

ceived and kept it, it might be used against him; and I cannot agree that it is incumbent on the Court *proprio motu* to reject it as evidence, notwithstanding that the parties to the suit have allowed the proof to proceed from first to last on the footing that it was properly put in process and in evidence.

In this view it is not necessary to consider the question whether, assuming that the co-defender had claimed the letter, the pursuer would have been entitled to lodge it in process against his will, or if it had been restored to the co-defender, to recover it under a diligence and use it in evidence. My present opinion is that the fact that the pursuer has committed a crime against the Post Office Acts in order to obtain possession of the letter does not affect his right, if he otherwise has it, to found upon the letter, assuming that its contents establish or go to establish the existence of adulterous relations between the defender and the co-defender. The case is precisely the same, in my opinion, as if the pursuer had intercepted the letter in the hands of a private messenger; or, perhaps, to come nearer the case, as if he had found the letter—after it had been delivered—lying on the co-defender's desk, and opened it. In both these cases, strictly speaking, a crime would have been committed.

On obvious grounds of public policy any interference with the transit of letters through the Post Office is visited with punishment of exemplary severity; and any injured husband who attempts to possess himself of a letter in that way will render himself liable to the statutory penalties.

But I know of no case, and we have been referred to none, where the Court have refused to look at a document which instructed crime simply because it had been obtained without legal warrant.

The pursuer's counsel did not argue that the letter is evidence against the co-defender. I do not propose to say anything upon that subject at present, because I am prepared to decide against the co-defender on the footing that the letter is not evidence against him. But I should like to guard myself by saying that I am not satisfied that an intercepted letter may not, in the absence of collusion, be in some circumstances competent evidence against the person to whom it is addressed. It is not a confession made to a third party outwith the presence of the co-defender; it is intended for the eye of the person to whom it is addressed alone. Again, it is not a mere expression of the writer's thoughts committed to paper and kept to herself; she has put them beyond her own control by posting the letter or delivering it to the co-defender's messenger. If, for instance, it were proved that a clandestine correspondence had gone on between a married woman and a man not her husband, and that all the previous letters had been destroyed, I do not at present see why an intercepted letter, the only letter remaining, should not be some evidence against the person to whom it was

addressed, subject, of course to any explanations which he might make, such as that he never received a letter couched in such terms from the lady before.

LORD JUSTICE-CLERK—I have anxiously considered this case, and with the advantage of consultation with your Lordships. I do not say what my judgment might have been without that consultation. But I have come to think, after hearing the opinions of your Lordships, that the proof is not so clear as to warrant my holding that adultery is conclusively proved. I concur, therefore, that the judgment should be recalled, and decree of absolvitor pronounced.

The Court recalled the interlocutor reclaimed against, and assoiized the defender and the co-defender from the conclusions of the action, finding the pursuer liable to the defender and the co-defender in expenses.

Counsel for the Pursuer—Ure, Q.C.—Salvesen. Agents—Reid & Guild, W.S.

Counsel for the Defender—Shaw, Q.C.—W. Campbell. Agent—J. Gordon Mason, S.S.C.

Counsel for the Co-Defender—Jameson, Q.C.—J. J. Cook. Agents—Simpson & Marwick, W.S.

Friday, December 17.

## SECOND DIVISION.

### STEWART'S TRUSTEES v. STEWART.

*Succession—Trust—Repugnancy—Gift of Vested Right of Fee in Residue, with Direction to Trustees not to Sell or Assign Part of Residue to Beneficiaries for Fifty Years.*

A testator by his trust-disposition and settlement, "subject to the said several provisions and bequests and the declarations after mentioned," appointed his trustees, "when convenient, to divide, pay, assign, and dispone the residue of my estate, heritable and moveable . . . into five shares, corresponding to the number of my children, one of which shares they shall pay, assign, and dispone" to each of his four elder children; and he appointed his trustees to hold the remaining share during the life of his fifth child, "and on his death to pay, assign, and dispone the said share to the children" of his fifth child "equally between them, share and share alike, on their respectively attaining twenty-six years of age," but that no payment of principal should be made during the lifetime of their father. It was provided and declared that the issue of any of the testator's children who should predecease the testator should take their deceased parent's share, and that the share of children predeceasing the

testator without issue should be divided equally among the testator's children surviving and the children of the testator's fifth child *per stirpem*. It was also provided that nothing should vest in the children of the fifth son till the period of payment. It was then further declared that in so far as the residue consisted of shares in a company to which the business formerly carried on by the testator had been transferred, the trustees were not to be "entitled to sell or assign to the residuary legatees these shares or any part thereof until the expiry of fifty years from 1st January 1895," but that these shares were to be held by the trustees "during the said period, when they shall be assigned by them to my said residuary legatees in the proportions aforesaid," power being given to the trustees to constitute a separate trust for the administration of these shares. The annual dividends during the prescribed period were to be paid to the residuary legatees. The testator died in 1896, and the shares above mentioned constituted between one-third and one-fourth of his whole estate. *Held* that a vested right of fee in the residue had been conferred upon the four elder children, that the provisions with regard to the trustees holding the shares for fifty years were repugnant with the absolute gift of fee, and must consequently be disregarded, and that the trustees were bound now, or within a reasonable time after the truster's death, to assign one-fifth of the shares *in forma specifica* to each of the four elder children, and to hold the remaining fifth for behoof of the children of the testator's fifth child until they respectively attained majority, reserving meanwhile all questions of vesting as regards the share falling to them.

*Miller's Trustees v. Miller*, December 19, 1890, 18 R. 301, *followed*.

George Stewart, carpet manufacturer, Thornhill, Lasswade, died on 15th November 1896, leaving a trust-disposition and settlement dated 24th September 1895, whereby he disposed his whole estate, heritable and moveable, to trustees for the trust purposes therein mentioned.

The first seven trust-purposes provided for payment of debts and legacies, and of an annuity of £1250 to the truster's widow. The last purpose of the trust-disposition was in the following terms—"and *Lastly*, Subject to the said several provisions and bequests, and the declarations after mentioned, I appoint my trustees, when convenient, to divide, pay, assign, and dispose the residue of my estate, heritable and moveable, with the interest and annual produce thereof due after my death, including the funds invested when disengaged, into five shares corresponding to the number of my children, one of which shares they shall pay, assign, and dispose to John George Stewart my son, another share to William Lyall Stewart my son, another share to Mrs Eliza Stewart or Wilson, my

daughter, another share to Margaret Stewart, my daughter, and I appoint my trustees to hold the remaining share, with all interest accruing thereon, during the lifetime of my son James Stewart, residing at Eskbank, and on his death to pay, assign, and dispose the said share to the children of the said James Stewart equally between them, share and share alike, on their respectively attaining twenty-six years of age, but no payment of principal shall be made during the lifetime of their father: And I further provide and declare that should any of my children before named predecease me leaving issue, such issue, equally among them, shall take their deceased parent's share, which shall be payable on their respectively attaining majority; but should any of my said children predecease me without leaving issue, such deceasing child's share shall be divided among my children surviving and the children of my said son James Stewart *per stirpem*; and should any of the children of the said James Stewart predecease their father or said term of payment, such issue shall take equally their deceased [*sic*] parent's share; and I explain that I have destined the said share to the children of my son James Stewart in consequence of the state of his health, but I specially provide and declare that should my said son or anyone on his behalf claim his legitim from my estate, the amount thereof shall be deducted from the said share of residue destined to his children, and they shall in that case be only entitled to and draw the balance of said share under such deduction; and I commit full power to my trustees to pay to each child of my said son James Stewart such part as they think proper of the annual interest of his or her portion of said share until the fee be payable, but I declare that no right shall vest in any child of my said son until such period of payment: Declaring always, as it is hereby specially provided and declared, that in so far as the residue of my estate consists of ordinary shares held by me in the concern of Henry Widnell and Stewart Limited, Lasswade, my trustees shall not be entitled to sell or assign to my said residuary legatees the said shares or any part thereof until the expiry of fifty years from the first day of January, Eighteen hundred and ninety-five, but the said shares shall be held by my trustees during the said period, when they shall be assigned by them to my said residuary legatees in the proportions aforesaid; but I commit power to my trustees, should they think proper to constitute a separate trust for the administration of the said shares during the said period, and if such trust shall be formed my trustees shall impose the said condition and provisions on the trustees to be assumed to hold said shares during the period foresaid, and not to assign the same to the residuary legatees until the expiry thereof: But declaring that, should the said company from any cause be wound up previously thereto, my trustees shall thereupon divide the proceeds of the shares as aforesaid, and said trustees named and to be assumed

shall during the said period pay the annual dividends thereof to the residuary legatees as aforesaid: Declaring further, that the whole provisions of whatever kind herein conceived in favour of females are and shall be exclusive always of the right of administration and other right whatsoever of any husbands they may have married or may marry, to whose debts or deeds or to the diligence of whose creditors the same shall not be subject or liable in any way, but their own receipts, without the consent of such husbands, shall be sufficient: Declaring, however, that full power is conferred on my trustees, in their discretion, and of which they shall be sole judges, to hold and retain the principal of two-third parts of the shares effecting to both or either of my daughters, for behoof of such daughters in liferent for their liferent use allanarly and their respective children equally among them in fee *per stirpem*: And declaring that should both or either of my daughters die without leaving issue or the descendants of issue, my trustees shall pay and dispoise the said two-thirds of such daughters' share, if retainable, as aforesaid, to such person or persons as they may appoint by a writing under their hands, and failing such appointment, they shall pay the sum of Five thousand pounds to the husbands of such daughters deceased, if such there be, for their own use, and the remainder or the whole, if there be no husband, to such daughters' nearest heirs in moveables, and my trustees shall constitute the necessary trust for behoof as aforesaid, in favour of such parties as trustees as they think proper: And which provisions hereinbefore made in favour of my said wife and children are and shall be accepted of by them respectively in full of all terce, *jus relictae*, legitim, and other claims whatsoever, which they or any of them could ask or demand in consequence of or at my death."

The testator was survived by his widow and by the five children above mentioned by name, who were all alive and had all attained majority when the present case was presented.

The testator was possessed at the date of his death of heritable estate of the amount of £65,712, or thereby, and of moveable estate to the value of £275,544, or thereby, as appearing from the accounts given up for estate-duty. Of the moveable estate, £101,000 was represented by the *par* value of 10,000 ordinary shares of £10 each, of Henry Widnell & Stewart, Limited, carpet manufacturers, Lasswade, of which company the trustor prior to and at the date of his death was a director. The trustor and his son John George Stewart were, at 23rd April 1895, the sole partners of the firm of Henry Widnell & Company, carpet manufacturers, Bonnyrigg, and at Roslin, in the county of Midlothian; and also of Stewart Brothers, carpet manufacturers, at Eskbank, also in the county of Midlothian. On 23rd April 1895 the businesses carried on by the trustor and his son John George Stewart were converted into a limited liability company under the name of Henry Widnell & Stewart, Limited,

with a right to the profits of the two businesses from 1st January 1895. The capital of Henry Widnell & Stewart, Limited, was £300,000, divided into 15,000 preference shares of £10 each, and 15,000 ordinary shares of £10 each.

The trustor's son James Stewart was married on 25th June 1879, and of this marriage four children were born, the dates of their birth being respectively 7th October 1883, 5th May 1885, 26th July 1886, and 2nd April 1890.

Prior to his marriage James Stewart entered into an antenuptial contract of marriage, dated 23rd June 1879, with his intended wife, by which he assigned to the trustees therein named a certain policy of assurance effected by him on his life, and bound himself to destine and settle under certain declarations and restrictions to and in favour of his wife, in liferent for her liferent use allanarly, and to the children to be procreated of his said intended marriage, and the children of any future marriage which he might afterwards contract, equally among them in fee, whom failing to his own nearest heirs and assignees whomsoever, the whole heritable and moveable real and personal estate, wherever situated, which should belong to him at the time of his death. James Stewart became incapable of managing his affairs in the early part of 1891, and on 1st May 1891 Thomas Jackson, chartered accountant in Glasgow, was appointed his *curator bonis*. James Stewart was formerly a carpet manufacturer. He suffered from general paralysis, and the parties to the present case were agreed that there was no probability of his ever again being able to manage his own affairs.

Questions having arisen regarding the import of the trust-disposition and settlement of the trustor George Stewart, and as to whether James Stewart's *curator bonis* was entitled to claim legitim in the name of James Stewart from the trustor's estate the present special case was presented for the opinion and judgment of the Court.

The parties to the case were (1) the testamentary trustees of George Stewart; (2) the children of George Stewart other than James Stewart; (3) James Stewart's *curator bonis*; and (4) the children of James Stewart.

The second and the fourth parties maintained that the provision and declaration contained in the trust-disposition and settlement that the first parties, as trustees thereunder, should not be entitled to sell or assign to the residuary legatees the shares held by the trustor in Henry Widnell & Stewart, Limited, part of the residue of his estate, until the expiry of fifty years from 1st January 1895, but should hold them during that period, was inept and of no effect, and that on a sound construction of the trust-disposition and settlement the first parties were not entitled to continue to hold the 10,100 ordinary shares in the company of Henry Widnell & Stewart, Limited, during that period, but that

these shares were divisible to the extent of four-fifths among the second parties within a reasonable time after the truster's death, and to the extent of one-fifth ought to be retained by the trustees for behoof of the fourth parties until the majority of said fourth parties respectively, reserving meanwhile the question of vesting, in the same manner as if the declaration with regard to holding the shares for fifty years had not been inserted in the settlement. The first parties, on the other hand, maintained that they were bound to hold these shares until the expiry of fifty years from 1st January 1895, unless the company should be wound up prior to the expiry of that period. In the event of its being held that the first parties were not entitled to continue to hold these shares as directed in the trust-disposition and settlement, the first parties maintained that they were bound, or at any rate entitled, as trustees foresaid, to realise these shares, or at least the one-fifth part of these shares destined to the fourth parties, the minor and pupil children of James Stewart, and to invest the proceeds of said one-fifth part thereof in proper trust securities. The second parties maintained that the first parties were neither entitled nor bound so to realise the four-fifths of these shares destined to them except at their express request, but were bound at once to transfer the four-fifths of these shares to them equally, share and share alike, *in forma specifica*; and the fourth parties maintained that the first parties were neither bound nor entitled so to realise the one-fifth part of these shares and to invest the proceeds, but that they were bound to retain the fifth part of these shares until the date of vesting in the fourth parties fixed by the trust-disposition and settlement.

The questions of law for the opinion and judgment of the Court were as follows:—“(1) Whether the first parties are bound or entitled to hold four-fifths of the said 10,100 shares for behoof of the second parties for the period and under the conditions specified in said trust-disposition and settlement? or (2) Whether the first parties are bound now, or within a reasonable time after the truster's death, to transfer to each of the second parties one-fourth of said four-fifths of the said 10,100 shares, or, if they are found entitled or bound to realise them, to pay to each of the second parties one-fourth of the proceeds thereof? (3) Whether the first parties are entitled or bound to realise the said shares so far as destined to the second parties respectively, except with their respective consents, or are bound to transfer said shares to them *in forma specifica*? (4) Whether the first parties are bound or entitled to hold one-fifth of the said 10,100 shares for behoof of the fourth parties, for the period and under the conditions specified in said trust-disposition and settlement? And in the event of the fourth question being answered in the negative—(5) Whether the first parties are bound or entitled to hold and retain said one-fifth of

the said 10,100 shares for behoof of the fourth parties until the majority of said fourth parties respectively reserving meanwhile the question of vesting? or (6) Whether they are entitled or bound to realise the same, and re-invest the proceeds thereof in proper trust securities.”

The *curator bonis* of James Stewart also desired the opinion of the Court as to whether (7) he was entitled on behalf of his ward to claim payment of legitim out of the trust-estate of the said George Stewart, certain facts as to James Stewart's financial position being set forth in the case.

By interlocutor dated 19th October 1897 Mr J. C. Couper, W.S., was appointed *curator ad litem* to the parties of the fourth part.

Argued for the second and fourth parties—There was here an absolute unconditional gift of fee vesting in the beneficiaries *a morte testatoris* followed by a direction as regards part of the estate that the trustees were not to sell or assign to the residuary legatees till fifty years after 1895. That direction was repugnant with the gift of an absolute vested right of fee, and must be disregarded—*Miller's Trustees v. Miller*, December 19, 1890, 18 R. 301; *Willkie's Trustees v. Wight's Trustees*, November 30, 1893, 21 R. 199. Indeed, this case was *a fortiori* of *Miller's Trustees*, for the period during which the trustees here were directed to retain the shares was very long. See *per* Lord Young in *Miller's Trustees* at p. 307. The general words of gift in the residue clause governed the disposal of the shares, and the directions with regard to them could not be taken to come under the head of bequests.

The remainder of their argument sufficiently appears from the statement of their contentions, *supra*.

Argued for the first parties—(1) There was no doubt of the truster's intention. It was unquestionably his desire that the trustees should retain the shares for the period specified by him. There was no reason why his wishes should not receive effect. The case of *Miller's Trustees v. Miller, cit.*, was distinguished from the present. Here no cumbersome or expensive trust was involved. The direction to retain only applied to part of the estate, and not to the whole. It had never been decided that a testator was not entitled to direct that part of what he gave in fee by his will was to remain invested in a particular way. The testator wished that these shares should remain as a *unum quid*, probably with the object of giving his trustees a controlling power in the company, and his wishes should receive effect. Moreover, here the shares did not fall under the general provision with regard to residue, and they did not vest *a morte testatoris*. As regards them at least there was no direct gift of fee, but merely a direction to sell or assign after fifty years. The words of gift in the residue clause were subject to the declaration that they did not apply to the shares. No right to them was given except by way

of a direction to sell or assign after 50 years. Vesting was consequently postponed till that date arrived in so far as the shares were concerned. In that view *Miller's Trustees v. Miller* had no application to the present case, which was governed by the rule laid down in *Bryson's Trustees v. Clark*, November 26, 1880, 8 R. 142. (2) If the direction with regard to the shares was to be disregarded, then the trustees were bound to realise the shares, and pay four-fifths of the proceeds to the second parties, and retain the remaining fifth invested in some proper trust investment for behoof of the fourth parties. If the direction was to be disregarded, it must be disregarded altogether, and the trustees had no authority to retain one-fifth of the shares for the fourth parties. These shares were undoubtedly not a proper trust investment, and as regards the wishes of the testator, there was nothing to show that he would have approved of one-fifth of the shares being retained. The object which he probably had in view, namely, retaining control of the company, would not be attained by the trustees retaining one-fifth of the shares, and it did not follow that because he wished the trustees to retain the whole of his shares, with a consequent control of the company, he could have desired them to hold one-fifth of his shares after such control had been lost.

At advising—

LORD JUSTICE-CLERK—The testator by the last purpose of his deed directed—[*His Lordship read the first part of clause quoted above*]. Now, leaving out for a moment the words in regard to a subsequent declaration, this clause of the deed does three things—(1) It deals with the residue of the estate, (2) it directs it to be divided into certain shares, and (3) it directs the trustees to pay, assign, and dispense a share to each of the second parties to this special case. This is a gift of fee vesting *a morte testatoris*. There is no destination-over, and there is no trust-purpose stated which should postpone the payment. The gift is expressed in terms which admit of no ambiguity. But it is said that the gift is over-riden by the subsequent declaration to which the gift is said to be subject. That declaration is as follows:—[*His Lordship read the part of the clause with regard to the shares*]. It is to be observed that there is no statement of any purpose, no trust purpose to be served. It is in effect nothing more than the withholding of payment of part of what has been bequeathed for fifty years without any expressed trust to be fulfilled by the trustees. It appears to me that such a declaration cannot receive effect, that the gift cannot be rendered ineffectual for fifty years where no trust purpose, such as the securing of a liferent to another, making the non-payment of the capital a necessity if that other is to enjoy what is gifted to him, is set forth. The case, in my opinion, is ruled by the case of *Miller's Trustees*, in which a clause directing trustees to hold the capital of a bequest to a son for a certain number of years until he should be

twenty-five years of age was held ineffectual and payment to the son ordered. I therefore think that the first question should be answered in the negative.

As regards the form in which the shares are to be paid over, I am of opinion that if the second parties so decide, they are entitled to have their shares conveyed to them in the form in which the testator's estate now stands, and therefore that the first branch of the second question should be answered in the affirmative, the second branch in the negative, and the third question in the negative.

There only remains the questions as to the one-fifth destined to James' children. As regards these, I think the fourth question follows the first, and must be answered in the negative, and the fifth (as amended) should be answered in the affirmative, and it follows that the sixth be answered in the negative.

The last question relates to the right of the curator of James to claim legitim for him. I have no doubt that he can, and would answer the seventh question in the affirmative.

LORD YOUNG—The first parties are the trustees and executors acting under the trust-disposition and settlement of the late George Stewart, carpet manufacturer, Lasswade, and the material, and only material question for us to answer is, "whether they are bound or entitled to hold" certain shares in the carpet company founded by the truster, and held by him at his death, "for the period and under the conditions specified in said trust-disposition and settlement." It would be superfluous on my part to cite the clause in the deed containing the truster's directions regarding the shares in question, for it is admitted by all the parties that they are expressed distinctly, without ambiguity or room for doubt as to the truster's meaning and intention. It is also admitted, and, indeed, too clear to be disputed, that the directions and the "conditions specified" are lawful. The only objection to their execution is that they are, as contended, repugnant to the immediately preceding part of the clause (lastly) of the deed, whereby, as contended, a beneficial fee in the whole residuary property of the truster is given to his children with vesting *a morte testatoris*. The authority relied on for this contention is *Miller's Trustees v. Miller*, December 19, 1890, 18 R. 301.

I am of opinion that the contention is erroneous.

In the first place, I have to point out that the deed is not a deed of conveyance except only to the trustees and executors, by payment, assignation, or disposition from whom alone the beneficiaries can take any property. What they are to pay, assign, or dispense to anyone, and when, must necessarily depend on the terms of the instructions for the execution of which they were appointed and invested with the estate of the deceased. Under such a deed there can be no conveyancing difficulty or question, except as regards the title of the

trustees, for no title by conveyance is given to any other. I do not, of course, mean that the beneficiaries specified in the instructions have not right and title to demand execution of them by the trustees. But here no questions can arise which do not regard the meaning and legality of the instructions. In deeds of conveyance a conveyancing mistake has often led, though not so often of late as formerly, to the intention of the maker being frustrated, although unmistakably indicated by other parts of the deed. But this can never happen in the expression by a testator of his will in the form of instructions to his trustees and executors for its execution. There is here no room for technicalities or anything beside or beyond the ascertainment of the testator's meaning.

In the second place, I have to point out that the declarations, immediately in question, regarding the shares held by the truster in the carpet company, occur in the clause (lastly) which contains instructions for the disposal of the residue of the testator's estate after satisfying or providing for the provisions and bequests in the seven preceding clauses. Taking the whole clause (lastly) together (and the whole of it relates to residue), the first part down to the declarations in question extends for about a printed page of the appendix, while these declarations which bear to apply, "in so far as the residue of my estates consists of ordinary shares held by me," in the carpet company is about the same length. The first part of the clause contains general instructions as to the division of "the residue of my estate, heritable and moveable," but "subject to the said several provisions and bequests," necessarily those before mentioned, and "the declarations after mentioned." Is it reasonably doubtful that the testator and the writer of the deed meant "the declarations" occurring in the same residuary clause, applicable, "in so far as the residue of my estate consists of the ordinary shares held by me in" the carpet company?

The term "repugnant" is, I think, quite inapplicable to the case. It is true, and, indeed, of familiar occurrence, that the last half of any clause in a deed or letter, or in a book, may be repugnant to the first in this sense, that without it the first would have a meaning and import different from what it has with it, or, in other words, that the whole clause means and imports something different from what the half of it taken alone would do.

The first half of the residuary (or lastly) clause here would, if taken alone, signify that the trustees were instructed on the truster's death to "pay, assign, and dispo" the whole residue of the estate to his children as residuary legatees. But when both halves are read, that is, the whole clause, that meaning cannot possibly be put upon it, or imputed to the truster, in the face of the declaration that the trustees shall not be entitled to assign the carpet company shares to these legatees, but shall themselves hold them and pay the income therefrom as directed for a period of fifty

years. I need not refer minutely to the details of the instructions respecting the shares of the daughters in the residuary estate, exclusive of the carpet company shares, and only notice the declaration, which may be important in the execution of the trust, "that full power is conferred on my trustees in their discretion, and of which they shall be the sole judges, to hold and retain the principal of two-third parts of the shares effecting to both or either of my daughters for behoof of such daughters in life for their life for their use wholly, and their respective children equally among them in fee," and with a distinct destination-over in the event of death without issue. It was explained to us that by "two-third parts" in this declaration, occurring at the end of the residuary clause, the truster referred to the residue of his estate exclusive of the carpet company shares, which in value amounted to one-third part of the whole residue. Is this declaration also bad for repugnance? I must say, for myself, that I know of no statute or rule of the common law which hinders a testator from conferring such a discretionary power on his testamentary trustees, and assuming that it may lawfully be conferred, I can conceive no reason for thinking that here it was not.

I must also observe that I understand, and in a sense appreciate the desire of the testator here that his shares in a great manufacturing business, which he had started and brought to great prosperity, should not on his death be withdrawn from the company he had founded, but should during a specified period be held by his testamentary trustees for behoof of his family under specific directions with respect to the income from the shares during that period, and the capital at the end of it. Neither the statement of facts nor the questions put in the case suggest a doubt on the part of the trustees or any of the testator's family as to the meaning of the directions given by this testator respecting the shares now in question. Nor is it even hinted that they are in violation of the statute or common law of this country. But if the directions are so clear that no doubt can be suggested as to their meaning, and are also admittedly legal, why shall they not have effect?

With respect to the case of *Miller's Trustees*, I desire to say, first, that I think this case is distinguishable from it; and second, that in my opinion, it deserves to be reconsidered.

I shall only add that, in my opinion, the doctrine of repugnancy applies only when one is made the absolute owner of property with a prohibition against a use of it which an absolute owner may lawfully make of his property, or if the word "only" is too strong, that this is at least a fair illustration of the meaning of the term "repugnancy" when used in argument in such a question as we are here dealing with.

LORD TRAYNER—The view which I take of the question here presented may be very shortly stated. The testator directed his

trustees, "subject to the declaration after mentioned," to divide and pay "when convenient" four-fifths of the residue of his estate to his four children named (the second parties to the case), and to hold the remaining fifth for behoof of his grandchildren, the children of his son James. I take that to be an absolute gift of his residue to the extent of four-fifths thereof to his children which vested in the beneficiaries *a morte*. The declaration, subject to which this gift was made, is to the effect that as regards a part thereof, consisting of 10,100 shares in a limited company, the trustees are to hold the same for a period of fifty years, to pay to the beneficiaries the dividends arising therefrom during that period, and on its expiring to assign the shares themselves to the beneficiaries "in the proportions aforesaid." I do not regard this declaration as the clause under which the testator's children take the shares of residue destined to them. It is a burden or restriction imposed, or attempted to be imposed, on a gift already made. This case, therefore, does not appear to me to belong to that class of cases of which *Bryson's Trustees* (8 R. 142) is an example. I think, on the other hand, that it is ruled by the principle laid down in the case of *Miller's Trustees*, and that the testator could not validly impose this restriction on a fee which he had absolutely given, and which vested in the beneficiaries on the testator's death.

This is the only question in the case of any importance. As regards the share of residue falling to James' children, I think the trustees must hold it at least so long as the said children are in minority. Whether it then vests, or does not then vest in the event of their father being still alive, is a question we are asked to reserve in the meantime. But until that question is settled with James' children, I think the trustees are bound to hold the shares in the limited company falling to these children, and deal with the dividends arising from the same as directed by the testator. With regard to the shares falling to the second parties, I think they are entitled to have them *in forma specifica* if they so desire, and that the trustees are not bound or entitled to realise the shares last mentioned contrary to the wish of the second parties. It was conceded that the seventh question should be answered in the affirmative.

LORD MONCREIFF was absent.

The Court pronounced the following interlocutor:—

"Answer the 1st question, the first alternative of the 3rd question, and the 4th and 6th questions therein stated in the negative: Answer the first alternative of the 2nd question, the second alternative of the 3rd question, the 5th question as amended, and the 7th question as amended therein stated in the affirmative: Find and declare accordingly, and decern: Find all the parties to the special case,

including the curator *ad litem* to the parties of the fourth part, entitled to their expenses as between agent and client out of the trust-estate of the deceased George Stewart, as the same may be taxed by the Auditor."

Counsel for the First Parties—Balfour, Q.C.—Craigie. Agent—Alex. Morison, S.S.C.

Counsel for the Third Party—Dundas, Q.C.—Crabb Watt. Agents—Simpson & Marwick, W.S.

Counsel for the Second and Fourth Parties—Johnston, Q.C.—J. J. Cook. Agents—Morton, Smart, & Macdonald, W.S.

Friday, December 17.

### FIRST DIVISION.

[Lord Pearson, Ordinary.]

CLIPPENS OIL COMPANY v. EDINBURGH AND DISTRICT WATER TRUSTEES.

*Police—Water Supply—Right to Divert Authorised Line of Pipes and Lay along Public Road—Waterworks Clauses Act 1847 (10 Vict. cap. 17), sec. 28—Edinburgh and District Waterworks Special Acts 1869 (32 and 33 Vict. cap. cxliv.), 1874 (37 and 38 Vict. cap. clvi.), 1876 (39 Vict. cap. xxxiii.), 1895 (58 Vict. cap. xxvii.)*

By the Act of 1869 the then existing water supply of Edinburgh was transferred from a company to trustees, and the limits of the Act were declared to be certain districts "and all places within the limits of supply of the Water Company." These did not include Lasswade. The trustees were authorised by the Act of 1874 to introduce a new water supply, and, *inter alia*, to construct a conduit along a definite specified course. The limits of the new Act, and of that of 1869, were "extended" so as to include certain parishes in the county of Edinburgh, but not that of Lasswade. The time limits imposed by the Act were five years for the compulsory power, and seven for the completion of the new works.

The 1876 Act authorised a supply of water for Lasswade. It contained no definition of its limits.

The 1895 Act had for its main purpose the authorising of a new water supply. The limits of the Act are defined to be those referred to in the Acts of 1869 and 1874.

Section 28 of the Waterworks Clauses Act 1847 empowers the undertakers to open up the roads "within the limits of the special Act," and place their pipes, &c., in them, and to do all that they may consider necessary for the supply of water to the inhabitants of the district within the limits, on payment of compensation for any damage done.