might exhaust it or not according to an uncertain future event, which being the death of the legatee with or without issue, was incapable of being ascertained before the legatee's death. According to the trust, the trustees were to pay the income of the legacy to the legatee during her life, and on her death leaving issue they were to pay the capital to them, whereby of course the legacy would be exhausted and the trust ended. If she died without issue, as in fact she did, the trust was ended, there being no longer any trust purpose to fulfil; but the trustees having the capital of the legacy in their hands, the question is, what are they to do with it? and that is the question which we have to decide. It depends, I think, on the consideration whether the trust I have referred to, subsequently declared with respect to the legacy previously bequeathed, operated as a revocation of the bequest, leaving the rights of parties to depend entirely on the declaration of trust, or whether the bequest remained subject only to the trust subsequently created; and I am of opinion that the latter is the right view. I think the testator put the legacy which he had bequeathed so as to vest *a morte testatoris* in trust for a specified purpose, and that subject to this trust the legacy subsisted as originally constituted, in the same way exactly as if the trust had been created by the legatee, whether voluntarily or pursuant to a direction in the will. I am accordingly of opinion that on the termination of the trust by the legatee's death without issue the legacy was set free of the only burden that was ever upon it, and became payable to her legal representative, just as it would have become payable to herself had the trust been such as might have been fulfilled and ended in her lifetime without exhausting the legacy. Had the trust been for a purpose that disappeared before the testator's death or was fulfilled thereafter, leaving the legatee, I think it not doubtful that the legacy must have been paid in terms of the unrevoked bequest. The fulfilment of the trust on the legatee's death (the legacy being extant) no otherwise varies the case, in my opinion, than that the legatee being dead her representative takes her place.

The Court answered the first question in the affirmative, and the others in the negative.

Counsel for First and Third Parties—Pearson. Agent—James W. Lindsay, W.S.

Counsel for Second Party—Kinnear. Agent—John T. Mowbray, W.S.

Wednesday, December 15.

SECOND DIVISION.

SPECIAL CASE—HASTIE AND OTHERS.

Succession—Words Importing Bequest of Heritage—Titles to Land Consolidation Act 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 20.

Terms of a document *held* effectual to carry heritage under the 20th section of the Act of 1868.

John Aim died on the 24th February 1880 at Bournemouth. He was unmarried, and was survived by his mother Mrs John Aim (who died before this case was presented), his brothers William Laughton Aim and James Barrie Aim, and by his sister Jane Aim or Hastie. After his death there was found in his repositories a document in an unclosed envelope addressed to his mother. That document, which was written on two sides of a half sheet of notepaper, and the the address on the envelope, were holograph of the deceased, the document being in the following terms:—"All furniture, books, and personal effects to Mrs Jon Aim absolutely, and the free liferent use of all my other means and estate.

"To John Aim, son of W. L. Aim, Pollokshields. On After Mrs A.'s disease, The whole of the estate to turned into cash at the time my trustees deem most suitable for best realising, and *proceeds* safely invested for disbursing as under, viz., To John Aim, son of W. L. Aim, Pollokshields, on his attaining the age of 21 years, £300. In event of his prediseasing, the same to be equally divided between his two sisters Catherine and Mary Jane, or the survivor of them (on their attaining their majority.)

"To John Aim, son of Jas. B. Aim, Rockhill, Hunter's Quay, on his attaining the age of 21 years, £300. In event of his prediseasing, the same to be equally divided between his brother James and his sister Agnes, or the survivor of them (on their attaining their majority).

"To Mary Margaret Hastie, daughter of Peter Hastie, Crosshill, on her attaining her majority, £300. In event of her predeasing, the same to go to her brother John Aim Hastie on his attaining his majority.

"To John Aim Hastie, son of Peter Hastie, Queen Villa, Crosshill, the residue with the accumulated interest, on his attaining the age of 21 years. In the event of his prediseasing, said residue, with accumulated interest, to be equally divided, share and share alike, between my sister Jane Aim or Hastie, James Barrie Aim, and William Laughton Aim, *or the survivors of them.*

"Trustees for carrying out the foregoing, I wish to name my two brothers and brother-in-law, and Mr Ritchie Lennie.

"JOHN AIM, 8 *March* 1877."

(The words underlined above were scored out, the word "proceeds" italicised was interlined in pencil, and the other words in italics were added in pencil.)

The heritable estate left by the deceased consisted of a dwelling-house and ground, which, if he was held to have died intestate, would fall to his immediate younger brother James Barrie Aim. The moveable estate consisted of money in bank, &c., amounting to about £1670. He also left household furniture, books, and other articles contained in an inventory and valuation of his effects which amounted in all to £35, while his whole estate was worth about £2100.

Peter Hastie was the sole accepting and acting trustee. Questions having arisen as to the effect of the above document, the trustee, the beneficiaries under the will, the next-of-kin of the deceased as representing their mother, and the heir-at-law, agreed to present this Special Case to the Court for opinion and judgment.

The questions of law to be decided were—"(1) Whether the document referred to is a valid testamentary settlement and conveyance of deceased's heritable and moveable estates in favour

of the parties therein namedas trustees, and whether the succession of the deceased is regulated thereby; or whether the deceased must be held to have died intestate as regards his heritable and moveable estate, or either of them? (2) Whether the party of the first part, as sole acting trustee foresaid, is entitled to complete titles for effectually vesting him in the right and estate of the deceased; and whether the said James Barrie Aim, as heir-at-law of the said deceased, is bound to make up a title to the heritable estate and convey it to the trustee acting under the said will? (3) To what portion of the moveable estate, in the event of the will being sustained, did the testator's mother Mrs Aim succeed under the clause, 'All furniture, books, and personal effects to Mrs John Aim absolutely?'"

The 20th section of the Titles to Land Consolidation Act 1868, 31 and 32 Vict. c. 101, provides as follows:—"From and after the commencement of this Act it shall be competent to any owner of lands to settle the succession to the same in the event of his death not only by conveyance *de præsenti*, according to the existing law and practice, but likewise by testamentary or *mortis causa* deeds or writings, and no testamentary *mortis causa* deed or writing purporting to convey or bequeath lands which shall have been granted by any person alive at the commencement of this Act, or which shall be granted by any person after the commencement of this Act, shall be held to be invalid as a settlement of the lands to which such deed or writing applies on the ground that the granter has not used with reference to such lands the word 'dispone,' or other word or words importing a conveyance *de præsenti*; and where such deed or writing shall not be expressed in the terms required by the existing law or practice for the conveyance of lands, but shall contain with reference to such lands any word or words which would if used in a will or testament with reference to moveables be difficult to confer upon the executor of the grantor or upon the grantee or legatee of such moveables a right to claim and receive the same, such deed or writing, if duly executed in the manner required or permitted in the case of any testamentary writing by the law of Scotland, shall be deemed and be taken to be equivalent to a general disposition of such lands, within the meaning of the 19th section hereof, by the grantor of such deed or writing in favour of the grantee thereof."

It was argued for the trustees and the beneficiaries under the deed—(1) On a sound construction of the 20th section of the Act of 1868 the document was good to carry heritage, as it contained words applicable to heritage which if applied to moveables would be effectual to carry them. (2) The heir-at-law must make up his title and convey in terms of the same section. (3) Mrs Aim was only entitled to get personal estate *ejusdem generis* with that which was expressly mentioned.

On the other hand, it was argued for the next-of-kin of the deceased, and as representing their mother, and for the heir-at-law—(1) This document was to be looked on as a mere scrawl. In it no trustees were named. The framer merely expressed a wish to name his brothers as such, and on the whole it could not reasonably be regarded as the completed expression of the testator's wish —*Forsyth's Trustees* v. *Forsyth*, March 13, 1872, 10 Macph. 616; *Lowson* v. *Ford*, March 20, 1866, 4 Macph. 631. But (2) even if it was a proper testament it only carried moveables. It was not enough that the intention of the testator appeared to be to convey lands in words conveying moveables—*Urquhart* v. *Deuar*, June 13, 1878, 6 R. 1026. (3) Mrs Aim was entitled to get the whole personalty, amounting to £2100.

At advising—

Lord Justice-Clerk—I see no reason for entertaining doubt here. This document was found addressed to Mrs Aim, and in an envelope amongst the repositories of the deceased. It is a carefully written and distinct document. Whether it was intended or not as a memorandum for a lawyer's settlement is of no moment.

The first question we are asked to decide is, whether it carries heritage under the 29th section of the Act of 1868? Now, some questions may arise no doubt, but I am of opinion that the construction of that section is clear enough. It provides (1) in reference to heritage, that it may be conveyed by *mortis causa* settlement. (2) It provides that the word "dispone," which was formerly essential, should be no more so. (3) It provides that heritage may be conveyed in a testament provided words are used in regard to heritage which if used in regard to moveables would be sufficient to carry them, and then that such a conveyance should be equivalent to a general disposition under the 19th section of the Act, and that the heir-at-law should make up his title accordingly. That, I take it, is the meaning of the clause. But then it is objected that in the present case heritage is not conveyed, there being merely a direction that the whole of the truster's estate is to be turned into cash and the proceeds safely invested for disbursing in manner directed. This, however, I cannot think to be a sound objection, and I am of opinion that this document will effectually carry heritage under the 20th section of the 1868 Act; and, looking to the whole language of this document, I am of opinion that it is perfectly clear the proprietor meant to convey his heritage, and under the section of the Act competently did so. The cases which have been quoted to us are not on all fours with the present case. The case of *Lawson* v. *Ford* was a very remarkable one, but far narrower than this. There was no settlement nor words of bequest, but simply a list of names with sums of money appended; it was certainly signed, but the Court refused to give effect to so bare an expression of the intention of the person who framed it.

I think, then, it is clear (1) that the first question must be answered in the affirmative. The conveyance is a good one, because words have been used in it with regard to heritage sufficient in regard to moveables to carry them. (2) It follows that the heir-at-law is under obligation to make up a title under the section of the Act, and besides section 46 of the 1874 Act applies to his case equally. (3) This question is chiefly a matter for common sense. The collocation of words, however, seems clearly to infer that Mrs Aim was to get the personal effects as contained in the inventory.

Lord Gifford concurred.

Lord Young—I am of the same opinion, and I have no doubt whatever about the case. It is true, I think, that the document before us is a proper will and no more. That which is commonly called a testament is not a conveyance of either heritage or moveable estate. It contains no words of conveyance. It has operation given to it, but that is in deference to the will of the deceased proprietor therein expressed. A will may contain a conveyance, and often does, but it is not necessary that it should do so. I speak of it without reference now to the changes in the law made by the 20th section of the Act of 1868. Before it was passed the proper purpose of a will or testament was to express the will and intention of the deceased with respect to the disposal of his personal estate, and the written instrument under his hand doing so was given effect to as the last will, or rather as the emphatic expression which disclosed the will in his mind at the last moments of his rational existence. If he had himself named a person to carry his express wishes into effect, the law armed that person with a title, and by naming and confirming him executor armed that person with a title, and then his duties were to execute the will of the deceased proprietor with respect to it; and even when he named no executor, but simply stated what his will was, the law appointed an executor to carry out that will, named and confirmed him, and vested him with a title to the property, his duty being to do with respect to it according to the mere wish of the testator.

That was the law of the land with respect to the will before the Act of 1868. The only other case was where the will contained an express conveyance of some specific subject; it then operated as a conveyance, and the party in whose favour it was made took independently of the executor altogether, and this distinction is explained by the text-writers and illustrated by decisions. But now since 1868, according to my own view of clause 20 of the Act of that year, heritage is placed in the same position as moveables, not with respect to a conveyance of it, but with respect to settlements of succession thereto. Formerly a proprietor, if he wished to sell his heritage, could not do so by declaring his will simply; the only mode of effecting his purpose was by making a *de præsenti* conveyance, and I think it has been expressly held that a conveyance in words to operate as a conveyance on death or six months after death is bad, because it is not a conveyance *de præsenti*. But under the Act of 1868 wills were made applicable to heritage as well as moveables, and since then you may affect the heritage as you may moveables by use of any words which will confer a right to moveables. Supposing a proprietor said, "I want £1000 to be divided amongst my three children," would the words be enough to confer on them a right to claim their share of the division of £1000? There can be only one answer. Well, the same words which would confer a right to moveables, will under the Act of 1868 confer a right to heritage if used with reference to heritage. I use them now with reference to heritage. The case, then, I think, is as clear as it can be. Again, let me give one more illustration. A list of legatees or persons entitled to take the estate of the deceased is quite good. If a proprietor directs that he wishes his estate to be divided so that A shall get £500, B a house, C a bit of land, and so on; and if he places opposite the surnames of some sums of money, and of others houses, the document which embodies these directions will be quite good to carry all, because whatever words give right to claim money will give right to claim land if land is mentioned. Therefore, as contrasted with a conveyance as the expression of the will of the deceased, I am of opinion that it is competent by the Act of 1868, as I read it, to give the will the same effect as regards heritage as regards moveables. The executor of the will is bound to give it execution with reference to both, following the testator's intention.

With regard to the second point, we decided the other day that under the 46th section of the 1874 Conveyancing Act a person in a position such as the heir-at-law here may complete his title under that section. And if we decide that the will is to have effect with respect to heritage, the heir-at-law can competently make up his title in terms of that section.

The Court answered the questions put to them in terms of these opinions.

Counsel for the Trustee and Beneficiaries—Kinnear — Mackintosh. Agent—Alex. Morison, S.S.C.

Counsel for the Representatives of the Deceased John Aim and the Heir-at-law—Solicitor-General (Balfour, Q.C.)—C. S. Dickson. Agents—J. & A. Hastie, S.S.C.

Thursday, December 16.

FIRST DIVISION.

[Sheriff of Lanarkshire.

LANDLESS *v.* WILSON.

Recompense — Architect's Charges — Quantum meruit.

In unusual or innominate contracts conditions will not be easily implied. *Held*, in conformity with this rule, that where an employer alleged that architectural plans for private buildings had been furnished to him gratuitously, and that no payment was to be made therefor unless they were adopted by him after competition with other plans, the *onus* of proof lay upon the employer.

Circumstances in which *held* that this *onus* had not been discharged, and that the employer having used the plans to increase the value of his property in the market was bound to pay for them.

In September 1876 the defender acquired a property at Wood Lane, Glasgow, upon which he determined to erect new buildings, and employed the pursuer to prepare plans for the purpose, and the plans were prepared and delivered to the defender early in December immediately following. The defender, however, did not proceed to build, but on 22d December 1876 sold the property. The pursuer was employed at the time on other matters for the defender, and on asking for a payment to account the defender objected to the item for preparing the plans in question.