my father's will or any other will."

In short, I am of opinion that Lieutenant Dunsmure's will was a universal will, and was intended to carry all his personal estate of whatever description, whether in possession or in claim.

In particular, I think that the will carried, and is effectual to carry, Lieutenant Dunsmure's share of the trust funds held by the trustees under his father and mother's marriage-contract. There may be some difficulty in holding the marriage-contract between the testator's father and mother to be a deed which would fall under the description "of my late father's will or any other will," although in many aspects provisions in favour of the children of a marriage made in a marriage-contract might not improperly be said to be made by the will of the parents or of one or other of them, especially when these provisions flow directly from the parents themselves, and when the person who calls a marriage-contract a will is an unprofessional person using loose and popular language and not discriminating exactly between different kinds of deeds.

But when it is recollected that the marriage-contract funds were not finally disposed of by the marriage-contract alone, but also by a deed of division and apportionment executed by Major Dunsmure and Mrs Dunsmure senior, I think this circumstance sufficiently explains Lieutenant Dunsmure's expression "my late father's will or any other will," for an unprofessional person might very naturally, and indeed without any impropriety, call the deed of division and appor-

tionment a will. Such a deed is in reality a will. It is the expression of the will of those who are vested with the power of apportionment, and it is not difficult to understand how Lieutenant Dunsmure, knowing that his father besides his own trust-disposition and settlement had left the deed of division executed by him and by Mrs Dunsmure, should, as if to exclude all doubt, use the words "any other will." I think this phrase was very likely employed by the testator with reference to the deed of apportionment and division, the technical name of which Lieutenant Dunsmure did not recollect, if indeed he had ever known it.

I am of opinion therefore that the first question put in the case should be answered in the affirmative. This answer supersedes the second question.

The Court therefore answered the first question in the affirmative and found it unnecessary to answer the second.

Counsel for First and Second Parties—Kinnear—Mackintosh. Agents—Mylne & Campbell, W.S.

Counsel for Third Party—Balfour—Murray. Agents—Morton, Neilson, & Smart, W.S.

Saturday, November 22.

SECOND DIVISION.

SPECIAL CASE — HODGE (HODGE'S FACTOR LOCO TUTORIS) *v.* DUNCANSON OR HODGE.

Succession — Heritable Bond — Whether Moveable as between Husband and Wife — Titles to Land Consolidation Act 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 117.

By the Titles to Land Consolidation Act 1868, sec. 117, it is provided that bonds and dispositions in security shall be moveable as regards succession except where conceived expressly in favour of heirs excluding executors and *quoad fiscum*, and as regards all rights of courtesy and terce; and that no heritable security, whether granted before or after marriage, shall to any extent pertain to the husband *jure mariti* where the same is or shall be conceived in favour of the wife. Where a married daughter succeeded to a share in a bond and disposition in security in which her father was creditor (he having died intestate), *held* that her share remained heritable and did not fall under her husband's *jus mariti*.

Succession—Collated Heritage—Whether Heritable or Moveable.

The fact of collation does not alter the character of property from heritable to moveable unless where it is actually sold.

The parties to this Special Case were (1) Thomas Hodge, executor of the late Peter Hodge, and factor *loco tutoris* to Peter Hodge's son, and (2) Mrs Helen Duncanson or Hodge, Peter Hodge's widow. At the death of Thomas Duncanson, Mrs Peter Hodge's father, intestate on 20th Dec. 1871, his estate consisted of (1) certain house property in Alloa in which his widow was liferented, (2) a bond and disposition in security for £900, and (3) personal estate worth about £1600. Mr Duncanson left three children and a widow. His widow took one-third of the moveables, her liferent of the Alloa subjects, and her terce of the £900 bond. There was no dispute as to her rights, and she was therefore not a party to the present case. Mr Duncanson's eldest son, J. J. K. Duncanson, M.D., collated his father's heritage, and thereupon each of Mr Duncanson's three children became entitled, subject to their mother's admitted rights, to (1) One-third of the fee of the Alloa subjects, (2) One-third of the bond for £900, subject to old Mrs Duncanson's terce, and (3) One-third of the moveables after payment therefrom of the deceased's debts and of old Mrs Duncanson's *jus relictæ*. Accordingly Mrs Helen Duncanson or Hodge (the second party), as one of the three children, had vested in her immediately on her father's death, or at least from the date of the collation by Dr Duncanson, one-third of the Alloa subjects, one-third of the bond for £900, and one-third of the personalty after paying debts and the widow's *jus relictæ*.

Before Mr Duncanson's estate was divided, Peter Hodge, the husband of his daughter Mrs Helen Duncanson or Hodge, the second party to this case, died intestate on 14th July 1872, and Thomas Hodge, the first party, was thereupon appointed executor and factor *loco tutoris* to the only child of that marriage. In dividing Mr Duncanson's estate the share which fell to Mrs Hodge (including the collated heritage, the bond, and the moveable estate) was dealt with as moveable as regarded her succession thereto, and as having passed to her husband *jure mariti*, and was thus included in the inventory of her husband's personal estate. The collated heritage had not been disposed of. The second party thereafter claimed that her share of the collated heritage and of the bond had been improperly included in her husband's estate, both being in point of fact heritable, the first being heritable and remaining heritable in her person, and the second heritable as between her and her husband under the Titles to Land Consolidation Act of 1868, sec. 117.

This Special Case was therefore adjusted, in which the questions submitted were as follows:—"(1) Is the share of the said collated heritage moveable, and did it pass to the deceased Peter Hodge *jure mariti?* (2) Was the interest of the second party in the said bond and disposition in security moveable as between her and her husband, and did it pass to him *jure mariti?* (3) In the event of the foregoing questions or the second question being decided in favour of the first party, will he be justified as factor *loco tutoris* foresaid in paying the expenses of this case out of the fund in dispute?"

At the discussion the point as regarded the collated heritage was not argued on behalf of the first party, as he admitted that collation did not alter the character of property unless it was actually sold.

Argued for the first party—The Titles to Land Consolidation Act 1868, sec. 117, provided that heritable securities should remain heritable as between husband and wife only where the security "is or shall be conceived in favour of the wife" or the husband, as the case might be; here it was not so, for the wife succeeded to the share of the bond *ab intestato*, and the ordinary