pose of the heritable property as she chose She did dispose of it in favour of the first party, who is consequently in my opinion entitled to prevail.

LORD CRAIGHILL—I concur. I think that the intention of the codicil was to give Margaret Lyon a fee in the whole heritable property, which left her free to dispose of it if she chose, though if she did not dispose of it, it went to George and David Lyon as substitutes.

LORD RUTHERFURD CLARK—This is about as plain a case as I can well imagine. It is nothing else than a case of simple substitution in favour of George and David Lyon, and it is quite clear that Margaret Lyon the substitute has evacuated that substitution.

LORD YOUNG was absent

The Court answered the second question in the affirmative.

Counsel for the First Party—James Reid. Agents—Macpherson & Mackay, W.S.

Counsel for the Second Party—Wilson. Agent—James Ayton, Solicitor.

Wednesday, February 8.

FIRST DIVISION.

[Lord Fraser, Ordinary.

STEWART *v.* FORBES AND OTHERS.

Trust—Adjudication of Trust-Estate—Expenses of Litigation in connection with Trust-Estate.

Held competent to lead an adjudication against a trust-estate upon a decree for expenses obtained against the trustees in a litigation in connection with the trust-estate.

Process—Adjudication—Recording of Abbreviate.

In an action of adjudication defences were lodged for two of the defenders, and thereafter, in respect of no appearance, the Lord Ordinary pronounced decree of adjudication against them. Decree in absence was then taken against the other defenders, which was afterwards recalled, and they were allowed to lodge defences. Decree of adjudication was thereafter pronounced against them, and on a reclaiming-note this was adhered to. The Court, in respect the decree against the first set of defenders had been pronounced more than sixty days before the date of their judgment, within which period the abbreviate required to be recorded, pronounced decree of adjudication *de novo* against them.

In November 1886 Malcolm Stewart, the superior of certain subjects in Grange Place, Edinburgh, raised an action of declarator of irritancy *ob non solutum canonem* and removing against Mrs Elizabeth West or Forbes, William Moncur, and John Howie, the trustees under a trust conveyance and deed of settlement granted by Mrs Forbes, and relative deed of assumption and conveyance, as trustees; against Mrs Forbes as an individual and as liferenter of the subjects; and against her husband Alexander Forbes, for his interest as an individual, and as administrator-in-law for his wife, and for the children of the marriage, and also against the children themselves. The summons set forth that the feu-duty for the last two years was unpaid, and concluded for expenses against the defenders, in the event of their appearing and opposing the conclusions thereof. Defences were lodged by the trustees, and by Mrs Forbes as an individual.

On 3d February 1887 the Lord Ordinary (FRASER) pronounced an interlocutor, holding (in respect the feu-duties had then been paid) the irritancy to be purged, and finding the compearing defenders liable in expenses.

On a reclaiming-note the First Division adhered to this interlocutor. The sum of expenses to which the pursuer was found entitled amounted to £43, 7s.

In December 1887 Stewart brought an action of adjudication upon this debt, of the subjects in Grange Place, the defenders called being the trustees, Mrs Forbes as an individual, and Alexander Forbes for his interest, and as administrator-in-law for his wife.

The pursuer averred that a charge had been given upon the extract decree for expenses, but that he had failed to recover any part of the sum due to him, and that the defender Alexander Forbes was an undischarged bankrupt.

Defences were lodged for Moncur and Howie.

On 26th November 1887 the Lord Ordinary, in respect of no appearance for the compearing defenders, adjudged, decerned, and declared against them conform to the conclusions of the summons.

On 30th November 1887 the Lord Ordinary adjudged, decerned, and declared in absence against the defenders Mr and Mrs Forbes.

On 14th December 1887 the Lord Ordinary, on the motion of the defenders Mr and Mrs Forbes, recalled the decree in absence, and allowed them to lodge defences, which they did.

The defenders averred that the subjects referred to belonged to Mrs Forbes in liferent, and to the children of the marriage in fee; that no defences were lodged for the children to the previous action, and that yet it was sought to make them pay the expenses personally incurred by the trustees; that the trust-estate was not liable for these expenses, but only the trustees, who were willing to pay the debt out of the rents of the trust property.

The pursuer pleaded that as the defenders were resting-owing to him in the sum condescended on, conform to the extract decree, he was entitled to decree of adjudication.

The defenders pleaded, *inter alia*—"(5) The subjects mentioned in the summons not being in any way subject to or liable for the said sum of £43, 7s., decree of adjudication should not be pronounced."

On 14th January 1888 the Lord Ordinary repelled the defences, and adjudged, decerned, and declared against them conform to the conclusions of the summons.

"*Opinion.*—The trustees acting under a trust conveyance and deed of settlement by Mrs Elizabeth West or Forbes, and relative deed of assumption and conveyance, did, in their character as trustees, with the view as they thought of defending the trust-estate, enter into a litigation in

which they were unsuccessful, and were found liable in expenses. The question then simply is, whether the creditor for those expenses, who cannot obtain payment of them from the impecunious trustees, is entitled to adjudge the trust-estate which they defended. That estate is held by the trustees in trust for the defender Mrs Elizabeth Forbes in liferent, and for her children in fee. The Lord Ordinary was moved to sist the children as defenders in this action, which motion he has not seen any reason for granting. Decree has already been pronounced against the defenders William Moncur and John Howie, who appeared and defended the action. The present compearing defenders, Mrs Forbes and her husband, did not lodge defences, but after decree was pronounced against her co-trustees she appeared and obtained right to lodge defences as having been decerned against in absence, which the Lord Ordinary allowed, and now that the defences have been seen they come to nothing. There is no averment to the effect that the trustees committed any breach of trust in litigating the case in which they were unsuccessful, and therefore no ground for saying that the debt incurred was a debt for which the trust-estate was not responsible. If the trust-estate instead of consisting of heritage had consisted of furniture held by them, it could surely have been poinded for a debt incurred by the trustees in the administration of the trust, and the case is no way differentiated when the diligence is not poinding but adjudication."

The defenders Mr and Mrs Forbes reclaimed, and argued—It was not competent to adjudge a trust-estate for debt constituted against the trustees personally. They alone litigated, and they alone should be made responsible—M'Laren on Wills, ii. 555. The decree was against the trustees personally, though they were litigating for behoof of the trust-estate. They were willing to undertake the burden of this debt, and offered to pay it by degrees from the revenue of the trust-estate. The litigation was entered upon rashly by the trustees, and was of no benefit to the trust-estate. No authority could be cited for adjudging a trust-estate in such circumstances—*Graham* v. *Marshall*, November 22, 1860, 23 D. 41.

Counsel for the respondent was not called upon.

At advising—

Lord President—There can be no doubt that the Lord Ordinary has acted quite properly here in granting decree of adjudication. The question of importance in such a case always is, were the trustees really representing the trust-estate in the litigation? If the trustees have in the past entered recklessly upon a course of litigation which has got the trust-estate into difficulties, that is a question which they and the beneficiaries will have an opportunity of settling at some future time; it, however, is not the question now before us.

In the action of declarator of irritancy the trustees were obliged to come into Court in order to save the trust-estate from forfeiture, for had they not appeared and purged the irritancy the estate would undoubtedly have been lost to the beneficiaries. When the pursuer obtained a decree for his expenses in the action, he was quite within his rights in going against the trust-estate. No doubt the remedy of adjudication is a somewhat formidable one, still, if the debt remains unpaid, the pursuer is undoubtedly entitled to adjudge the trust-estate.

Lord Mure and Lord Adam concurred.

Lord Shand was absent from illness.

R. V. Campbell, for the pursuer and respondent, in respect more than sixty days had elapsed since 26th November 1887, when decree of adjudication had been pronounced against the defenders Moncur and Howie (within which time it was necessary that the abbreviate should be recorded), moved the Court to pronounce decree of adjudication *de novo* against these defenders. He cited *Cathcart* v. *Maclaine*, December 18, 1846, 9 D. 305.

The Court adhered to the Lord Ordinary's interlocutor and granted decree of adjudication *de novo*.

Counsel for the Pursuer and Respondent—R. V. Campbell. Agent—D. Cook, S.S.C.

Counsel for the Defenders and Reclaimers—Rhind—Salvesen. Agent—D. Howard Smith, Solicitor.

Thursday, February 9.

FIRST DIVISION.

MAGISTRATES OF IRVINE *v.* MUIR.

Succession—Legacy—"Natives of Irvine."

A testator who was born in the royal burgh of Irvine in 1807, died in 1859, leaving a will made in the same year, by which he bequeathed, on the expiry of certain liferents, a sum of money to the "Magistrates and Town Council of Irvine, to be applied by them in such way and manner as they shall deem proper towards the support of aged poor persons, natives of Irvine." The legacy became payable in 1886. A special case was presented to determine whether the expression "natives of Irvine" meant (1) natives of the old royal burgh; (2) natives of the Parliamentary burgh as defined by the Reform Act of 1832; (3) natives of the burgh as extended by the Irvine Burgh Act 1881; or (4) natives of the parish of Irvine.

Held that the persons intended were natives of the Parliamentary burgh.

Robert Rankine Holmes of Barloch, writer in Glasgow, died in 1859, leaving a testament dated 16th May 1859, by which he bequeathed, on the expiry of certain liferents, the sum of £500 to the Magistrates and Town Council of Irvine, "to be applied by them as they shall deem proper towards the maintenance of aged poor persons, natives of Irvine, not receiving parochial aid, and unable adequately to support themselves."

The legacy became payable in 1886, and was paid over to the Magistrates in terms of the testator's bequest.

A question then arose as to the meaning of the expression "natives of Irvine" occurring in the will.