Friday, July 18.

SECOND DIVISION.

SPECIAL CASE—FORD'S TRUSTEES AND FORD

Succession—Testament—Words importing a Bequest of Heritage—Titles to Land Consolidation Act 1868 (31 *and* 32 *Vict. c.* 101), *sec.* 20—"*All I have in the World*"—"*All my effects.*"

In 1861 a testator executed a holograph testamentary writing, *inter alia*, in these terms—"I now then leave and bequeath all that I have in the world—life assurance, money in the bank, goods in hand and in my shops . . . also household furniture, bed and table linen, and all other effects in my house No. 5 St John Street, belonging to me—to my wife, for her maintenance and for the upbringing of my children by her . . . I appoint her sole trustee with power to call in whom she pleases." In 1864 he acquired certain heritable subjects, taking the destination to himself and his wife in conjunct fee and liferent, for her liferent use allenarly, and to his own heirs and successors whomsoever in fee. In 1870 he executed another holograph testamentary writing commencing in these terms—"I have this day looked over my settlement or will, dated 17th September 1861, and as far as the disposal of *all* my effects, in money, stock-in-trade, and otherwise, are concerned, I hereby confirm the same to be at the disposal of my wife." He predeceased his wife, leaving several children. In a question after her death, between his heir-at-law and her testamentary trustees, *held* that the terms of his settlement were not habile to convey the fee of the heritage to his widow *mortis causa*, and that they passed to his heir-at-law.

James Ford, merchant in Edinburgh, died on 16th March 1872, possessed of certain property, heritable and moveable. He left certain holograph writings of a testamentary nature. The earliest of these writings was dated 17th September 1861, and was as follows:—"*Edinburgh*, 17 *Sep.* 1861.—I, James Ford, being in good health and in sound mind, have this day resolved to make my will, which, I am free to confess, I should, like a wise man, have done long ago, for reasons which are obvious. I now then leave and bequeath all that I have in the world—life assurance, money in the bank, goods in bond and in my shops 184 High Street, and 15 Kirkgate, Leith, also goods in shop in 114 Canongate, in my son Thomas' name (at this date I owe him £25 sterling, which in the event of my death will be deducted from the stock, as afterwards provided for), also household furniture, bed and table linen, silver plate, and all other effects in my house No 5 St John Street, belonging to me—to my wife Elizabeth Ford, for her maintenance, and for the upbringing of my children by her under the following deductions—*First*, The payment of my lawful debts, that *is*, *all* my debts, for I have no *unlawful* debts;" *Second*, to pay to his daughter Catherine, as her marriage portion, the sum of £100 sterling, with certain bed and table linens. His gold watch he left to one son Thomas; his silver snuff-box to another. "The lease and shop furniture of shop 114 Canongate I leave to my son Thomas; the stock in said shop he must account for to my trustee for behoof of my wife and her children. The lease and shop furniture of my shop 15 Kirkgate, Leith, I leave to my son Alexander, the stock therein to be accounted for the same as in the case of his brother Thomas." He then directed that his son John should be manager of his shop in High Street at a certain salary. "In reference to the silver plate presented to me for my public services, I have no objections that it should be divided in any way which my wife thinks best. I appoint her sole trustee, with power to call in whom she pleases. This and the three preceding pages contains my settlement."

In 1864 Ford bought a house at Lauriston Park, taking the title "to and in favour of James Ford, merchant, High Street, Edinburgh, and Mrs Elizabeth Toshach or Ford, his wife, in conjoined fee and liferent for her liferent use allenarly, and to the heirs and successors of the said James Ford in fee."

On 25th June 1870 and 9th January 1872 he made these additions to his will:—"*Edinburgh*, 25*th June* 1870.—I have this day looked over my settlement or will, dated 17th September 1861, and so far as the disposal of *all* my effects, in money, stock-in-trade, and otherwise, are concerned, I hereby confirm the same to be at the disposal of my wife. The Leith and Canongate shops are disposed of. I have still the High Street shop; but in the event of my death I do not think it should be carried on. My shop at Merchiston, carried on under the firm of James Ford & Son, belongs entirely to my *estate*, with the exception of the sum which my son Thomas has in the business, the amount of which will be seen in pass-book signed by me. As the business is good, it should be carried on by Thomas Ford for behoof of my family and his own, upon the terms of the deed of copartnery, duly signed by both parties; and for the better management of the same, I hereby nominate and appoint Mr Wm. Ford, merchant, Leith, and Mr Robt. Hunter, merchant, Edinburgh, as my trustees, to act along with my wife for the interest of all concerned, and with power on their parts to add to their number when they see fit," &c.

"9*th January* 1872—On looking over this addition to my will, my intentions are altered with reference to the High Street shop. It should be carried on, so long as it is deemed advisable, by my son Alexander, who has managed with much credit to himself up till this date; and as the property now belongs to our friends in Leith, he may ultimately become their tenant, and be supported by them in the event of my trustees and wife giving it up."

Ford was twice married, and was survived by his second wife and by children of both marriages. Thomas Ford was his eldest son and heir-at-law. Mrs Ford, his widow, died on 30th March 1884 leaving a trust-disposition and settlement dated in December 1882, by which she conveyed her whole estate, heritable and movable, to Adam Toshach and Duncan M'Gregor, as trustees for certain purposes therein specified.

The house in Lauriston Park which belonged to James Ford was then claimed by her trustees as part of her trust-estate, and also by Thomas Ford,

as falling to him from his father's estate *ab intestato.*

In these circumstances this Special Case was adjusted between Mrs Ford's testamentary trustees of the first part, and Thomas Ford of the second part, who submitted the following question for the opinion and judgment of the Court:—"Whether the said subjects in Lauriston Place, Edinburgh, were conveyed by the settlement and codicils executed by the said James Ford, and form part of the trust-estate of the said Mrs Elizabeth Ford?"

Argued for the parties of the first part—The first part of the settlement made a universal disposition of the testator's estate. It left all "he had in the world" to his widow, and he could not have more than that. The question was entirely one of intention to include or exclude heritage. Here the terminology used, keeping in view the nature of the deed, an informal one, not prepared by a law-agent, was wide enough to instruct such intention. Though the first part of the settlement was made before the change in the law (Titles to Land Act 1868, sec. 20) which dispensed with words of *inter vivos* conveyance in *mortis causa* settlements of heritage, it was confirmed in equally universal terms by the second writing, which was subsequent to the Act. Besides, it was settled that a bequest was to the heirs pointed out by the law at the time of the testator's death, not at the date of the will—*Maxwell* v. *Maxwell*, December 24, 1864, 3 Macph. 318; *Ewart* v. *Cotton*, December 6, 1870, 9 Macph. 232. The words used here were comprehensive enough to prevent the case being ruled by *Pitcairn* v. *Pitcairn*, February 25, 1870, 8 Macph. 604; *Edmond* v. *Edmond*, January, 30, 1873, 11 Macph. 348; *Aim's Trustees* v. *Aim*, December 15, 1880, 8 R. 294; or *Farquharson* v. *Farquharson*, July 19, 1883, 10 R. 1253. If, then, the words of the writing of 1861 were wide enough to carry heritage, the confirmatory writing of 1870 made them convey heritage acquired between these dates, and the special destination in the title to the Lauriston Park subjects was evacuated by the general disposition contained in these two writings, following the rule of *Campbell* v. *Campbell*, July 8, 1880, 7 R. (H. of L.) 100.

Argued for the second party—The words of these writings were clearly not habile to carry heritage. They were merely another example of such words as had been held inhabile to do so in the cases of *Edmond*, *Aim's Trustees*, and *Farquharson* (*supra cit.*). The words of the writing of 1861 were admittedly inhabile to settle heritage *mortis causa* at its date, and even assuming that they were habile at the date of death, this was an important element of interpretation in arriving at the testator's intention when the writing was executed—*Farquhar* v. *Farquhar's Executors*, November 3, 1875, 3 R. 71.

At advising—

LORD YOUNG—I have read carefully the instruments which constitute the settlements of the testator in this case, and also the title which he took in 1864 to the heritable subjects in Lauriston Park of which he died possessed, and my opinion is that these heritable subjects cannot pass to his widow. I do not think the language used is fitted to pass them, and I am quite satisfied that it was not his intention to pass them, but that his intention was that his widow should have his property generally, but only the liferent of those subjects.

LORD CRAIGHILL—I agree with your Lordship.

LORD RUTHERFURD CLARK—I am of the same opinion. I think it very clear that the deceased's settlement is confined to moveable estate, and does not include heritage.

The Court answered the question in the negative.

Counsel for Parties of the First Part—Graham Murray. Agents—Curror & Cowper, S.S.C.

Counsel for Parties of the Second Part—Strachan. Agent—John Walls, S.S.C.

Saturday, July 19.

SECOND DIVISION.

[Sheriff of Inverness-shire.

SINCLAIR *v.* FRASERS.

Arbiter—Action to Compel Arbiter to go on with Reference — Sheriff — Jurisdiction — Competency.

Two arbiters on a submission to fix the price to be paid for certain subjects by an incoming to an outgoing tenant, agreed as to the value of all but one subject, one of them desiring to have some evidence of its value from skilled persons, while the other refused to allow any inquiry, and insisted on having the value fixed along with the others. They failed to adjust the disputed item in a short period, and neither issued an award nor made a devolution on the oversman. The outgoing tenant raised an action against the arbiter who declined to proceed without inquiry, to have him ordained to join with the other arbiter in issuing an award fixing the value of all the subjects at certain specified rates, or alternatively to join with the other arbiter in executing a devolution on the oversman. *Held* (1) that the defender could not be ordained to concur with the other arbiter as first concluded for; but (2) (*diss.* Lord Young) that the Sheriff could competently ordain him to concur with the other arbiter in devolving the submission on the oversman; and that the arbiters had so differed in opinion as to make that course the proper one.

William Sinclair was the outgoing tenant of the farm of Balnafettack, in the parish of Inverness, at Whitsunday 1883, and the incoming tenant was Huntly Fraser. These parties, on 3d May 1883, executed a minute of reference to Donald Paterson, farmer, and James Fraser, civil engineer and surveyor, as joint arbiters (with power to appoint an oversman in case of their differing in opinion), for fixing the value of first year's grass, ploughing of fallow land, fencing, gates, &c., and certain lead water-piping to the house and fields on the farm.