corpus of the estate. The truster does not give his widow a liferent (which might be more as well as less than £40). What he gives her is a "free yearly annuity."

I take it to be clear that the truster's first purpose was to burden his estate with the annuity of £40, to be paid out of his estate—that is, out of the yearly produce of the estate if it was sufficient, and if not, then out of the *corpus* of the estate. That view is strengthened by the fact that the annuity does not depend upon the expression of the truster's will, but is in a sense matter of bargain. He took his wife's acknowledgment of that provision as the price of her renunciation of her legal rights, and he could not without her consent go back upon that agreement, and I do not think that it was his intention to do so. I am of opinion therefore that we should sustain the defences and assoilzie the defenders.

LORD MONCREIFF—I am of the same opinion. I think the main intention of the truster was that the widow's annuity should be paid preferably out of his estate. The trustees are given power to secure the annuity either by retaining heritage unsold, or by selling part of it and investing the proceeds in some security which would yield a yearly income sufficient to satisfy the annuity. If they had done so, it may be that if the capital or fee of the security had proved insufficient they might not have been able to go back upon the remainder of the estate. But they did not do so; no part of the estate was set aside to satisfy the annuity; and they now seek to charge the general body of the estate which remains in their hands with the deficiency. Their power to do so I think endured even to the end. If there was not enough income to meet the annuity or the trust expenses they could have sold any of the heritable subjects. I regard the third direction in the second codicil as simply a convenient way of disposing of the residue instead of realising the heritage and dividing it. But from first to last I can see no trace of any intention to favour the residuary legatees in preference to the widow, or to the prejudice of the widow's rights under the original deed.

I therefore agree that the appeal should be sustained and the defenders assoilzied.

The LORD JUSTICE-CLERK was absent.

The defenders moved for expenses as between agent and client, and cited *Fletcher's Trustees* v. *Fletcher*, July 7, 1888, 15 R. 862; *Davidson's Trustees* v. *Simmons*, July 17, 1896, 23 R. 1117; *Erentz's Trustees* v. *Erentz's Judicial Factor*, November 12, 1897, 25 R. 53.

The Court pronounced an interlocutor by which they sustained the appeal and assoilzied the defenders. The interlocutor concluded as follows—"Find the defenders entitled to expenses as between agent and client in this and in the Inferior Court, and remit the account to the Auditor to tax and to report: Further, authorise the defenders to charge against the trust estate in their hands, before accounting therefor to the pursuer, all expenses incurred by them since 30th November 1899, and not falling under said remit, as the same may be taxed by the Auditor."

Counsel for the Pursuer and Respondent—W. Campbell, Q.C.—Sandeman. Agents—Armstrong & Hay, S.S.C.

Counsel for the Defenders and Appellants—Salvesen, Q.C.—Wilton. Agent—Henry Robertson, S.S.C.

Wednesday, January 16.

FIRST DIVISION.

[Sheriff Court at Rothesay.

CRAWFORD *v.* SIMPSON.

Process—Appeal—Appeal for Jury Trial—Competency—Time for Appealing—Court of Session Act 1825 (6 *Geo. IV. c.* 120) (*Judicature Act*), *sec.* 40—*Act of Sederunt*, 11*th July* 1828, *sec.* 5.

The Court of Session Act 1825 (6 Geo. IV. c. 120) (Judicature Act), section 40, which authorised advocation from inferior courts for jury trial, did not enact that advocation must be made within any specified number of days after the interlocutor allowing a proof. The Act of Sederunt, 11th July 1828, enacts (section 5) that if "neither party, within fifteen days in the ordinary case, and in causes before the courts of Orkney and Shetland within thirty days, after the date of such interlocutor allowing a proof, shall intimate in the inferior court the passing of a bill of advocation, such proof may immediately thereafter effectually proceed in the inferior court, unless reasonable evidence shall be produced to the inferior judge that a bill of advocation has been presented, or the judge be satisfied that effectual measures have been taken for presenting it."

In an action of damages for seduction and for aliment for an illegitimate child, the Sheriff-Substitute, by interlocutor, dated 17th December 1900, allowed a proof. On 3rd January 1901 the pursuer marked an appeal for jury trial. The defender objected to the competency of the appeal on the ground that it had not been marked within fifteen days after the interlocutor allowing a proof. The Court, *following Davidson* v. *Davidson's Executor*, July 7, 1891, 18 R. 1069; *Williams* v. *Watt & Wilson*, May 28, 1889, 16 R. 687; and *Kinnes* v. *Fleming*, January 15, 1881, 8 R. 386, *dismissed* the appeal as incompetent.

Counsel for the Appellant—W. Thomson. Agents—Gibson & Paterson, S.S.C.

Counsel for the Respondent—A. S. D. Thomson. Agents—Patrick & James, S.S.C.

Tuesday, January 22.

SECOND DIVISION.

WARRAND'S TRUSTEES *v.* WARRAND.

Succession—Faculties and Powers—Power of Appointment—Power to Appoint under "Conditions and Restrictions"—Exercise of Power Partially ultra vires—Appointment to Share of Residue—Restriction of Share to Liferent with Limited Right of Testing—Fee to Descendants not Object of Power.

A testatrix by trust-disposition and settlement directed her trustees, on the death of herself and her brother, to convey the residue of her estate to the children of her brother, in such proportions, at such times, on such conditions, and under such restrictions as he might direct, and failing such direction, equally among them. She further declared that the children's shares should vest on the death of their father and their attaining majority, or in the case of the females, on their majority or marriage. The testatrix was survived by her brother, who executed two deeds of appointment, whereby he appointed "that the said residue" should on his death "belong to" his "children (on the conditions and under the restrictions" thereinafter "written, so far as" he might "lawfully impose such conditions and restrictions)" in certain proportions, but provided further that the shares appointed to certain of his children should belong to them in liferent only, and for their alimentary use allenarly, and should be held by the trustees during these children's lifetime, and that the fee of their respective shares should belong to their issue, and in the event of the death of any of these children without issue, that his share should be disposed of as he might by will or other deed direct, and failing direction should belong to his next-of-kin.

In a question raised after the death of the appointer between the trustees and A and B, two of the appointer's children whose shares had been restricted to a liferent, *held* that the appointment, in so far as it appointed that the residue should belong to the appointer's children in certain proportions, was a valid exercise of the power, but that the gift of fee to the issue of certain of the children, and the restriction of these children's rights to a liferent, with power of disposal in the event of their dying without issue, were *ultra vires* and ineffectual, and that A and B were entitled to payment of the capital of the shares appointed to them.

Lennock's Trustees v. *Lennock*, October 16, 1880, 8 R. 14; *Wallace's Trustees* v. *Wallace*, June 12, 1891, 18 R. 921; and *Wright's Trustees* v. *Wright*, February 20, 1893, 21 R. 568, *distinguished* and *commented on*.

Mrs Catherine Munro Warrand of Bught died on 24th March 1891 leaving a trust-disposition and settlement dated 3rd October 1883, whereby she conveyed her whole estate, heritable and moveable, to certain trustees for the purposes therein specified.

The fourth purpose was as follows—"I direct the said trustees and their foresaids, on the death of the said Alexander John Cruickshank Warrand (the truster's brother), or on my own death should I survive him, to hold and apply, pay, divide, and convey the said residue and remainder of said means and estate to and for behoof of the lawful child or children of the said Alexander John Cruickshank Warrand (including the heirs succeeding to the said estates of Bught and Piltochie), and that in such proportions, at such times, on such conditions, and under such restrictions as he may direct by any writing under his hand executed after my death, and failing any such writing, then to hold the same for behoof of the children of the said Alexander John Cruickshank Warrand (including as aforesaid) equally among them, payable in the case of sons of my said brother on their respectively attaining majority, and in the case of daughters on their respectively attaining majority or being married, whichever of these events shall first happen: And I declare that the interests of my said brother's children in said residue shall vest in them respectively upon the occurrence of the two events of the death of my said brother and their majority, or in the case of daughters on their majority or marriage, it being my intention that their said interests should not vest prior to the periods of payment herein appointed, and that the share of any child of my said brother who may predecease the term of payment of such share, leaving lawful issue, shall be paid to such surviving issue or their legal guardians, and failing issue the share of any such predeceasing child shall belong to the survivors of the said children of my brother and the issue of predeceasers, if any, equally among them *per stirpes*: But it is hereby declared that any of the children of my said brother, upon attaining majority, and during the lifetime of their father, shall have power to divide and apportion his or her prospective interest among his or her children and their issue, in such proportions and subject to such conditions as he or she may think proper; and I direct the said trustees to hold and apply the rents, dividends, and other annual produce and income of the share of said residue prospectively falling to each of the children of the said Alexander John Cruickshank Warrand (in the event of his decease), or such part thereof as the said trustees may deem necessary and proper for the maintenance, clothing, education, upbringing, and advantage of such children, until actual payment of his or her share, and to accumulate as part of