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

and Peebles. He found that the deceased's personal property amounted, without deduction of debts, to £1514, 19s. 6d., including the above-mentioned sums of £1000 and £200. The personal debts of the deceased were of very small amount.

A special case was presented by (1) the executor, (2) the residuary legatee, (3) Miss Morrison's next-of-kin, for the opinion of the Court upon the following questions of law:—"(1) Do the words 'Any residue to be given to Janet Millar,' occurring in the first holograph testamentary writing referred to, give right to the said Janet Millar only to any balance remaining of the £200 mentioned in the said writing after deduction of debts and the sums for mournings left by the testatrix; or, Are these words sufficient to carry any free moveable estate belonging to the deceased at the date of her death after providing for the specific legacies and bequests left by the testatrix, and the debts and expenses of the executry? (2) In the event of its being held that the words in question refer only to the balance of the said sum of £200, Do the funeral and executry expenses, including the inventory and legacy duties, or any of these items, fall to be charged against or deducted from said sum of £200 so far as that sum will meet them; or, Is it only debts due by the deceased before her death that are to be deducted therefrom, and the sums left for mournings?"

The residuary legatee argued—The presumption was for testacy. It was true that the testatrix had divided the great part of her estate into specific legacies, but it was plain that she considered there must be more estate than she was actually dealing with, because she directed the legacies to be paid free of legacy-duty. The deed was a settlement disposing of her whole estate and appointing an executor. There was therefore nothing in the context to show that the testatrix did not desire to leave the residue of her whole estate to the person named as residuary legatee—Jarman on Wills, i. 723; Williams on Executors, ii. 1317; *Jull* v. *Jacobs*, July 10, 1876, L.R., 3 C.D. 703.

The next-of-kin argued—The presumption against intestacy might be rebutted, and it was plain that in this case the testatrix was dealing solely with the specific legacies she had given, and meant that any small sum over after paying debts should go to Miss Millar, but she had not disposed of her whole estate by the legacies she left, and therefore the residue of the whole estate, excluding these sums of £1000 and £200, went to the next-of-kin—*Hastings* v. *Hane*, March 16, 1833, 6 Symon, 67; *Ommaney* v. *Butcher*, July 22, 1823, 1 Turner & Russell, 260; *Jull* (cited *supra*).

At advising—

LORD JUSTICE-CLERK—It is plain that the document the terms of which we are asked to construe in this case was left by this lady Miss Millar as a settlement of her whole affairs; indeed, the envelope in which the document is enclosed has written upon it, in her own handwriting, the words "My will." In that document we find, in the place at which we would naturally expect to find them in a settlement disposing of the lady's whole estate, words which seem to be a direction as to what is to be done with the residue of her estate after giving effect to the particular directions settling what shall be done with the greater part of it.

The words are, "Any residue to be given to Janet Millar," &c., and I think we must read these words as meaning that she gives the residue of her whole estate, after providing for special legacies, to Janet Millar, unless the other parties to the case can show some circumstances weighty enough to lead us to say the contrary.

The only thing which is urged against that view is the mention by the testator of the special sum of £200 in the hands of her brother, and the way in which she has disposed of it, and it is contended by the testator's next-of-kin that looking at the position of the mention of this sum of £200, and the way in which the testator says it is to be applied, we must hold the statement as to residue as alluding merely to what may remain of the £200 after applying it as the testator has directed. I think there is no necessity for one reading these words as applying only to the residue of the £200, and as the words this lady has used in her settlement are sufficient to carry the residue of the whole estate to Janet Millar, and there is nothing to the contrary, there is a presumption that she intended to convey the residue of the whole estate to her. I think her words should receive their ordinary effect.

It is true, as was said by counsel for the next-of-kin, that in an earlier part of the settlement Miss Millar does receive a considerable sum of money as a legacy as well as being made residuary legatee, but I do not think that means any more than that the testatrix was not aware of the amount of estate she had to dispose of, and thought it less than it was, and directed that any small balance of residue should go to her friend. On the whole, I think we must read these words as giving to Janet Millar a right to the residue of the whole estate after paying the legacies provided for by Miss Morrison.

LORD RUTHERFURD CLARK—I think that the words we have to construe here must be read according to their ordinary meaning, unless there is anything in the context which would lead us to take a different view. I cannot see anything in the language of this will which leads me to think that the testatrix intended that the words should mean anything different from their ordinary signification.

LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court answered the second alternative of the first question in the affirmative and found it unnecessary to answer the other question.

Counsel for the First and Second Parties —Wilson. Agent—R. Cunningham, S.S.C.

Counsel for the Third Parties—Guthrie—Grainger Stewart. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday, June 28.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MANN AND BEATTIE *v.* EDINBURGH NORTHERN TRAMWAYS COMPANY.

Process — Reclaiming-Note—Competency — Leave to Reclaim—Court of Session Act 1868, secs. 27, 28, and 54.

The record in an action of accounting was closed in 1889 and a proof allowed. In 1894 the Lord Ordinary remitted to the Taxing Master of the House of Commons to report on certain objections to the accounts. Against this interlocutor a reclaiming-note was presented within six days, but without the leave of the Lord Ordinary.

Held that the reclaiming-note was by sec. 54 of the Court of Session Act 1868 incompetent, as the interlocutor reclaimed against was not pronounced under sec. 27 of that Act.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), by sec. 27 enumerates what interlocutors as to future procedure the Lord Ordinary may pronounce at the closing of the record. Section 28 provides that against an interlocutor pronounced under section 27, a reclaiming-note may be presented within six days without leave of the Lord Ordinary, and section 54 enacts that against all other interlocutory judgments a reclaiming-note can only be presented with leave.

The record in an action of accounting brought by the Edinburgh Northern Tramways Company against Mann and Beattie —see June 26, 1891, 18 R. 1140, and H. of L. November 29, 1892, 20 R. (H. of L.) 7—was closed in 1889 and a proof allowed.

Upon 13th June 1894 certain objections to the defenders' accounts having been lodged by the pursuer, the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:— . . . "Remits also to C. W. Campion, Taxing Master of the House of Commons, to report on objection XI." . . .

Against this interlocutor the pursuers reclaimed without leave upon 19th June.

They argued—(1) The reclaiming-note was competent, because it was virtually an interlocutor fixing the mode of proof—*Quin* v. *Gardner & Sons, Limited*, June 22, 1888, 15 R. 776. This was really a new litigation in which new facts had to be ascertained. (2) The Taxing Master of the House of Commons was not a suitable person in the circumstances. He had not the necessary experience, and would pass the accounts as a matter of form. A civil engineer should have been nominated.

Argued for respondents—The reclaiming-note was incompetent, as the leave of the Lord Ordinary had not been obtained—Court of Session Act of 1868, secs. 27, 28, and 54, and A.S., March 10, 1870.

At advising—

LORD PRESIDENT—In the Single Bills notice was taken by the counsel for the respondents in the reclaiming-note that this reclaiming-note was in his judgment incompetent, and we sent the case to the roll, reserving that objection. That objection falls now to be disposed of. In my opinion it is well founded. The reclaiming-note is presented without leave of the Lord Ordinary, and that raises the question whether it is a reclaiming-note falling under section 28 of the Court of Session Act 1868; because, if it is not, then it is excluded by the 54th section of that Act as being without leave. Now, the question whether it is a reclaiming-note under section 28 seems to me to be very easily decided. Section 28 provides that any interlocutor pronounced by the Lord Ordinary under the 27th section shall be reclaimable without leave within six days of its date. I have stated it shortly, but that is the substance of the provision. Accordingly, unless this interlocutor is an interlocutor pronounced under section 27, this reclaiming-note against it is not competent under section 28. Now, the broad facts of this case seem to preclude the idea that this is an interlocutor under section 27. Section 27 is dealing with that stage of the case at which the record is being closed, and the future procedure in the case determined. At that stage parties are allowed to reclaim against an interlocutor of the Lord Ordinary without leave. But then we find in the present case that so long ago as 1889 the closing of the record stage of the case was reached and passed, and the Lord Ordinary in actually closing the record pronounced an interlocutor sending the whole cause to probation. It seems to me that that was the first, last, and only interlocutor reclaimable under section 28 of the Court of Session Act in this case. It is true that the interlocutor reclaimed against is but a mode of ascertaining certain facts; but it may very well happen that in the incidental stages of a case, which has gone to proof and been judged of after proof, there will arise certain matters of detail to be ascertained, and these are just the kind of cases where it seemed very proper that the leave of the Lord Ordinary should be required before another appeal is taken to the Inner House. But it seems to me that while the reason of the Act applied to cases which have somewhat detailed procedure is entirely sound, the more direct and conclusive reason for refusing this reclaiming-note is that on the terms of sections 28 and 27, compared with section 54 of the Act of 1868, this is not a reclaiming-note under section 28.