"wilfully," or has prevented substantial justice from being done. Now, "wilfully" is out of the question, for there is no suggestion that the Sheriff did what he knew he had no right to do and yet went on to do it. Nor did he act in so capricious a manner as to cause any grave injustice to be done. Indeed, there has been no injustice done here at all. If the case had stopped where the irregularity complained of began, then the appellant would not have proved his claim and would have got nothing. The case therefore fails on that ground, and it is not advisable or necessary to state a precise opinion on the other point raised. My own impression is that section 10 applies only to cases where a final decree which is extractable is proposed to be pronounced. We know that such decrees are made by entries in the Sheriff Court book without further publication, and one can quite well see that it is right and proper that parties and their advisers should know when a decree is to be pronounced by the Sheriff. It is quite reasonable therefore that there should be such a provision as that for the appointment of a special day, and when the Sheriff has fixed a day then the Act says that he may go on and pronounce the decree without requiring any party to attend. If, on the other hand, he does not fix a day, then it is quite right that parties should not be kept going to the Sheriff Court to find out on what day the decree is pronounced. Accordingly, the Act says "if you do not tell the parties on what day you are to pronounce your decree you must pronounce it within seven days." But then I think that these provisions do not refer to the ordinary procedure in a cause, and if the Sheriff makes avizandum and then makes an order with reference to procedure merely, that is not in my opinion "pronouncing decree," and the 10th section does not apply. But I decide this case on the ground that there has been no deviation from statutory enactments which was wilful, or which prevented substantial justice from being done.

LORD M'LAREN—I think it is impossible to read the clause regulating appeals under the Small Debt Act without seeing that it was not intended to allow any review upon the merits, excepting only when the judge perverts his office by acting corruptly or oppressively. While there are obvious reasons for the exclusion of review on the merits, the parties are entitled to this protection, that the case must proceed on the statutory lines, and in accordance with the statutory provisions. Also, the parties are entitled to have a decree within a reasonable time. Any deviation from these provisions may be corrected by an appeal. But even then with this limitation, that the right of appeal is only competent against a wilful curtailment of the rights which the statute gives to litigating parties, or where, though the deviation may not be wilful, it has resulted in injustice towards the appellant.

I am not satisfied that we have here anything falling under the second head of the statutory enactment. It is out of the question, and it is not suggested, that the Sheriff in adjourning the case for more than a week acted "wilfully," *i.e.*, capriciously. But further, I cannot see how either party could be prejudiced by so short an extension of the time. Cases may very easily be figured where an extension of the time prescribed by the statute would be quite excusable, and would furnish no ground of appeal.

On the question whether the interlocutor was informal, I reserve my opinion. It may well be that the same reasons which require that a decree should be pronounced within a week, or on an appointed day, should also apply to an interlocutory order. I am inclined, however, to think that "pronouncing decree" does not apply to anything but final decree, and that the statutory enactment as to making avizandum was only intended to apply after the judge was fully possessed of the case.

LORD KINNEAR—I am of the same opinion. I agree with your Lordships that it is impossible to set aside a decree in a small-debt action on the ground of deviation from statutory form, unless the deviation has either been wilful or has resulted in substantial injustice. The procedure in this case was not a wilful deviation, by which I understand a departure of set purpose from the forms prescribed by the statute, and it certainly has not resulted in any injustice to the appellant. It is therefore unnecessary to consider whether there has been any such deviation as would have entitled the appellant to have the judgment set aside if substantial injustice had been done.

The Court dismissed the appeal.

Counsel for the Appellant—Constable. Agent—James F. Macdonald, S.S.C.

Counsel for the Respondents Robinson and Knight—C. D. Murray. Agent—Alexander Mustard, S.S.C.

COURT OF SESSION.

Friday, June 28.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

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

Succession—Marriage-Contract—Disposal of Trust Funds after Failure of Purposes—Will by Truster—General Bequest qualified by Descriptive Words.

By antenuptial marriage-contract a wife conveyed a sum of £2500 to trustees, whom she directed to pay the liferent to herself and her husband and the survivor of them. With regard to the disposal of the fee of the capital of

the trust funds after the death of the longest liver of the spouses, the trustees were directed to hold the same for behoof of the children of the marriage and their issue, and, in the event of there being no children surviving at the death of the longest liver of the spouses, to pay the whole capital "to and in favour of the assignees, executors, or the nearest of kin" of the wife. The marriage was dissolved by the death of the wife, who was survived by several children of the marriage, all of whom predeceased their father. The wife left a holograph will, by which she left and bequeathed her "whole means and estate, real and personal," to her son J. Attached to the will was a memorandum describing "the property" and stating where it would be found. The property described in the memorandum included all her means and estate, with the exception of the £2500 in the hands of the marriage-contract trustees.

Held (1) that the wife was entitled to dispose of the trust funds in the event of there being no children of the marriage who should survive the longest liver of the spouses; and (2) (*rev.* judgment of Lord Kincairney) that they were validly disposed of by the will.

The deceased James Montgomery and Mrs Eleanora Anstruther Thomson or Montgomery were married in 1835. They entered into an antenuptial contract of marriage, under which Mr Montgomery's father bound and obliged himself to pay, and did thereafter pay, to the trustees therein named the sum of £16,000. Mrs Montgomery bound and obliged herself to pay, and did thereafter pay, to said trustees the sum of £2500. The trustees under the marriage-contract were appointed to hold the trust-estate, and to pay the free income during the subsistence of the marriage to the spouses, and thereafter to the survivor. These provisions of liferent were declared to be strictly alimentary. By the fourth purpose it was provided, "with regard to the disposal of the capital of the said trust funds after the decease of the longest liver" of the spouses, *inter alia*, that the trustees should "hold and retain the said capital for behoof of the child or children who may be procreated of the said marriage, and the issue of such child or children, whom failing, as hereinafter written, for behoof of the persons or person to whom on their failure the same is likewise hereinafter provided, and shall account for and pay over the said capital to the said child or children or the said issue at the times and in the manner following," viz., if there should be only one child who should attain majority, or being a daughter should be married, and if such child should survive the longest liver of the spouses, or die leaving lawful issue, then the trustees were to pay to such child or issue the sum of £10,000; if there should be two children or their issue, who should fulfil the above conditions, the sum of £12,000 equally between them; and it was provided that "in either of the above events of there being only one or two children, the residue of said trust capital shall be at the disposal of the said James Montgomery, or his heirs, executors, or assignees;" and if there were three or more children or their issue who should fulfil the above conditions, the whole of the said trust capital was to be paid over to such children or their issue equally, share and share alike, but subject to a power of division to the said James Montgomery; it being declared that the share of any child who should die before majority or marriage without issue should devolve to the survivor or survivors of the said children, and to the issue of such others as might have died leaving issue, and that the issue of deceasing children should succeed to their parents' share; and that the shares, both original and accrescing, should be payable to the children or their issue at the term of Whitsunday after the decease of the surviving spouse . . . if they had attained majority, or being daughters had married by that date. It was further provided—"And in the event that there shall be no child or children of the said intended marriage or issue of the bodies of such child or children surviving at the death of the longest liver of" the spouses "or that such as may survive the longest liver and their issue shall die before majority, or being daughters before marriage, that the said trustees or trustee acting for the time shall pay over, assign, and convey to and in favour of the assignees, executors, or nearest of kin of the said James Montgomery and Eleanora Anstruther Thomson respectively the whole of the said trust capital, and that in the proportions respectively advanced by or for them as herein specified."

Mrs Montgomery died on 8th January 1878, survived by Mr Montgomery, who afterwards died on 13th March 1894, and by three children—Clementina Margaret Montgomery, who died unmarried and intestate in the year 1885, James Frederick Montgomery, who died on 17th January 1889 leaving a trust settlement and will, and John Conrad Montgomery, who died on 19th January 1893, unmarried and intestate.

Mrs Montgomery left the following holograph will, dated 12th April 1875, with codicil or memorandum appended:—

"Holograph Will and Testament by Mrs Eleonora Anstruther Thomson or Montgomery, dated 12th April 1875, with Codicil or Memorandum appended thereto of same date, and Ratification by her Husband, also annexed to the Will, and dated 30th March 1878.

"I, Mrs Eleanora Anstruther Thomson or Montgomery, residing at Lillington Manor, Leamington, do hereby leave and bequeath my whole means and estate, real and personal, to James Frederic Montgomery, my son, subject to payment of such legacies as I shall appoint by any writing under my hand; and I appoint James Frederic Montgomery to be my sole executor; and I declare that this will shall be valid and effectual though found in my repositories.—In witness whereof, I have written and

subscribed these presents with my own hand at Lillington Manor, the 12th day of April 1875, before these witnesses, Doctor Thomas Birt, M.D., and Julia Clark, domestic servant."

"Holograph Codicil or Memorandum appended to the foregoing Will.

"The property will be found in the possession of Charles Henderson, 2 York Terrace, Edinburgh, in debentures in the Scottish American Investment Company to the amount of £430, also in the British Linen Company, St Andrew Square, Edinburgh, two bonds of the Italian Irrigation Cavour Canal Company, and the interest thereon in the banks."

The will with the memorandum appended to it had been sent by Mrs Montgomery to her man of business in a sealed packet addressed to her son James Frederick Montgomery, to be opened after her death. Her only property at that time, apart from the sum in the hands of the marriage-contract trustees, consisted of that described in the memorandum. After Mrs Montgomery's death her husband consented to and ratified the will, and consented to probate being granted to his son James Frederick, the beneficiary under it. James Frederick Montgomery, at his death in 1889, left a trust settlement, disposing of his whole estate.

Questions having arisen concerning the £2500 paid by Mrs Montgomery to her marriage-contract trustees, they raised an action of multiplepoinding, that sum constituting the fund *in medio.*

Claims were lodged, *inter alia,* by James Frederick Montgomery's trustees, and by the representative of his brother John Conrad Montgomery, and by John Anstruther Thomson, Mrs Montgomery's brother, who was her nearest of kin at the date of her husband's death.

The claimants, James Frederick Montgomery's trustees, maintained that the fund *in medio* was carried by Mrs Montgomery's last will and testament to her son James Frederick, and by his trust settlement and will to them. They claimed to be ranked and preferred to the whole fund *in medio.*

This claim was opposed by the claimants, John Conrad Montgomery's representative and John Anstruther Thomson, who maintained that the fund *in medio* was not carried by Mrs Montgomery's will.

On 27th March 1895 the Lord Ordinary (KINCAIRNEY) found, *inter alia,* that the fund *in medio* was not bequeathed by the will executed by the deceased Mrs Montgomery dated 12th April 1875, and therefore repelled the primary claim for the trustees of James Frederick Montgomery.

"*Opinion.*—This is a multiplepoinding which has been brought by the trustees acting under an antenuptial marriage-contract between the late Mr and Mrs Montgomery, and the fund *in medio* is the sum of £2500 which was contributed to the trust-estate by Mrs Montgomery. The questions raised depend on two deeds—first, the marriage-contract; and secondly, Mrs Montgomery's will. The question under Mrs Montgomery's will is whether she intended to bequeath by it this £2500. The questions under the marriage-contract arising, if that question as to the will be answered in the negative, are (1) what right to the £2500 vested in the issue of the marriage; and (2) who are, in the sense of the deed, Mrs Montgomery's 'nearest of kin?'

"The facts and dates which require attention are these—[*His Lordship then narrated the facts already stated*].

"The first question to be considered seems a simple one. It is whether Mrs Montgomery by this will intended to bequeath the £2500 placed in the hands of the marriage-contract trustees, and I think it clear that she did not. It may be admitted that the words of the will are amply sufficient to include this sum, and it may be true that, generally speaking, such comprehensive words will be held to include all the estate over which the testator had testamentary power. See *Dalgleish's Trustees* v. *Young*, June 29, 1893, 20 R. 904. But there is no general rule to that effect, and if there be such a presumption it is easily overcome by indications in the deed to the contrary. On this point the following cases were referred to:—*Mackenzie* v. *Gillanders*, June 19, 1874, 1 R. 1050; *Reeve's Executors* v. *Reeve's Judicial Factor*, July 14, 1892, 19 R. 1013; *Enohin* v. *Wylie*, April 3, 1862, 10 Clarke's Rep. (H. of L.) 1; *Attorney-General* v. *Wiltshere*, July 26, 1847, 16 Simons' Appeals, 36, which last case is much in point.

"On this question I consider the terms of the memorandum conclusive. It is written on the same sheet, and also on the same day as the will, and as part of it. The expression "the property" refers to the will, and undoubtedly means the property referred to in the will, and cannot be legitimately read as meaning 'part of the property referred to.' The £2500 in the hands of the marriage-contract trustees was not at the date of her will Mrs Montgomery's property, but only property over which she might in certain improbable contingencies have a power. The words 'my whole means and estate' did not, according to their strict and also their natural meaning, include that sum. They might be held to do so, but only by an extension of their natural meaning. I think that the memorandum defines and limits the property bequeathed by the will in language which admits of no mistake or doubt.

"There is another strong ground for holding that Mrs Montgomery did not intend to bequeath the £2500 to her son James Frederick—which is, that she had no power over the fund until after he was dead, and it was by no means likely—although it may be possible—that she should leave a legacy to a legatee to take effect after his death, and still more improbable, and even incredible, that she should appoint him her sole executor.

"I have no doubt that the £2500 was not covered by Mrs Montgomery's will, and therefore the primary claim for James

Frederick Montgomery's trustees must be repelled."

[*His Lordship then proceeded to consider who were entitled to the fund in medio under the marriage-contract*].

The claimants, James Frederick Montgomery's trustees, reclaimed, and argued—1. The purposes of the marriage contract having failed, the share contributed by Mrs Montgomery, in accordance with the terms of the contract, reverted to her assignees, *i.e.*, to the person to whom she disposed of her property by her will. The trustees only held it for certain purposes, and the fee not being required to fulfil her directions as to its disposal owing to the contemplated contingencies never having arisen, was held by them for her, and was *in bonis* of her when she made her will—*Mackenzie* v. *Gillanders*, June 19, 1874, 1 R. 1050, at 1052. 2. Her will was intended to cover her whole estate, the memorandum was only added in case of there being any difficulty in finding and identifying certain portions of it. No such difficulty would arise with regard to the £2500 in the hands of the marriage-contract trustees, and therefore no reference was made to it. The words of the will were amply sufficient to include this sum, and they did so include it—*Dalgleish's Trustees* v. *Young*, June 28, 1893, 20 R. 904; *Cameron* v. *Mackie*, August 29, 1833, 7 W. & S. 106; *Hyslop* v. *Maxwell's Trustees*, February 11, 1834, 12 S. 413. This was not a question of a power of disposal granted by one person to another, but of the disposal of what always had been the property of the testatrix—a distinction which the Lord Ordinary had failed to observe. But even if it were not, Mrs Montgomery's intention was that that sum should be carried by her will.

Argued for the respondents—1. Mrs Montgomery was not able to make a will disposing of property which could not come into existence, as within her power, till after the death of her children, one of whom was the person to be benefited by her will. It was clear that she did not intend the sum to be included in the will, for three of her children were alive at the time, and her right to dispose of it would only arise in the very unlikely contingency of their all predeceasing the survivor of their parents. 2. The terms of the memorandum showed that she did not include the £2500 in her will, as no reference was to it as being part of "the property" referred to as carried by the will. Though the words of the will were comprehensive enough to include this sum, the presumption that they did so was easily overcome by indications to the contrary such as were contained in the memorandum—*Enohin* v. *Wylie*, 1862, 10 Clarke's Rep. (H. of L.) 1; *Attorney-General* v. *Wiltshere*, 1847, 16 Simons' App. 36.

At advising—

LORD M'LAREN—The question we have to consider relates to the disposition by the deceased Mrs Montgomery of a sum of £2500, which at the time of her marriage she contributed towards the purposes of the marriage, and which was settled by contract. The finding of the Lord Ordinary, which is brought under review, is "that the fund *in medio* was not bequeathed by the will executed by the deceased Mrs Montgomery dated 12th April 1875, therefore repels the primary claim for the trustees of James Frederick Montgomery." James Frederick Montgomery was Mrs Montgomery's eldest son, and he was an executor and universal legatory under her will. Now, when we turn to the Lord Ordinary's opinion in explanation of his finding, his Lordship points out that in the event of the subject not being carried by Mrs Montgomery's will, a further question arises as to who are entitled to it. His Lordship then states the reasons in consequence of which he conceives that Mrs Montgomery's will does not pass the £2500, and I think I am not doing injustice to the Lord Ordinary's view when I say that his opinion is mainly founded on the effect of a holograph memorandum in which the lady states where her investments are to be found, but does not include the £2500, which is vested in her marriage-contract trustees. Now, it is in a sense true that the question is, whether Mrs Montgomery had a testamentary intention applicable to this fund, but in reading the Lord Ordinary's introductory words in connection with the argument, it is plain that what he is considering is, not whether this fund can be identified as a subject which might be carried by her will, but whether Mrs Montgomery had expressed a definite testamentary intention with respect to this particular fund. His Lordship treats the case as one of power of disposal, and from this point of view states, in accordance with all the authorities, that the question whether a fund subject to a power of disposal is or is not carried by general words in a will is a question of intention in which the intention to deal with a particular estate is to be ascertained in the same way as any other question of identification of the subject of bequest. But then the system of cases of decided points on which the Lord Ordinary founds his opinion has relation to powers of disposal granted by one person to another person to deal with the first person's estate, and that I conceive is the proper meaning of estate subject to a power of disposal. It means that the granter is, with reference to the particular subject, not dealing with his own property, but dealing with property of another person in virtue of his mandate. But then, apparently, his Lordship has not adverted to the distinction between such cases and a case like the present, where Mrs Montgomery was disposing of estate which was originally hers, which never passed to any other person except contingently for the purposes of the marriage-contract, and which, on the failure of all these purposes, reverted to her, not by the effect of a power, but because it had remained hers from the beginning subject to the purposes of the marriage-contract. There is no such state of facts in this case as would raise for determination the effect

of a proper power of disposal, and I think there is no true analogy between the question or system of questions referred to by the Lord Ordinary and the present case.

Accordingly I proceed to consider what I think is the real question, whether the words of the marriage-contract in any way limited the right of Mrs Montgomery to deal with her estate after the purposes of the marriage trust were exhausted, or whether the ultimate destination to assignees, executors, and next-of-kin means anything more than that on the exhaustion of these purposes the property reverts to herself, and is subject to her order and disposition. Now, it is difficult to conceive a more clear and more comprehensive declaration of the reservation by the granter of his right of fee on certain events than a declaration that failing other purposes the property shall pass to himself, his assignees, executors, and next-of-kin. I note here that the lady does not introduce her own name in the destination, and probably for this reason, that the determination of the ultimate destination of the fund was only to take place on the death of the survivor of her husband and herself, so that she never could expect to have the personal enjoyment of the property; she could only exercise a proprietary right over it in the sense of passing it to her disponees or representatives. But considering the source from which this money came, and that the purposes of the marriage-contract are just the ordinary purposes of a provision to the wife and to the children, it is most natural to suppose that the funds settled by each spouse should return to himself or herself if there were no longer any marriage purposes to be fulfilled. There is no reason to suppose that anything different was intended than that if all the children predeceased the termination of the trust, so that there were no longer objects of the marriage-trust, all the right of the settlor in the estate was reserved. And if you call this a power, it is very well-settled law that a so-called power by reservation is nothing more than a fee; it is just a reservation of the original right subject to the trusts, which in certain events should come into operation and divest the granter. Again, if we look a little further at the words of the destination, we find that the alternative is certainly suggested between persons who are to take by gift from Mrs Montgomery, and those who are to take by operation of law, because the words are "to assignees, executors, or nearest of kin." It was pointed out by Mr Mackay that in the case of *Graham* v. *Lawson*, which went to the House of Lords, and has been followed in many subsequent cases, a legacy to the executor and next-of-kin, or to the executors or next-of-kin of a person designated has been interpreted as meaning a gift to those who take by operation of law. Now, there are two remarks that I venture to make on *Graham* v. *Lawson*, which, I think, prevent the decision from having any application to the present case. The first is, that there the opinion of the Court was that only one class of persons were identified by this composite expression that executors and next-of-kin were synonymous expressions. But secondly, that was a case not of a person leaving money to her own executors or next-of-kin, but it was a gift to the executors or next-of-kin of another, and certainly when you describe a legatee by his relationship to another person, it is very natural to conclude that some definite relationship was intended rather than the alternative which would be given if you interpret executors as meaning executors-nominate. At all events, this was the decision of the highest legal authority of Scotland, differing, I believe, from the decisions of the courts of England, for by the law of England a bequest to executors means to executors in the only sense in which that word is used in England—the testamentary executors.

But it is quite evident that the case of *Graham* v. *Lawson* could not govern a destination to executors coupled with words which imply voluntary disposition, because there is no rule of law which prevents a testator from leaving his property to the executors of another person to be disposed of for the purposes of the will. That question occurred in a case that I referred to in the course of the argument—*Scott's Executors* (17 R. 389). The bequest there was a bequest of residue, and the destination was to certain persons equally, share and share alike for their own use and behoof, and, failing all or any of them by their predeceasing the testator, then to their several and respective executors and representatives whomsoever, "whom," he added, "I hereby appoint to be my residuary legatees." Under such a destination it was held by the Lord Ordinary, and then by a unanimous judgment of the Inner House, that the testamentary executors of the persons named had a right preferable to the next-of-kin. The most distinct exposition of the principle of construction is to be found in the Lord Ordinary's note, of which I shall read only one sentence. His Lordship says—"The words to be construed have a perfectly clear and well-established legal meaning, and they must receive effect according to that meaning, irrespective of any conjecture as to what the testatrix might have done if she had anticipated the event which has happened when the will was written." And then he says—"In the event of the legatee predeceasing the testatrix, she gives his share of the residue to his executors and representatives whomsoever." That these words will include executors-designate as well as next-of-kin appears to me to be beyond all question. They are sufficiently general as the testatrix uses them to embrace all classes of persons who by any possibility may stand in the position of executors and representatives to the legatee. But if that be the construction where property is destined to the executors of another person, it is not less easy to hold that it is the true construction where a party destines her estate to her own executors and next-of-kin. In my judgment it would be very difficult indeed to put any other construction upon such

words. I should suppose that in either case the intention is to include all persons who take, whether by voluntary disposition or by operation of law, and I can see no reason for limiting the effect of the words "to next-of-kin." In the present case Mrs Montgomery has made a will, in which she appoints her son to be her executor, and I think, whether your Lordships regard the ultimate destination in the marriage-contract as a reservation to the wife of the right of property, or whether you regard them as an expression of the way in which she proposes to limit her powers over the estate, that in either case she has executed an assignment which is adequate to dispose of all her interest in the marriage-contract fund.

Now, these considerations would dispose of the question between the parties were it not for the argument which has been founded on the memorandum appended or put up with the holograph will. It is quite true that even in dealing with one's own estate it may be possible that general words should be used—words descriptive of the testator's whole estate, and yet that by other writings of a testamentary and obligatory effect it may be made clear that some particular subject was not comprehended. A familiar illustration of that exception is the case of a special assignation of some subject to a legatee. When that assignation is produced, then, notwithstanding the general words of conveyance or testamentary effect, of course the generality is controlled by showing that the particular subject has been excepted in another instrument. In the present case there is no exception of any property which was subject to Mrs Montgomery's distribution, there is only an instruction which was intended, doubtless, for the information of her executors as to where certain securities should be found—debentures of an investment company, and two bonds of another company. Nothing could be more natural or reasonable than that the testator, whose money was locked up in investments, should leave a paper telling her executor where he was to find them. There was no need for including the marriage funds in such a list, because this money was already in the hands of the marriage trustees, and the testator's son knew where to find it; that it would be to the trustees he or his representatives should apply when they came to claim the money which the lady had settled. I therefore fail to see that any serious argument can be founded on the memorandum if your Lordships agree with me that the will was not a will in the exercise of a power of disposal, but a will which dealt with this estate in the ordinary way in which a testator deals with his own estate. Of course if the will had not taken effect the property would have gone, under the second branch of the destination in question, to the next-of-kin, or rather, as I think, it would have gone to them because it was Mrs Montgomery's estate. But in the view which I understand your Lordships to take, this question does not arise, for we are all quite clear that this fund passed under Mrs Montgomery's will.

Lord Adam—My opinion is capable of being shortly stated on this case. The first question is, what is the will of Mrs Montgomery? Is it to be found in the holograph will or testament, or are we to construe what is called the memorandum as a testamentary document forming part of her will. That is really the question, and it is said that taking and reading the two together we are to come to the conclusion that the will left by her is not to be found in the first document at all, but in the second, because it is said the true meaning of the lady's will is that "I leave and bequeath the property in debentures in the Scottish-American Investment Company to the extent of £430, also in the British Linen Company, St Andrew Square, Edinburgh, two bonds of the Italian Irrigation Cavour Canal Company, and the interest thereon in the banks." And it is said that we are to read this as a specific definite conveyance of these specific articles of property. If that be so, of course it would exclude all property falling in from the date of the will, the date of death, and everything else except these specific articles. I must say I cannot take that view at all. I think the words of the will are perfectly clear and distinct, and that Mrs Montgomery leaves her whole estate to her son. Well, why are these words not to receive effect? I confess I do not see any reason. It is said that because she has left a memorandum setting forth certain property which belonged to her, and stating where it was to be found, we are to say from that that she intended to convey her other property to others. I do not at all follow that reason. I do not know how it was, but it may be that she had nothing in her mind at the time but this particular property. Supposing she had not, does that at all take away from the fact that her intention—she expresses it—was that her son was to have her whole means and estate, real and personal, at the time of her death. I do not see that the two things are in the least inconsistent. The existence of the memorandum does not in the least interfere with the fact that her will is that her whole estate and effects should go to him at the time of her death. Therefore to my mind the only question raised here is, was this property, I mean the rights under the marriage-contract, carried by this lady's will? Now, my view of the case is that the fund was *in bonis* of her at the time of her death. It is quite true that at that time it was held by trustees for certain contract purposes, but except so far as required for these purposes it was held for her as original proprietor of the money. If the fee was not required for any purpose, then it was held by the trustees for her, and it was exactly in the same position as if she had had it in her own hands from the first, because it was held by them *in bonis* of her, and was carried by her last settlement, as at the time of her death, to her son. Whether you call him her son or her executor is to my mind a matter of practically no difference. It was carried by her will to her son. If her son had survived, it would have gone to him under this will,

and I do not see how any argument to the contrary could be maintained. If it had happened that he had survived, it would have gone to him, and as he has not, it goes to his son.

LORD KINNEAR — I am of the same opinion. I think the fund of £2500 now in question was not property subject to a limited or defined power of disposal in Mrs Montgomery, but was her own absolute property which she might dispose of as she pleased by virtue of her right of ownership. She had placed it in trust for the protection of certain contingent interests, but these interests depended on conditions which were never purified, and the moment it was ascertained that the contingencies had not arisen, and that the interests dependent on them had not emerged, it was ascertained at the same time that the fund had continued to belong to her as it had done previously to the trust, and remained her property up to the moment of her death. I agree with Lord M'Laren that the direction to the trustees to pay it over in the event which happened to and in favour of the "assignees, executors, or nearest of kin of the said Eleanora Anstruther Thomson," has precisely the same meaning and effect as if she had directed the trustees, in that event, to pay to herself, her heirs, executors, and assignees. The result of it is that nobody can claim except through her. If it had appeared during her life, as might well have happened, that all the contingent interests to be provided for by the marriage-contract had been effectually excluded—if her husband had died without children having been born of the marriage, or if he had died, and all the children born of the marriage had died also leaving her surviving, so that there was no interest to be protected under the contract except her own, then I think it clear she would have had the same right to compel the trustees to convey to her as she would have had if she had inserted her own name in place of the designation of her heirs, executors, and assignees. The money was hers and belonged to her absolutely, although the fact that she had this absolute right of ownership could not be ascertained until the death of all her children. That being the nature of her right, I entirely concur with Lord M'Laren and Lord Adam as to the effect of the will and conveyance. I do not say that the construction of the will would have been different if the question had related to a fund of which she had nothing more than a definite power of disposal by testament. But that question does not arise. I see no reason to doubt that the will carries all the property that belonged to the testatrix at her death.

The LORD PRESIDENT concurred.

The Court pronounced this interlocutor—

"Recal the said interlocutor (of 27th March 1895): Remit to the Lord Ordinary to rank and prefer the said reclaimers in terms of the first alternative conclusion of their claim: Find the respondents jointly and severally liable to the reclaimers in the expenses of the competition," &c.

Counsel for the Claimants J. F. Montgomery's Trustees—Dundas—C. K. Mackenzie. Agents—Dundas & Wilson, C.S.

Counsel for the Claimant, the representative of J. C. Montgomery — Mackay — Dudley Stuart. Agents — Henderson & Clark, W.S.

Counsel for the Claimant John Anstruther Thomson — Rankine — Neish. Agents — Henderson & Clark, W.S.

Tuesday, July 2.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

SCHANK v. SCHANK.

Succession—Entail—Destination to Heirs of Entail in Possession or Having Right to be in Possession of Another Entailed Estate—Disentail of that Estate.

A testator disponed his whole heritable estate to his sister for her liferent use allenarly, and after her death to his nephew, H. A. S., Esquire of Castlerig, also in liferent. The deed proceeded—"And after his death I hereby give . . . such liferent use and enjoyment as aforesaid to the heirs of entail who may be in possession or have right to be in possession" of the entailed estate of Castlerig under deeds of entail specified.

The testator's nephew, H. A. S., disentailed the estate of Castlerig, and died in 1886, predeceasing the testator's sister.

In an action brought after her death, *held* (*rev.* judgment of Lord Kyllachy) that the destination to the heirs of entail "who may be in possession, or, have right to be in possession," of the entailed estate of Castlerig had become inoperative owing to the disentail of that estate, and that the testator's heir-at-law was accordingly entitled to the fee of the lands disponed by the testator.

Inglis v. *Gillanders*, January 19, 1895, 22 R. 266, *aff.* May 30, 1895, 32 S.L.R. 478, *distinguished.*

James Schank, Esquire, barrister-at-law, of 62 Gloucester Place, London, died upon 16th December 1871. He left a disposition and settlement by which he disponed to his sister, Lady Scott, wife of Sir James David Scott of Dunwald, in case she should survive him, "for her liferent use allenarly," his whole property in Laurencekirk, commonly called "The Villa," and after the death of Lady Scott he disponed the property of the villa to his nephew, Henry Alexander Schank, Esquire of Castlerig, also "in liferent, for his liferent use allenarly." The deed then proceeded—"and after his decease I