Lord Benholme—This is a case in which a son seeks to remove his mother from the house where she has resided for a considerable time, and this position of matters disposes me to deal strictly with the pursuer, and favourably with the defender. That consideration must not, however, weigh unduly. There arises two points in this action,—*Firstly*, the technical objection to the summons in the Sheriff-court, on which objection the interlocutor appealed against is founded. The pursuer therein describes himself as trustee for behoof of the firm, and the house is described, with reference to that statement, as being situated within the company's premises. On this point I agree with your Lordship in thinking that the Sheriff was wrong, and that he proceeded too strictly. *Secondly*, it is admitted that an *ex facie* absolute conveyance of the premises was granted to Cuthbertson in 1868, and infeftment having followed thereon, the question which arises is whether that is a circumstance upon which the defender can found to the effect of resisting the pursuer's claims upon her to remove from subjects to which she does not say she has any title. Now, in my opinion it would be a very strict view of the law to take, were it to be held that a party in an action cannot ascertain the real nature of a contract between him and his creditor. According to this, the defender, a third party, having no title whatsoever of her own, and having no interest in the capital or company funds, is entitled to say, "I am in possession; that original infeftment in your favour has been done away with by the subsequent one in favour of Mr Cuthbertson, and you have not any title to dispossess me." This is a very strong proposition, to which I am not prepared to assent. It is proved by Cuthbertson's own writ that his infeftment operated merely as a security. Mrs Traill founds on *jus tertie* in the strictest sense, and it is proved that the third party's right on which she founds was merely that of a creditor.

I regard the position of Mrs Traill in this case as that of a squatter, and I do not think a third party can intervene. I do not concur in Lord Cowan's views as to the effect of the wording of the summons, for it appears to me that the fact of the pursuer's giving an ordinary period of warning to quit, in place of a peremptory removing, renders his case not worse, but better. I think the pursuer is entitled to go on with his action.

Lord Neaves—I am in the peculiar position of agreeing with much that Lord Benholme has said, but nevertheless of concurring, on the whole, in the results at which the majority of your Lordships have arrived. I do not think that, in the circumstances, it was necessary for the pursuer to found on an infeftment. He might have proved one of two things—either that he was justly entitled to continue his father's possession, or that he had explicitly given to his mother a precarious right to occupy this house—a right flowing from him and superseding his own rights. This, as I have observed, he might have proved; as it is, we have only an indication of such a line of argument in Art. 5 of the Condescendence.

The pursuer is not correctly infeft, and although he in his defences says so, and terms himself "sole heritable proprietor," this is not, strictly speaking, correct. The defender, however, Mrs Traill, who from her husband's rights derives all her own, is not entitled now to come forward and impugn those rights. The pursuer refers his position to his trusteeship, to his being the sole surviving partner and trustee for the firm; but we have no means of knowing how he is trustee, what partnership, if any, existed, nor does he vouchsafe any explanation as to why he wants the house.

He has not then clearly indicated that the defender's possession flows from himself by direct concession; he has not enlightened the Court as to this partnership, to which he avers that he stands in the position of trustee, and in the absence of any evidence on these points I do not think the action for removing can be sustained.

As to the form of the summons, I do not go much upon that; a reasonable time is always given in the most summary process to allow parties to remove.

The Court pronounced the following interlocutor:—

"Recall the interlocutor of the Sheriff; Find that no sufficient title to the subjects in question has been relevantly set forth by the pursuer on this record: Therefore dismiss the action, and decern: Find expenses due by the pursuer in both Courts, and remit to the Auditor to tax and report."

Counsel for Pursuer and Appellant—Solicitor-General (Clark), Q.C., and Black. Agent—D. Curror, S.S.C.

Counsel for Defender and Respondent—Lord Advocate (Young), Q.C., and Asher.

S., Clerk.

Tuesday, October 28.

FIRST DIVISION.

[Sheriff of Lanarkshire.

THOMSON *v.* LINDSAY.

Trust—Writ.

In a case where an insolvent firm made a composition with their creditors, A, the brother of one of the partners, became responsible for one of the instalments payable, and received in security certain sums from his brother B. He was relieved of his obligation, and soon after died without accounting for the sums so received, and B raised an action against the judicial factor on A's estate for repayment. *Held* that an entry in A's cash book and a relative letter by B, purporting to have been written and received at the time, were equivalent to A's writ, and as such sufficient to prove a trust against A's estate.

In 1858 the affairs of M. C. Thomson & Co., flax spinners, Glasgow, of which the pursuer was a partner, became embarrassed, and they made a composition with their creditors, one of the conditions of which was, that the deceased James Thomson, the pursuer's brother, should become security for one of the instalments payable under the composition. The pursuer deposited in the said James Thomson's hands, as security, certain sums amounting to £439, 8s. 9d., and the sums so deposited with the said James Thomson were duly entered by him in his books in his own handwriting to the credit of the pursuer, and the deposit was further explained, and its terms confirmed by the following letter, signed and addressed by the

pursuer to the said James Thomson, and handed to him of the date it bears, viz.,—"2 *St Andrew Square, Glasgow*, 17*th January* 1859,—Dear James,—Your having subscribed a bond, binding yourself for the last instalment for M. C. Thomson & Co.'s composition of 1s. 6d. per £, in addition to any security which they have or may offer to you, I hereby authorise you to hold and retain the following sums belonging to me, free of interest, until you are relieved of every obligation for them, viz., a sum of £265, 18s. 7d., realized from sale of shares in the National Building Society; a sum of £156, 2s. 2d., amount of a bill granted you for behoof of my children, for which you are trustee; also a sum of £17. 8s., being balance of a bill by the Messrs M. C. Thomson & Co., making in whole the sum of £439, 8s. 9d. sterling.—I am, Dear James, your affectionate brother. (Signed) WILLIAM THOMSON." The said James Thomson was relieved of his said obligation on 27th October 1859, when the foresaid several sums were payable by him to the pursuer, but he failed to do so, and died a short time afterwards, without having paid to the pursuer the said sums so held by him. The pursuer, shortly after the death of the said James Thomson, lodged on his estate an affidavit to the verity of the said debt, but the same has not been paid. After James Thomson's death the said letter was found in his repositories, and in his cash book the sums concluded for were entered to the pursuer's credit. In these circumstances the pursuer raised this action in the Sheriff Court of Glasgow, to recover these sums from the defender, who was judicial factor on the estate of the deceased James Thomson.

The pursuer pleaded—"(1) The said several sums concluded for having been held and retained by the said James Thomson, in security of the obligations undertaken by him and he being relieved thereof, was bound to refund the same to the pursuer. (2) The said James Thomson having failed to repay the said sums to the pursuer, and the same being still resting owing, the defender, as judicial factor on his trust estate, is bound to account for and pay to the pursuer the said several sums and interest, as concluded for. (3) In the whole circumstances, the pursuer is entitled to decree as concluded for, with expenses. (*Additional*) The pursuer is not in any way bound by the acts or agreements of third parties, and the defender not having averred that the pursuer stated to him, or to the beneficiaries under the trust, that he would forego his claim, or any part of it, the second article in the defender's statement of facts is irrelevant and should not be admitted to probation.

The defender pleaded—"(1) The said James Thomson being now dead, the pursuer can establish the claims alleged by him only by the writ of the said deceased James Thomson. (2) The pursuer is barred by prescription from insisting in his present claim. (3) The pursuer having, as sole trustee on the estate of the deceased Jomes Thomson, represented the estate to be insolvent, and compounded with the creditors on that footing, is not entitled now to payment in full of any alleged claim at his instance. (4) The delay in instituting the present proceedings having rested with the pursuer, he is not entitled to claim interest thereon. (5) In any case, the pursuer is not entitled to more than bank interest. (6) Even though wholly or partially successful, the pursuer is not entitled to expenses against the defender, who, as an officer of court, is bound to appear and state defences."

The Sheriff-Substitute found for the defender, and his judgment was reversed by the Sheriff.

The defender appealed to the Court of Session.

At advising—

LORD DEAS—It seems to me that there has been a great deal of confusion in this case, and perhaps it is not very remarkable that this should be so, seeing the connection which existed between the parties, but on the whole matter I agree with the Sheriff. As regards the question whether, this being of the nature of a trust, it can only be proved by written evidence, I think it clear that the letter was written and delivered to the alleged trustee, and the fund was put into his hands in trust. The entries in his books, and the letter are sufficient legal evidence, and, so far as we can see, the truth of the case is in the same direction. The only difficulty was caused by what was said about the pursuer not giving up the funds to the creditors, but if he had acted fraudulently in not doing so that would have had to be shown, which has not been done. It could not be shown that these funds were available for the creditors. I think the Sheriff is quite right.

LORD ARDMILLAN—I think the appellant probably thought it right to defend the judgment of the Sheriff-Substitute, but I agree with your Lordship, that the law, which trenches on delicacy, is still clear enough, and that the Sheriff is right. Our judgment must be grounded on the entry by James Thomson, which is equivalent to his writ, and it is sufficiently confirmed by the letter of 17th January by William Thomson. Unless something very singular happened, it is an inference that such a letter having been written must have been received. Putting together James Thomson's document and the pursuer's explanatory letter, I think we get enough.

LORD PRESIDENT—I agree with your Lordship. At the same time the case requires somewhat delicate handling. It is a case which can only be proved by writ, and so we must be quite clear as to what the writ is. There are three writings which amount, I think, to clear proof; they are, first, the bond, secondly the entry by James Thomson, thirdly the letter by the pursuer. The first of these shows the occasion on which it was granted; the third stands in this position, that it was certainly written at the time, and though not James Thomson's writ, if it was delivered to him and kept by him, that made it equivalent to it. That must be established by facts and by parole, viz., that the letter was so delivered. I think the letter book shows that it was written, and I think also that it was delivered. The letter explains the footing on which the three sums were deposited in the hands of the deceased at the date of the bond, and we find them entered in his books in such a way as to show him debtor.

LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:

"Find that the three sums, amounting in all to the sum of £439, 8s. 9d., sued for, are entered by the deceased James Thomson, on

whose estate the defender (appellant) is judicial factor, in the book or ledger No. 7/1 of process, in his own handwriting, as sums due by him to the pursuer (respondent): Find that the letter No 7/2 of process, addressed by the pursuer to the deceased James Thomson, was delivered to him of its date, and was retained by him, and found in his repositories after his death, and is thus, taken in connection with the said entries in his book and the bond after mentioned, equivalent to the writs of the deceased: Find it proved by the said letter and other writs that the said three sums were to be held and retained by the deceased free of interest, until he was relieved of every obligation under the bond aftermentioned: Find it proved by the bond No. 8/1 of process that the said deceased James Thomson became security for payment to the creditors of the bankrupt firm of M. C. Thomson & Co., of which the pursuer was a partner, of a composition amounting to a much larger sum than the total of the said three sums, which were received and held by the said deceased as a collateral security in case he should be called on to make payment under the said bond: But find that the said deceased was not called on to pay any part of the composition for which he had become cautioner under the said bond, the whole being paid by the bankrupts themselves: And find, in these circumstances, that the said three sums are still resting-owing to the pursuer, with interest from the date of citation: Therefore refuse the appeal, and decern: Find the appellant liable in expenses; allow an account thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for Appellant—Solicitor-General (Clark) and Balfour. Agents—Rhind & Lindsay, W.S.

Counsel for Respondent—Watson and Johnstone. Agent—T. J. Gordon, W.S.

M., Clerk.

Friday, October 31.

FIRST DIVISION.

SPECIAL CASE—SANDERSON AND OTHERS AND GODDEN OR WARDROPE AND OTHERS.

Trust-Deed—Vesting of Provisions—Effect of Terms of Codicil.

Where a truster by a trust-deed left the fee of the residue of his estate on the death of the liferentrix to A, whom failing, to the children of B; but in a codicil provided (with respect to one portion of said residue) that it should be given to the said children of B *nominatim*, with no clause of survivorship, and (with respect to another portion) that it should be given to C on the ground of special favour,—*Held*, that the terms of these provisions had the effect of altering the trust-deed, so as to change the period of vesting of the several portions of the estate dealt with by them from the date of distribution to that of the death of the truster.

Mr Alexander Macdonald, principal keeper of the Register of Deeds, residing in Regent Terrace, Edinburgh, and Mrs Elizabeth Ewart or Macdonald, his wife, executed a mutual trust-disposition and settlement, dated 5th July 1837, whereby, on the narrative that they had entered into no contract of marriage, and were resolved to settle their affairs in such a manner as to prevent all disputes after their deaths, they gave, granted, assigned, and disponed to certain trustees their whole heritable and moveable property of every description in trust for the purposes therein expressed. The trusters also appointed the trustees to be their executors. By that deed the liferent of the trust-funds, with the exception of the sum contained in a policy of assurance on Mr Macdonald's life, is provided to the survivor, and in the event of there being no issue of the marriage alive at the death of the survivor, the residue of Mr Macdonald's estate, both heritable and moveable, was directed to be made over to the children of the marriage of Mr and Mrs Sanderson, share and share alike, unless otherwise provided by a writing under Mr Macdonald's hand. By a holograph testamentary writing or codicil executed by the said Alexander Macdonald alone, dated 18th June 1845, he declared that certain assets were the property of his wife, Mrs Macdonald, and directed his trustees to make them over to her, and he made several specific legacies of various articles to friends. That codicil then proceeds:—"I further direct my said trustees to transfer my five shares of Commercial Bank stock to the five sons of Henry Sanderson, surgeon, one to each—John Thom, Alexander Macdonald, Henry, Leslie Moodie, and William Andrew." After some other legacies, the codicil proceeds:—"The rest of my moveable property, including money in the banks and all debts due to me, household furniture of every description, books, paintings, and engravings, Water Company stock, and fifteen shares of the Scottish Union Insurance Company, to be sold by my said trustees as soon as convenient after my death, and the proceeds to be equally divided among the children of the said Henry Sanderson." By a second codicil or memorandum of bequests, dated 27th March 1847, Mr Macdonald bequeathed certain other articles to various individuals, and amongst others, "to John T. Sanderson, M.D., now in the Bombay Presidency, I leave and bequeath my two shares of stock of the British Linen Company, lately purchased by me, so much gratified with his conduct to his brother Henry of late, and failing him by death, to Alexander M. Sanderson and Henry Sanderson his brothers." Mr Macdonald died on the 23d day of December 1850, survived by his widow, there never having been any issue of the marriage. At the period of Mr Macdonald's death the following children of the marriage between Mr Henry Sanderson and his wife were alive, viz.—John Thom Sanderson, Alexander Macdonald Sanderson, Henry Sanderson junior, Leslie Moodie Sanderson, William Andrew Sanderson, and Mrs Mary Sanderson or Paterson. Mrs Macdonald was paid by the trustees the whole annual produce of the estate, except the interest of the sum due under the policy of assurance before mentioned, from the date of Mr Macdonald's death till her own death, which took place on the 23d May 1871. Two of Mr and Mrs Henry Sanderson's children predeceased Mrs Macdonald, viz.—Dr John Thom Sanderson, who died in the East Indies on 15th February 1864, having left a will dated the day of his death, in favour of his wife Mrs Ann Godden or Sanderson, now Wardrope; and William Andrew Sanderson, who died on the 1st day of January