Vary the said interlocutor: Find that so much of the present Market Muir of Forfar as is held of the Crown under the charter of 1665 has been immemorially possessed and used by the burgesses and inhabitants of Forfar as a place of public recreation, and that such use is a quality of the respondents' right and title: Therefore (and under reference to the plan No. 67 of pro.) interdict, prohibit and discharge the respondents from selling alienating, or leasing (except for pasturage) any part of the said muir held by them under their Crown charter dated in 1665, and from building thereon or enclosing any part thereof, and decern: *Quoad ultra* refuse the prayer of the note; adhere to the said interlocutor in so far as regards the finding for expenses incurred prior to the presentation of the reclaiming-note; and *quoad ultra* find no expenses due to or by either party."

Counsel for the Complainer—H. Johnston—Law. Agents—J. & J. Galletly, S.S.C.

Counsel for the Respondents—Jameson—N. J. D. Kennedy. Agents—T. J. Gordon & Falconer, W.S.

Wednesday, June 28.

FIRST DIVISION.

MITCHELL, PETITIONER.

Churchyard—Burial—Disinterment—Petition by Widow for Authority to Remove Deceased Husband's Remains.

A widow petitioned the Court for authority to remove her husband's remains from one churchyard to another. The petition having been served on the clerk to the heritors of the parish in the churchyard of which the body was interred, and on the next-of-kin of the deceased, and no no answers having been lodged, the Court *remitted* to the Sheriff to inquire into the facts set forth in the petition, with power to proceed as should be just.

This was a petition at the instance of Mrs Maggie Mitchell for authority to disinter the remains of her deceased husband, which had been interred in the churchyard of the parish of Gamrie, in order that they might be removed to the churchyard of the parish of King Edward for interment therein. The petitioner craved the Court to appoint the petition to be intimated upon the walls and in the minute-book, and to be served upon the clerk to the heritors of the parish of Gamrie, as representing said heritors, and upon the deceased's three sisters, who were his next-of-kin.

The statements of the petitioner were substantially to the following effect—Her husband had died on the 24th June 1892. He had three sisters who survived him. They had been adverse to the deceased marrying, had conceived a groundless dislike to the petitioner, and had always treated her coldly. When her husband died the petitioner had been so overcome with grief that she had been unable to give directions for the funeral, and the place of interment had been determined by her eldest sister-in-law, who gave directions that the deceased should be buried in Gamrie churchyard. The deceased accordingly had been interred there on 29th June. Though resident in Gamrie parish the family had attended the parish church of King Edward, and had always been associated with the concerns and interests of that parish. On going to visit her husband's grave in Gamrie churchyard shortly after the funeral, the petitioner had found the churchyard to be in an offensive and deplorable condition from neglect. His sisters-in-law also refused to allow the petitioner to erect a tombstone to her husband's memory unless the inscription to be put upon it received their approval. They had further expressed themselves to the effect that they would take care that when the petitioner died she should not be laid beside her husband. Although it might not be in their power, the petitioner believed they would seek to prevent her remains being laid beside her husband's. The petitioner had purchased burying-ground in the churchyard of the parish of King Edward, and in the circumstances she deemed it desirable to have her husband's remains removed there. There were no bodies buried above that of the deceased, and the disinterment would cause no disarrangement of the burying-ground, or removal of tombstones, or other interference with the rights of third parties.

The Court ordered intimation and service as craved. No answers were lodged.

The petitioner argued—That though there was no direct authority upon the point, the Court clearly had jurisdiction to entertain an application of this kind—*Wright* v. *Wright*, October 20, 1881, 9 R. 15. [The LORD PRESIDENT referred to Lees on Sheriff Court Styles (3rd ed.), p. 161.]

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the petitioner upon the petition, no answers having been lodged, remit to the Sheriff to inquire into the facts set forth in the petition, with power to proceed in the said petition as shall be just."

Counsel for the Petitioner—Salvesen. Agent—Alex. Morison, S.S.C.

Tuesday, June 29.

FIRST DIVISION.

DALGLEISH'S TRUSTEES *v.* DALGLEISH AND OTHERS.

Succession—Power of Appointment—Exercise.

A testator directed his trustees to pay his daughter the interest of a sum of £3500 during her life, and at her death to pay the capital to her children, in such proportions as she might direct by any writing under her hand, and in the event of there being no children, to such person as she might direct by any writing under her hand, and failing such direction to the heir of entail in possession of a particular estate. The daughter died unmarried, leaving a trust-disposition and settlement, wherein she conveyed to trustees, for the purposes therein mentioned, her whole estate, heritable and moveable, of what kind and nature soever, presently belonging and addebted, or which should belong and be addebted, to her at the time of her decease. She bequeathed legacies amounting to £18,000. Her whole estate exclusive of the said sum of £3500 amounted only to £15,200.

In a special case presented after the daughter's death it was stated that she was fully aware of the amount of her funds, and of her power with regard to the sum of £3500. *Held* that she had validly exercised her power of appointment with regard thereto.

James Dalgleish, W.S., of Westgrange and Ardnamurchan, died in September 1870. By a codicil to his trust-disposition and settlement dated 16th March 1870, he directed his trustees to pay his daughter Mary Wellwood Dalgleish a sum of £7500, "and to lend out on proper security a further sum of £3500, and pay over to her during her life the interest to accrue thereon, which interest it is hereby declared shall not fall under the *jus mariti* or right of administration of any husband she may marry, nor shall it be assignable by her or her husband or arrestable for her or his debts, and at her death to pay over the capital to her child or children or their issue in such proportions as she may direct by any writing under her hand, and failing such direction, equally among them, and in the event of there being no such child or children or issue alive at her death, then to pay over the said capital sum to such person as she shall direct by any writing under her hand, and failing such direction, to the heir of entail in possession of the estate of Ardnamurchan for the time, or failing him, to her nearest of kin." By his settlement Mr Dalgleish directed the estate of Ardnamurchan to be entailed upon his son John James Dalgleish and certain other heirs.

In implement of the direction in the codicil, Mr Dalgleish's trustees granted a bond and disposition in security for the sum of £3500 over a heritable property belonging to the trust-estate in favour of themselves as trustees foresaid, for the purposes specified in the said codicil, and paid the interest to Miss Dalgleish during her life.

Miss Dalgleish died unmarried on 3rd April 1892, leaving a trust-disposition and settlement whereby she conveyed and made over to certain trustees, for the purposes therein specified, "All and sundry lands and heritages, and in general the whole estate, heritable and moveable, real and personal, of what kind or nature soever, or wheresoever situated, presently belonging and addebted, or which shall belong and be addebted, to me at the time of my decease, with the whole vouchers and instructions, writs, titles, and securities of and concerning my said estate." The settlement contained no express allusion to the power of disposal given to Miss Dalgleish by her father.

After Miss Dalgleish's death a special case was presented by (1) the trustees under her settlement, (2) the trustees under her father's settlement, (3) John James Dalgleish, as the institute in the entail of Ardnamurchan which his father directed to be executed, and (4) John James Dalgleish and Laurence Dalgleish, as next-of-kin of Miss Dalgleish, in order to obtain the opinion of the Court upon the following questions:—"(1) Has the said Miss Mary Wellwood Dalgleish, by her said trust-disposition and settlement, validly and effectually exercised the power of disposal of the said sum of £3500 conferred upon her by said codicil, to the effect of entitling her trustees, the first parties, to claim the said sum as part of her trust-estate? And in the event of the first question being answered in the negative, (2) Is the said sum now payable to the third party as the person who would have been heir of entail in possession of the estate of Ardnamurchan, had it been entailed in terms of the said James Dalgleish's settlement, or to the fourth parties as next-of-kin of Miss Dalgleish?"

The following statements were made in the case—"The said Mary Wellwood Dalgleish was fully aware of the amount of her funds, and collected her income herself, including the interest of the said £3500. She was also fully aware of the terms of her father's settlement as to the said £3500, and of her power with regard thereto. At the date of her settlement her estate, exclusive of the sum of £3500 in question, consisted, as nearly as may be, of . . . £15,200. She bequeathed legacies to the amount of £18,000."

Argued for the first parties—Looking to the terms in which the power of appointment was given, to the terms of the conveyance in Miss Dalgleish's settlement, and to the admissions in the case, there was clear evidence that Miss Dalgleish intended to exercise her power of appointment. The case fell under the rule established in *Smith* v. *Milne*, June 6, 1826, 4 S. 679; *Hyslop* v. *Maxwell's Trustees*, February 11, 1834, 12 S. 413; *Grierson* v. *Miller*, July 3, 1852, 14 D. 939.

Argued for the second, third, and fourth parties—There was no clear indication that