this is so, and maintains that there is a presumption that when he built his house, he kept his gable within the line of his feu. In my opinion there is no such presumption. I cannot say whether the defender, in building his house, went to the verge of his property or not, but it is certain that the pursuer's byre, which extends eastwards from the gable of the defender's house, has been in the occupation of the pursuer on a habile title for fifty years.

In these circumstances I think he must be regarded as the proprietor of the *solum* east of the gable, including the ground on which the scarcement stands. I think there has been an infringement of the pursuer's right, and that he is entitled to our judgment.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties in the appeal against the interlocutor of the Sheriff of Perth, dated 16th April 1894: Find in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against: Therefore dismiss the appeal and affirm the interlocutor appealed against, and of new interdict the defenders and all others acting for them or under their instructions, in terms of the interdict in the said interlocutors, and decern," &c.

Counsel for Appellant—Vary Campbell—H. Johnston — Orr. Agents — Miller & Murray, S.S.C.

Counsel for Respondent—Macfarlane—Graham Stewart. Agent — John Dobie, Solicitor.

Wednesday, June 13.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

M'KENZIE (FRASER'S TRUSTEE) *v.* CAMPBELL.

Agent and Client — Money Handed by Person Accused of a Crime to his Agent for the Purpose of Preparing for his Defence—Revocable Mandate—Sequestration of Client—Accounting by Agent.

A person apprehended on a criminal charge handed money to his agent with instructions to prepare for his defence, and also to pay on his behalf any sum he might direct. His estates were sequestrated shortly thereafter, and before the trial took place.

Held that the case was ruled by that of *Pollitt*, 1893, L.R., 1 Q.B. 175 and 455, that the money remained under the client's control, that the mandate was revocable at his will and fell by his sequestration, and that after sequestration his agent held the moneys entrusted to him for behoof of the creditors, and was bound to account therefor to the trustee in bankruptcy.

Case of *Charlwood*, 1894, L.R., 1 Q.B. 643, *distinguished.*

Bankruptcy — Arrestment within Sixty Days of Sequestration—Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 108.

The 108th section of the Bankruptcy Act provides that "No arrestment . . . of the funds . . . of the bankrupt on and after the sixtieth day prior to the sequestration shall be effectual; and such funds . . . shall be made forthcoming to the trustee."

Held that an arrestment used within sixty days of sequestration is not absolutely ineffectual. It creates no preference in favour of the arresting creditor, but the arrestee must account for money so arrested, and make it forthcoming to the trustee in bankruptcy.

Thomas James Fraser, corn factor, Glasgow, was apprehended upon 11th October 1893 on a charge of forgery.

On the 12th and 13th October he handed over to his agent James Murdoch Campbell, Glasgow, sums amounting to about £250, and to him he wrote the following letters—"12*th October* 1893.—With reference to the money which I have instructed you to receive from Mr Howie, my cashier, and take possession of, I request and authorise you to use the same for the purposes of my defence in the criminal charge against me, in such manner as you may think advisable, as also to pay on my behalf any sum or sums that I may direct you." "14*th October* 1893.—From the moneys in your hands, handed to you by me, I instruct you to pay for my maintenance while in prison awaiting trial. You will also note that you have to pay for the food, &c., I had in the police office. You are also to pay for any underclothing, collars, &c., also for the papers and stamps you are to send me through the governor."

Upon 14th October 1893 arrestments at the instance of certain creditors of Fraser for a total sum of £1120 were used in Campbell's hands, and upon 25th October Fraser's estates were sequestrated, when Robert Campbell M'Kenzie, C.A., Glasgow, was appointed trustee.

Mr M'Kenzie's appointment was confirmed on 13th November, and the following day he wrote to Campbell asking him to account for all moneys in his hands received from Fraser as at 14th October, under deduction of the sum necessary to meet his business account up to that date. This Campbell refused to give, but promised to account to the trustee for any surplus in his hands after carrying out Fraser's defence.

Fraser's defence was arranged for, but on 27th December 1893 he pleaded guilty, and was sentenced to a period of penal servitude.

On 20th November 1893 Mr M'Kenzie brought an action against Campbell to have him ordained to account for the whole intromissions with Fraser's means and estate had by him as factor or agent for Fraser. After setting forth the facts given above, the pursuer pleaded, *inter*

alia—"(1) The defender having as agent for the bankrupt, or otherwise without authority, intromitted as condescended on with the bankrupt's estate, is bound to count and reckon with the pursuer as trustee on said bankrupt's estate, so that the balance payable to him may be ascertained, and the pursuer is accordingly entitled to decree of count, reckoning, and payment against him as concluded for, with expenses. (4) The funds in the defender's hands having been validly arrested on 14th October 1893, the defender is bound to pay over to the pursuer the whole funds in his hands as at said 14th October, under deduction only of sums actually due to himself at that date; or otherwise, and in any view, the estates of the said Thomas James Fraser having been sequestrated on 25th October 1893, the defender is bound to pay over to the pursuer the whole funds in his hands as at said 25th October, under deduction only of sums actually due to him at said last-mentioned date."

The defender set forth that he had been engaged by Fraser the day after his apprehension to conduct his defence, produced the letters given above, and pleaded—"(1) No relevant case. (2) The money in the defender's hands having been specially appropriated to a special purpose under a new contract, the defender is not bound to count and reckon until that purpose is fulfilled, and then only for the balance. (4) The action being premature, ought to be dismissed, with expenses. (6) Fraser being undivested and in full charge of his own estate and affairs at the date when he devoted the money in question to the purposes stated in the defences, the said appropriation was valid and effectual. (7) The pretended arrestments referred to on record having been invalid and ineffectual, and not having attached anything in defender's hands, did not bar the defender from intromitting with the funds in his hands."

The Bankruptcy Act 1856 (19 and 20 Vict. cap. 79), by section 108, provides— . . . "No arrestment or poinding executed of the funds or effects of the bankrupt on or after the sixtieth day prior to the sequestration shall be effectual; and such funds or effects, or the proceeds of such effects, if sold, shall be made forthcoming to the trustee." . . .

Upon 22nd March 1894 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds that the defender is bound to pay to the pursuer the whole funds which belonged to the bankrupt Thomas James Fraser, and were affected by the arrestment used in the defender's hands on 14th October 1893, under deduction of sums due to him by the bankrupt at that date; and also to pay any sums belonging to the bankrupt which came into the possession of the defender between the said date and 25th October 1893, and were in his possession at that date, being the date of sequestration: Therefore to that extent and effect sustains the fourth plea-in-law for the pursuer, and to that extent and effect repels the pleas for the defender, and appoints the cause to be enrolled for further procedure, &c.

"*Opinion.*—This action is by the trustee on the sequestrated estate of Thomas James Fraser against the defender, who was Fraser's law-agent, and it calls on the defender to account for money placed by Fraser in his hands.

"The pursuer's leading averments are that Fraser was apprehended on a charge of forgery on 11th October 1893, that on 12th October the defender received from Fraser £285, 5s. 2d., that Fraser's estates were sequestrated on 25th October, and that the pursuer was confirmed as trustee on 13th November.

"The defender admits the receipt of money from Fraser, there being a subordinate question as to the amount received, and he does not dispute his obligation to account for it to the trustee. The question arises as to the footing on which the accounting is to proceed.

"The defender alleges that on 12th October Fraser instructed him to conduct his defence against the criminal charge, and that he undertook to do so, and to provide for Fraser 'aliment and necessaries while in prison awaiting trial,' on the condition, then agreed to by Fraser, that the defender should be put in funds for these purposes, and that accordingly Fraser placed in his hands £250, 5s. 2d. The defender avers that he acted on these instructions, inquired into the charge of forgery, and generally attended to Fraser's defence. The result was that on 27th December 1893 Fraser pleaded guilty. The defender has lodged a business account, said to have been incurred to him by Fraser, which more than exhausts the sum placed in his hands. The account is untaxed, but it is not necessary to go into the details of it at present. The chief question raised is, whether after Fraser's bankruptcy the defender—his agent—was entitled, in the circumstances averred, to expend the bankrupt's funds in his hands in defending Fraser against the criminal charge, and in providing for his aliment while in prison.

"The pursuer's plea on this point is—'In any view, the estates of the said Thomas James Fraser having been sequestrated on 25th October 1893, the defender is bound to pay over to the pursuer the whole funds in his hands as at said 25th October, under deduction only of sums actually due to him at said last-mentioned date.'

"The defender's plea is—'The money in the defender's hands having been specially appropriated to a special purpose under a new contract, the defender is not bound to count and reckon until that purpose is fulfilled, and then only for the balance.'

"There are subordinate questions, but the pursuer contends that this legal question, distinctly and sharply brought out by the pleas, should be decided as a question of law, and on the relevancy of the defence. He would not renounce probation, but held out the hope that the most of the subordinate questions might be adjusted, and submitted that in any view if that question were decided for him, any inquiry necessary would be greatly narrowed.

"It is not without some misgiving that I have entertained this suggestion. But I have come to the conclusion that a definite and important question of law is distinctly raised on the defender's averment and the pleas, and that it ought to be decided against him, assuming the truth of all his averments, about which in fact there is not much if there is any dispute.

"I assume, therefore, that the transaction said to have taken place on the 12th of October was unchallengeable, and that Fraser's money came unobjectionably into the defender's hands. There is in this view no question as to the Act 1696, cap. 5.

"It is necessary to see clearly what the defender's averment as to the footing on which he received Fraser's money amounts to. For it is not an averment of a contract between them that the defender should conduct Fraser's defence and aliment him for the sum of £250, 5s. 2d., to be paid to the defender irrevocably. It is no more than an averment that Fraser employed the defender as his agent to conduct his defence, and put money in his hands to enable him to fulfil that employment. It is an averment of a mandate in the defender's favour essentially revocable. There was no proposal to amend the averment, and no suggestion that such an interpretation of it was not in accordance with the defender's understanding and intention. That could hardly have been suggested, looking to the correspondence between Fraser and the defender, and especially to Fraser's letter of 12th October. That is one specialty of this transaction, viz., that the money was placed in the defender's hands on a revocable mandate. The other specialty is that the money was appropriated in the defender's hands for the benefit of the bankrupt himself.

"The question then is, whether money put in the hands of a law-agent on the footing explained was taken out of the bankrupt's estate, or was so appropriated as to defeat the title of the trustee?

"The pursuer contended that on the defender's averments the money put into the defender's hands remained under Fraser's control, and might have been re-claimed, so far as unexpended, whenever Fraser chose to recal the defender's mandate. It was therefore, he contended, money belonging to the bankrupt, which necessarily passed to his trustee—there was no one else to whom it could be said to belong. Further, that it could not be held to be so appropriated as to exclude the trustee, unless a *jus quæsitum* in it were vested in some one other than the bankrupt. It was maintained that that could not be the case here, because under the contract of agency the defender had no right to insist against Fraser or any one in his right of retaining the funds put in his hands. The case it was said involved an attempt by the bankrupt to put his money beyond the reach of his creditors, while he retained his right to it and to the beneficial use of it, which was impossible in law—*Learmonth* v. *Miller*, May 3, 1875, 2 R. (H. of L.) 62.

"The defender contended that the antecedent contract being *ex hypothesi* unchallengeable, the charges and payments as they fell due from day to day were merely the fulfilment of that antecedent contract, and were therefore not struck at by the sequestration, and further, that the money was so appropriated to a special purpose as to be protected from the effect of the sequestration—*M'Kenzie* v. *Finlay*, October 29, 1868, 7 Macph. 27; Bell's Comm. ii. 71.

"I am of opinion that this money was never taken out of the right of the bankrupt, and of necessity passed to the trustee; that the effect of the sequestration was to withdraw the defender's mandate so far as it authorised the defender to expend the funds he placed in his hands; and that in order to let in the principle that money in the hands of a bankrupt or of his agent may be protected against the sequestration by special appropriation, it is necessary that the right to the funds be taken out of the bankrupt and vested in some other person. But in this case there was no such right vested in anyone. I think that so long as funds belonging to a bankrupt remain under his control they cannot be withheld from his trustee.

"The point under consideration was somewhat strikingly brought out by two cases recently decided in England, *in re Pollitt*, L.R. 1893, 1 Q.B. 455, and *in re Charlwood*, L.R. 1894, 1 Q.B.D. 643.

"In the case of *Pollitt* money had been paid to a solicitor in order to defray the expenses of pending legal proceedings. On the bankruptcy of the client it was held that the solicitor was bound to pay to the trustee the amount due by him to the client at the date of the bankruptcy, and was not entitled to apply it in the conduct of the cause after the bankruptcy.

"The case of *Charlwood* is perhaps still more to the point. Charlwood was charged with murder, and on 3rd December he entered into an agreement with a solicitor (Cripps), whereby he agreed to pay Cripps £250, and Cripps agreed on his part to conduct the defence for that sum. The money was paid on the 10th December, and Charlwood became bankrupt on 20th December, and Cripps had notice of the bankruptcy on the 21st. The whole sum seems to have been required for the defence, but apart from that circumstance, it was held that Charlwood's trustee was not entitled to the amount or any part of it, and that Cripps was not bound to account for it. The judgment, however, was expressly rested on the ground that by the agreement Cripps was entitled to the sum paid, and to no more, and that whereas in *Pollitt's* case the right to the money placed in the hands of the agent remained in the bankrupt, in the case of *Charlwood* the money had before bankruptcy ceased to belong to the bankrupt, and had become the property of the solicitor Cripps.

"That case expresses the distinction—at least one of the distinctions—on which I consider that the question under consideration falls to be decided. If the effect of the contract averred by the defender had been

to pass the right to the sum paid from the bankrupt to the defender, then the trustee could not have claimed it unless he could challenge the prior transaction; but if the money under the contract averred remained the property of the bankrupt, it of necessity passed to the trustee.

"There would have been, I think, no doubt on this point had the litigation in which the solicitor was employed been an ordinary action relating to the bankrupt's estate. But it is said that there was a difference in this case, because the defence of the bankrupt from a criminal charge was personal to himself, and was not a matter in which the trustee could interfere, and that the result of the pursuer's plea was that a bankrupt in such circumstances would not have been defended at all. I do not know whether the trustee might or might not have undertaken the defence. But if he did not, then Fraser would only have been in the position of a person charged with a crime who had no money to pay for his defence, which was in point of fact his predicament — a very disadvantageous predicament, but only that in which all persons charged with crime and not possessed of funds necessarily are.

"The sequestration here took place on 25th October, and the trustee was not confirmed until 13th November. In that interval a large part of the account now founded on by the defender was incurred. It is averred that the defender's instructions never were recalled, but it is not averred that the judicial factor or the trustee ever waived their right to claim the funds in the defender's hands, or acquiesced in his expenditure of them in the defence of the bankrupt. If there had been an averment to that effect I would have allowed a proof, but as I read the record, there is no such averment.

"On the whole, I consider the pursuer's contention well founded that the defender must account to him for the funds belonging to Fraser which were in his hands at the date of the sequestration.

"I do not decide whether the defender may have a claim against the trustee if he can show that he made any payments which the trustee would have been bound to make, nor is it necessary for me to say anything as to the defender's right to claim and rank on the bankrupt's estate.

"But the pursuer's claim goes somewhat beyond a claim for the money due by the defender to Fraser at the date of the sequestration, and extends to the sum in the defender's hands on 14th October when a creditor used arrestments. This claim is expressed in the first part of his fourth plea. It depends entirely on the 108th section of the Bankruptcy Act, 1856, which provides that no arrestments of the funds of a bankrupt executed on or after the sixtieth day prior to sequestration shall be effectual, 'and such funds or effects, or the proceeds of such effects if sold, shall be made forthcoming to the trustee.'

"The defender says that the effect of this clause and of the sequestration is that the arrestment was rendered invalid and wholly ineffectual, and that was the only ground on which the defender supported his seventh plea in law, and the averment as to the invalidity of the arrestments at the commencement of his answer 3. No authority on this point was quoted, but it appears to me that the contention for the pursuer is in accordance with the true construction of the section, and that the effect ascribed to the section by the defender would reduce it to an absurdity. I am therefore prepared to sustain the pursuer's plea, and to repel the seventh plea for the defender.

"My judgment does not determine either what the amount belonging to Fraser was which was in the possession of the defender at the date of the sequestration, nor what the sum was which was validly arrested. It is possible that funds may have come into the hands of the defender after the arrestment which may not have been covered by the arrestment, but which may be covered by the sequestration." . . .

The defender reclaimed, and argued — (1) He had been engaged to perform definite professional services for which he had been paid in advance, and which he was bound to carry out. It was immaterial whether Fraser could or could not recal his mandate; in fact he had not done so. The sequestration did not recal the mandate for it was not said that Fraser was insolvent when he entered into this arrangement with his agent. To affirm this interlocutor would be to place law-agents in a worse position than builders, artists, landlords, &c., who may all be paid in advance by a solvent man, without fear of having to account for the money received. The case was ruled by that of *Charlwood*, L.R., 1894, 1 Q.B.D. 643. The case of *Sinclair*, 1885, L.R., 15 Q.B.D. 616, was also in point. (2) In any case he was not bound to account for moneys expended before 25th October. The arrestment of 14th October was absolutely ineffectual, under the 108th section of the Bankruptcy Act, in consequence of the subsequent sequestration. Even if it were not, the agent had a preference for his expenses as against an arresting creditor — *Wight's Trustees* v. *Allan*, December 12, 1840, 3 D. 243.

Argued for respondent—The Lord Ordinary's judgment was well founded. This money did not become the agent's property, but remained under the control of Fraser and upon his sequestration passed to the creditors. The case was on all fours with that of *Pollitt*, L.R., 1893, 1 Q.B. 175 and 455, and was in marked contrast to that of *Charlwood*. Mr Justice Wright in *Charlwood* stated the distinction between these cases very clearly. *Sinclair's* case was special, and in subsequent cases the judges had expressed the opinion that the exception there allowed in favour of an agent should not be extended. (2) The plain meaning of the 108th section of the Bankruptcy Act was to equalise all arrestments within sixty days of sequestration not to make arrestments absolutely invalid. That would be to create a preference in favour of the arrestee.

At advising—

LORD PRESIDENT—On 11th October 1893 Mr Thomas James Fraser was apprehended on certain charges of forgery to a large amount, and was taken to prison. He there bethought him as to the necessary steps to be taken for looking after his affairs, and he wrote to his law-agent, the defender Mr J. M. Campbell, writer, Glasgow, authorising him to take any steps necessary to preserve his estate, intimating that his clerk would afford him all information, and he further wrote as to the money which Campbell would get from his clerk. This Campbell was to take charge of and use for his defence in the criminal charge, &c. Now, acting under that authority, Campbell took possession of £285, and became the depositary of Mr Fraser his client. One of Fraser's letters to Campbell says that he is to pay any sums which he may direct him to pay. He was in fact "to hold the money for my order," and the other letters specifically direct the carrying out of this general order. Mr Campbell proceeded to carry out that mandate and he had Fraser defended, but Fraser pleaded guilty and received sentence of penal servitude.

Now, if Fraser had been solvent, what was done was precisely in accordance with instructions, but unfortunately on the 25th of October, about a fortnight after the apprehension, Fraser's estates were sequestrated. From the date of the sequestration the money in Mr Campbell's hands became the money of the creditors or of the trustee, and from that time Mr Campbell's duty was to look not to the bankrupt but to the organ of the creditors, viz., the trustee, for direction as to the disposal of this money. It is impossible to say that this is anything else than a revocable mandate, because Fraser could have changed the agency at any time. I cannot see that there is any good defence to this claim by Fraser's trustee—at least after the date of the sequestration the mandate ceases and the money goes to the trustee.

To use the language of Mr Justice Wright in *Charlwood's* case—"In the case of *Pollitt* the money of the debtor was handed to the solicitor, who was to apply it to meet future costs. On the occurrence of the bankruptcy the authority ceased and the money went to the trustee." That is the case before us, and there is a clear distinction between it and the case of *Charlwood*, where when the bankruptcy took place the money no longer belonged to the client but to the agent.

I have hitherto discussed the case as if the sequestration was the date which we had to regard, but it turns out that an arrestment was used by a creditor of Fraser in Campbell's hands on 14th October 1893. It is said that the supervening sequestration rendered that arrestment invalid. I think, however, that the 108th section of the Bankruptcy Act only cuts down the right of the individual arrestment, and provides that the money arrested shall be handed over to the trustee. Accordingly, the effect of the arrestments is that a *nexus* was laid upon the money in the hands of Campbell, preventing him from paying it away to anybody, and the sequestration gives a right to the trustee to get the money instead of the arresting creditor. It is therefore at the date of the arrestment by the individual creditor that Campbell became disabled from carrying out Fraser's instructions, and as from that date the trustee is entitled to the money in Campbell's hands.

LORD ADAM—I agree. The money put into Campbell's hands remained at the disposal of Fraser. It is impossible to spell out a contract under which, in return for the money handed over, Campbell was employed to carry out Fraser's defence. There was no obligation on Fraser to continue to employ Campbell or on Campbell to continue the employment. He was to expend such sums as Fraser might from time to time direct. The money remained at Fraser's absolute control, and if so in fact, in law the sequestration at once put an end to Campbell's power of disposal of what was Fraser's money. It may be a hard case, but not harder than that the creditors should pay for Fraser's defence.

We have been referred to two English cases, the one that of *Pollitt* and the other that of *Charlwood*, and I agree with your Lordship that the present case is ruled by the former and not by the latter. In *Charlwood's* case there was a distinct contract, and upon that ground the case was decided. The agent got a definite sum which he was to keep absolutely, but under the obligation of conducting his client's defence whatever it might cost. It was not so here. As in *Pollitt's* case the bankrupt employed an agent, but he remained free to change his agent at any moment.

I also agree as to the effect of the arrestment here used. The 108th section of the Bankruptcy Act says that no arrestment on or after the 60th day prior to the sequestration shall be effectual—that is effectual against the trustee, to whom all funds arrested are to be made forthcoming. It cannot mean that the arrestments are absolutely ineffectual. The sum arrested therefore ought to have remained in Campbell's hands, and been made forthcoming to the trustee.

I think the date from which the accounting is to be held must be the date of the arrestment.

LORD M'LAREN—In considering whether a client may make a bargain with an agent for professional services, entitling the agent to go on to the completion of the work even against the wishes of creditors, we must remember that an agent is not entitled to receive more than his legal charges without breaking through the rule that he must not enrich himself beyond the sum to which he has a legal right.

But there is no rule against a client even though insolvent entering into a contract with an agent to obtain his professional

services for a definite sum, and a typical instance is that of arranging for his defence against a criminal charge. If the money has not been paid, a trustee in bankruptcy can put an end to the contract even although he may have to pay damages for breach of the contract, but if the money has been paid it is impossible for him to intervene and stop the agent going on with the contract. The agent could then say, "I have been paid and I am willing to complete the work." The case of *Charlwood* was a case where the Court held that a trustee in bankruptcy was not entitled to repayment of money given to an agent for professional services. The present case is different. Here, with the prospect of requiring professional aid, Fraser put certain money into his agent's hands with authority to expend it as he might direct. That was nothing but a deposit, the agent being the depositary. Bankruptcy supervened, and the trustee, I think rightly, on the morning after his confirmation called for an accounting and for a determining of the contract of employment. The agent no doubt had a right to retain money in payment of his account up to that date but no further, and was bound to account for the surplus.

With regard to the question whether the right of retention was not terminated at an earlier date than that of the sequestration, the facts are as follows — Before sequestration an arrestment had been used in the agent's hands, and I see no reason why it should not receive full effect, so as to attach all funds belonging to Fraser in Campbell's hands so far as not required for repayment of outlays at that date. A *nexus* was thereby laid on preventing Campbell from paying any more money to himself between 14th and 25th October, when sequestration took place. While the Bankruptcy Act cuts down all preferences in the interest of creditors, it would be inconsistent with its policy and provisions to hold that it had the retrospective effect of making the arrestment absolutely ineffectual so as to enable the arrestee to make the funds arrested in his hands available for payment of his disbursements after the arrestment. The words of the 108th section are, I think, clear. They render arrestments within sixty days ineffectual as in competition with the trustee, to whom all sums arrested are to be made forthcoming.

The trustee for creditors is vested in the whole funds of the debtor, and the arrestee cannot have any preference over another arresting creditor.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuer and the Respondent—Ure—M'Lennan. Agent—Robert D. Ker, W.S.

Counsel for the Defender and Reclaimer—Dundas—Guy. Agents—Wylie, Robertson, & Rankin, W.S.

Thursday, June 21.

SECOND DIVISION.

MILLAR (MORRISON'S EXECUTOR) AND OTHERS.

Will and Succession — Construction — "Residue."

A holograph settlement provided certain specific legacies amounting to £1000 free of legacy-duty, and proceeded—"The Thousand pounds so bequeathed is in the hands of my brother . . . also two hundred pounds, which latter if *not* expended by me *before* my decease & still in his hands will be—to be taken for all just and lawful debts, to give mournings to . . . my servant to the extent of Two pounds—also mournings to my niece to the extent of £5—Any residue to be given to J. M." A legacy had already been provided to J. M.

Held that the words "any residue" were not limited to the balance of the £200 after deduction of debts and mournings, but carried the free moveable estate of the deceased.

Miss Janet Scott Morrison died on 7th October 1893 leaving several *mortis causa* writings of a testamentary nature holograph of the deceased, the first being dated 31st August 1893, the second being undated, the third dated 31st August 1893, and the others being undated. These documents were all enclosed in an envelope, and on the envelope were these words—"My will, Janet S. Morrison," in her own handwriting."

By the first of these testamentary writings Miss Morrison bequeathed certain pecuniary legacies to different persons, amounting in all to £1000, under the declaration that these legacies were to be paid free of legacy-duty. The document then proceeds as follows:—"The Thousand pounds so bequeathed is in the hands of my Brother William, Merchant, Leith; also Two hundred pounds, which latter if *not* expended by me *before* my decease & still in his hands will be—to be taken for all just and lawful debts to give mournings to Jessie my servant to the extent of Two pounds—also mournings to Nephew John Morrison's wife to the extent of Five Pounds—Any residue to be given to Janet Millar, residing at Castle-Douglas"—Signed "Janet S. Morrison; witness, Jessie Robertson." Miss Millar received a legacy of £100 under the former part of the settlement. In the second testamentary writing, styled by the deceased "Codicil No. I," Miss Morrison increased the sums for mournings, and nominated Mr William F. Millar, merchant, Leith, her sole executor, giving him £20 for his services. The other testamentary writings made specific bequests to different parties for certain articles of furniture, &c.

Mr Millar, as executor-nominate, was confirmed by the Sheriff of the Lothians