his refusing to carry out the order of the Sheriff to repair was that he might get a final interlocutor which he could appeal against, and so get a judgment of this Court on the matter.

LORD M'LAREN—I hold, in common with your Lordships, that an application to a sheriff for the repair or the rebuilding of a march fence is an administrative proceeding falling within his summary jurisdiction, and that it is quite a competent, and indeed the normal and usual, first step in such a process to make a remit to a practical man to report. I have no conception that, because the pursuer or the defender is reasonable and does not object to the remit, he is barred from challenging the opinion of the reporter, or disabled from moving for further inquiry. It is only when a party consents to a remit which is *extra cursum curiæ* that he is held to have put the judge in the position of an arbiter and to be barred from getting the case restored to the ordinary procedure. But a remit in the case relating to a march fence was not *extra cursum curiæ*, and accordingly when the report was made, and one of the parties was dissatisfied with it, there was nothing to prevent him from bringing the matter before the Sheriff on appeal. I venture to doubt the expediency or utility of ordering a proof as the Sheriff has done. I would have been more disposed to make a second remit to the reporter calling attention to the points in regard to which the first report was found to be deficient. It would also have been a competent proceeding to conjoin another practical person along with the reporter, had that appeared to be expedient. But an order for proof having been pronounced, no appeal was taken, and the order being competent, we are bound to consider the evidence and make the best of the case on the materials that are before us. Now, it is to be observed that the Sheriff-Substitute, who was prepossessed in favour of the fence being rebuilt, upon hearing the proof came to the conclusion that unless the parties were barred—as he thought they were—from challenging the report, the wall was capable of being repaired. It would be a strong thing in the face of the opinion of the judge who heard the evidence, and of the Sheriff, who perhaps is more cognisant of such questions than we are, to hold that this fence was not capable of being repaired, and must add that in my opinion the preponderance of the testimony is that the fence can be repaired. I agree that this is the proper solution of the case.

LORD KINNEAR was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor of the Sheriff dated 17th March 1898, and the interlocutors subsequent thereto: Find in fact that the fence in question is to some extent dilapidated and requires to be repaired, and is capable of being repaired so that it may be restored to a proper condition as a march fence of the height of four feet above ground as it was originally: Find in law that the pursuer is entitled to have the fence so repaired, but not to have a new fence built, and decern: Find the defender entitled to expenses in both Courts (the expenses in the Sheriff Court to be on Scale II.), and remit," &c.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C.—Chree. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Defender—Ure—Deas. Agents—D. Lister Shand & Lindsay, W.S.

Wednesday, March 9.

SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

MELLIS *v.* MELLIS'S TRUSTEE.

Succession—Testament—Revocation—Republication—Codicil to Will Revoked but Subsequently Revived.

In the repositories of a testator five writings of a testamentary nature were found at the date of his death, viz. (stated in order of the dates of their respective signatures)—(1) A general trust-disposition and settlement containing a clause revoking all former testamentary writings; (2) a codicil relative to No. 1, but written on a separate piece of paper; (3) a general trust-disposition and settlement containing a clause revoking all former testamentary writings; (4) a codicil relative to No. 3; and (5) a codicil relative to and written upon the same piece of paper as No. 1. The deed No. 5 proceeded upon the narrative that the testator had reconsidered "the foregoing trust-disposition and deed of settlement" (namely the deed No. 1), and had "resolved to make the following alterations and additions thereon," and it concluded with these words, "and with these alterations and additions I hereby homologate and approve of said trust-disposition and deed of settlement in all other respects." *Held* that the testator's estate fell to be administered in terms of the deeds Nos. 1 and 5 only, and that all the others, including the first codicil to deed No. 1, were revoked.

Succession—Vesting—Direction to Convey Heritage to Daughter at Postponed Date—Conditional Institution of Issue of Daughter.

A testator directed his trustees, *inter alia*, (1) to pay from the rents of his heritable property an annuity of £20 to his half-sister; (2) during the lifetime of his widow, provided she did not marry again, to pay two-thirds of the remaining free rental to her; (3) to pay one-half of the remaining third of the free rental to his daughter as an ali-

mentary provision; and (4) to expend the other half for the maintenance of his son in such a way as they should think proper, this provision being declared alimentary. He also directed his trustees, on the death of the longest liver of his widow and his half-sister, to convey half of his heritable property to his daughter, declaring that in the event of her dying "before drawing the portion provided" to her, and leaving lawful issue, such issue should be entitled to the share to which their parent would have been entitled if in life at the time of division. The testator did not say what was to be done with the two-thirds of the free rental between the death or re-marriage of his widow and the death of his half-sister, if, as was the case, the latter was the longer liver of the two. *Held* that the fee of one-half of the heritage vested in the daughter *a morte testatoris*.

This was an action of count, reckoning, and payment brought in the Sheriff Court at Aberdeen by Thomas Mellis, Aberdeen, against John Stephen, engraver there, as sole surviving testamentary trustee of the pursuer's father Thomas Mellis.

Accounts were lodged by the trustee, and objections were stated thereto by the pursuer. These objections were of two kinds, some being of a general character and raising a question as to whether all, or if not all, which of certain testamentary writings were to receive effect in the disposal of the estate left by the pursuer's father, and as to the true meaning and effect of these writings, while others were merely objections to certain items in the accounts. The latter were of no general interest or importance, and need not be further referred to.

The following statement of the facts out of which the case arose is in substance taken from the note to the interlocutor of the Sheriff-Substitute (ROBERTSON)—"This case has reference to the construction of various testamentary deeds left by the late Mr Thomas Mellis, and involves questions of considerable pecuniary importance.

"Mr Mellis died on 16th September 1883, leaving a widow, who died on 7th December 1884, and two children of the marriage," viz., a son, the pursuer in the present action, and a daughter, who is the wife of the defender, "and at his death the following documents of a testamentary nature were in existence — (1) Trust-disposition and settlement, dated 21st March 1879; (2) Codicil, dated 3rd May 1879," relative to No. 1 but written upon a separate piece of paper; "(3) Trust-disposition and settlement, dated 17th May 1879; (4) Codicil engrossed thereon, dated 22nd May 1879; (5) Codicil, dated 30th June 1881, engrossed upon the trust-disposition first mentioned of 21st March 1879."

"The first question to be disposed of is whether all, or if not all, which of these various writings are to be given effect to in the disposal of the estate left by the deceased.

"In the first place, it is to be noted that the first deed mentioned contains a clause of revocation of all former trust-dispositions and testamentary writings and codicils thereto, and the third deed mentioned, the second trust-disposition, contains a similar clause. This last-mentioned deed bears to be a disposal of the testator's whole estate, and there can be no question that when it was executed it revoked the first deed and codicil thereto. The fourth deed, the codicil to the last-mentioned, makes certain alterations upon it, but except for these alterations approves and homologates that deed.

"We come then to the last deed, the codicil of June 1881, written upon the original trust-disposition (deed No. 1).

"This codicil unquestionably has reference to the deed upon which it was written; it has internal evidence which puts that beyond question, and there is no room for any suggestion (indeed none was made) that it was engrossed upon this deed by mistake. The codicil makes certain important alterations upon the original deed, but after narrating these it goes on to say, 'with these alterations and additions I hereby homologate and approve of said trust-disposition and deed of settlement in all other respects.'

"It will be remembered that, before this codicil was put on, this first trust-disposition was a revoked deed, having been revoked by the second trust-disposition (No. 3), but in view of the terms of the last codicil it was admitted by both parties at the discussion that this codicil revived the original disposition, and that it must be treated as a valid deed of the deceased's.

"The parties were, however, at issue as to the date which it must be held to bear, whether its original date, or the date of the homologating and adopting codicil. The trustees seem to have been administering the trust as if all the five documents were in force, and were to be all read as part of the deceased's will in so far as not contradictory, and this involves the contention that the first deed is to be held as being of its original date. The pursuer here, on the other hand, who is the deceased's only son and heir-at-law, claims that the only operative documents are the first and last; the first being now, as he contends, to be held as of the date when it was adopted, *i.e.*, the date of the last codicil. Before indicating any opinion as to which party is right, I think it advisable to state briefly the purposes of the various deeds, so far as bearing on the question in this case.

"The first deed is, as stated, a disposition of the testator's whole heritable and moveable estate to trustees, in trust for certain purposes—*First*, *Second*, and *Third* are the payment of the testator's debts, the liferent of his furniture, &c., to his widow, and whatever money was standing in his bank account also to his widow; *Fourth*, his trustees were to pay to his half-sister, Mrs Provost, from the rents of his heritable property a yearly annuity during all the days of her life of £20 sterling, payable in equal portions at Whitsunday and Martinmas."

The fifth and sixth purposes were as follows—"(*Fifth*) During the lifetime of the said Isobel Eckford, my said wife, I direct and appoint my trustees to divide the whole free rental of my heritable properties (after deduction of the foresaid amount to my said half-sister, feu-duties, taxes, repairs, expense of management, &c., &c.) into three equal parts, and to pay two parts thereof half-yearly to the said Isobel Eckford, my wife, declaring that in the event of her entering into a second marriage said payment shall cease and determine and be no longer payable to her, and the remaining third part I direct and appoint my trustees to pay equally between my son Thomas Mellis junior and my daughter Margaret Mellis or Stephen, wife of John Stephen, engraver, my said son-in-law, declaring hereby that the half thereof falling to my said daughter Margaret Mellis or Stephen shall not be affectable by the debts or deeds, nor subject to the diligence of the creditors of her said present husband or any other husband she may subsequently marry, the same being hereby declared to be purely alimentary, and that her own receipt to my trustees, without the consent of her present or any future husband, shall be sufficient exoneration to my trustees for the payment of her said half-yearly share of said rents; Declaring further, that in the event of either or both my said son and daughter dying during the lifetime of either of the said Charlotte Fyffe or Provost, or my said wife, and leaving lawful issue, such issue shall be entitled to the portion of said rents which would have fallen to their deceased parent if alive. (*Sixth*) On the death of the longest liver of my said wife Isobel Eckford or Mellis and Charlotte Fyfe or Provost, my half-sister, I direct and appoint my trustees to convey and make over the whole of my said heritable property to the said Thomas Mellis junior and Margaret Mellis or Stephen equally, share and share alike, declaring that in the event of either of my said two children dying before drawing the portion hereby provided to them, and leaving lawful issue, such issue shall be entitled to the share to which their deceased parent would have been entitled if in life at the time of division."

It also contained a clause revoking all former trust-dispositions and deeds of settlement and testamentary writings and codicils thereto executed by him.

"These are the main provisions of this deed, and it will be seen from them that the testator made no express provision for the disposal of two-thirds of the free rental of his heritable properties after his widow's death if that occurred before Mrs Provost's.

"The first codicil has only a provision giving the use of testator's dwelling-house rent free to his daughter during the widow's life, and in all other respects homologating the principal deed.

"The next deed is the second trust-disposition, which also bears to be a disposal of all testator's property, and proceeds very much on the same lines as deed No. 1. The same trustees are appointed, and the first two purposes are the same; the third purpose in the first deed, however, is omitted, but the next purpose, viz., the annuity to Mrs Provost, is inserted in similar terms. As regards the fourth purpose, however, which corresponds with the fifth in the first deed, an alteration is made—first, a third each of the rents is given to his widow, his son, and his daughter, and it is declared that, in the event of his widow predeceasing Mrs Provost the free rental was then to be divided into two equal parts, and paid to his son and daughter respectively, and a similar provision as regards issue in the event of their parents predeceasing, as already narrated in the original deed. The fifth purpose of this deed is in similar terms to the sixth purpose of the first deed, and makes no change. This deed also, as already stated, has a clause of revocation of all testamentary deeds, writings, and codicils, and there is no question whatever that at its execution it revoked Nos. 1 and 2.

"Deed No. 4.—The codicil annexed to No. 3 cancels the fifth purpose of that deed, and instead of directing his trustees to convey the whole of his property to his son and daughter, the testator by this codicil directs them to pay only the free rental during the lives of his son and daughter, and after their death to their children till the youngest attained twenty-one, when the properties were to be sold and the price divided into two equal parts, half going to the children of his son and the other half to the children of his daughter. In other respects this codicil homologated the deed No. 3."

The fifth deed, the last codicil, which, as stated, was written on the first deed, makes certain important alterations. It begins as follows:—"I, the before designed Thomas Mellis, having reconsidered the foregoing trust-disposition and deed of settlement, have resolved to make the following alterations and additions thereon." The alterations are as follows:—Firstly, the nomination of testator's son as a trustee is cancelled and another trustee appointed in his place; secondly, the fifth purpose of deed No. 1 is withdrawn "in so far as it provides one-half of a third of the free rental" of his "heritable properties" to his son, and it is declared that "the same shall not be paid to him but shall be expended by" his "trustees and executors for his maintenance and support in such way and manner as" his trustees and executors shall deem proper, and this provision is declared to be purely alimentary; third, the sixth purpose of said trust-disposition is withdrawn in so far as it directed his trustees to make over the half of his heritable property to his son, and instead his trustees are directed "to hold the same in their own names during his lifetime, and pay the rents and interests thereof for behoof of the said Thomas Mellis junr. and his children, in such way and in such proportions among them as my said trustees may think proper," and further, declaring the same to be alimentary. The codicil concludes with these words—"and with these alterations and additions I hereby homolo-

gate and approve of said trust-disposition and deed of settlement in all other respects."

"The testator left estate consisting mainly of house property, but also including a feu-duty or superiority, and certain personalty.

"It will be seen from the above narrative that if only the first and fifth documents are taken as deceased's will no express provision is made for giving the use of his house to his daughter, nor for the disposal of two-thirds of the income of the heritable properties after Mrs Mellis's death and during the life of the annuitant Mrs Provost; and further, that in terms of the codicil the half of the estate, which by the sixth purpose of the deed No. 1 is directed to be conveyed to the testator's son the pursuer at the death of the annuitant, is there directed to be retained by the trustees and retained in their own names during the pursuer's lifetime, and that the rents and interests should be paid by them for behoof of the pursuer and his children in such way and in such proportions as the trustees should think proper, nothing further being said. Pursuer argues that this clause brings about a state of matters by which there is no disposal of the fee of this half.

"On the other hand, if all the deeds are construed together so far as not contradictory, there is provision made for the daughter having the use of the house during the widow's life. There is also provision for the disposal of the rents after the widow's death made in deed No. 3, and deed No. 4 provides for the disposal of the estate after the annuitant's death.

"The trustees, of whom one only survives, have been ever since the testator's death in 1883, proceeding on the assumption that all the deeds are in force, and that by them all the testator's means are disposed of.

"This is now challenged by the testator's son, who brings this action of accounting, concluding for an account of intromissions of the trustees and for payment of £750."

Mrs Provost survived the testator's widow, and died after the present action was raised.

The pursuer maintained that only the first and fifth deeds were to be regarded; that on the death of the testator there vested in him (1) an alimentary beneficial interest to the extent of one-sixth of the free rents of the testator's heritable properties; (2) a beneficial fee to the extent of one-half of said heritable properties; and (3) an absolute fee in the feu-duty or estate of superiority—the last-mentioned fees resulting under the trust in favour of the pursuer as heir-at-law to lapsed heritable succession; and also that on the death of the testator's wife the two third parts of the free rents of the testator's heritable properties provided to her during her lifetime thereafter became payable to the pursuer—one-half accruing to the fee (2) vested in him as aforesaid, and the other half resulting to him as heir-at-law, being undisposed of during the lifetime of Mrs Provost.

The pursuer claimed (objection to account No. 3) a sum of £7, 7s. 11d., as due to him for his share of the rent which he maintained ought to have been charged for the house which the trustees had allowed the testator's daughter to occupy rent free on the supposition that the codicil No. 3 had not been revoked.

By interlocutor dated 29th July 1897 the Sheriff-Substitute found, upon a sound construction of the testamentary deeds left by the deceased Thomas Mellis (1) that his estate fell to be administered in accordance with the provision of the three deeds Nos. 1, 2, and 5, and that the deeds Nos. 3 and 4 were revoked; (2) that the provision to the testator's daughter in the sixth head of the first deed vested *a morte testatoris*, and *quoad ultra* repelled certain of the pursuer's detailed objections, sustained one of them, viz., No. 5, and *quoad* others continued the cause for further procedure, and granted leave to appeal.

Note.—[*After stating the facts as narrated above*]—"The first question to be disposed of is, as already indicated, what date deed No. 1 must be held to be of.

"I may say at once that my opinion is that it must be of the date of the homologation. This seems to me to follow of necessity from the existence and terms of deed No. 3. If the deed No. 1 is to be taken of its original date, then deed No. 3 is subsequent to it and revokes it. Deed No. 3 is still in existence, and the only way in which deed No. 1 can have effect is by assuming that it is dated subsequent to deed No. 3 and therefore revokes it. So far, therefore, I am in pursuer's favour. As regards deeds Nos. 3 and 4 I think they are revoked, but I do not agree that deed No. 2 the first codicil is of necessity revoked; it, I think, must be regarded as a part of deed No. 1 and as being revived along with it. It is clear that the provisions of this codicil are in no way inconsistent with the provisions of deed No. 5, and the natural inference, I think, is that this codicil is included in the homologation of the deed which it follows.

"This finding does not, however, seem to dispose even of the general question in the case, because that will further depend upon when the provision to testator's daughter Mrs Stephen (in art. 6) is to be held to have vested. If it vested *a morte testatoris* then the result will be practically the same, so far as the general question is concerned, as if the whole of the deeds were in operation. On the other hand, if vesting is postponed until the death of the annuitant Mrs Provost, the pursuer will mainly succeed.

"Before indicating the opinion I have formed on this question, I may say a word as to what seems to me the unquestionable intention of the testator as far as we can gather it from the confusion that these deeds have caused. As I have already said, I cannot hold otherwise than that deeds Nos. 3 and 4 are revoked, but I think it probable that the testator or his advisers may have had the idea that these deeds might be considered as part of the settlement to the effect of providing for the event of the widow dying before Mrs Provost. Apparently the testator was very

anxious to provide carefully for the manner in which his estate was to be distributed, and it is hardly likely that, after having in deed No. 3 provided for the *casus improvisus* just referred to, he would deliberately cancel this and leave the liferent of two-thirds of his estate undisposed of. It is quite obvious, from the whole scope of the deeds, that testator's intention in the first instance was that his son and daughter and their families should share equally; certainly he nowhere indicates a shadow of intention that the son should be preferred to the daughter; on the contrary, the effect of the last codicil is to show that while the testator still wished to treat his son fairly and justly, he seems to have distrusted his discretion, and in consequence gives him what is plainly intended to be only a liferent alimentary interest in the half of the estate instead of a fee.

"In considering whether the daughter's provision vested *a morte testatoris*, and whether, therefore, she is entitled to half of the two-thirds of income unprovided for, I think it is highly relevant to keep in view the obvious intention of the testator, for after all the question of vesting is, in the first instance, a question of the testator's intention—*Dunlop Macrae*, 11 R. 1104. Keeping these considerations in view I am prepared to hold here that this case is to be viewed as falling under the class of cases of which *Cunningham* v. *Cunningham*, 17 R. 218, is, I think, one of the latest, where the postponement of the enjoyment of the fee is to an event certain, and where vesting has been held to have taken place. The event certain here is the death of the last survivor of the widow and Mrs Provost. I do not think that the fact that there is no direct gift here, but merely a direction to his trustees to convey really affects the question—M'Laren on Wills, 3rd ed., p. 786. I quite admit the difficulty in distinguishing this case from that of *Bryson's Trustees* in 8 Rettie, but it seems to me that Lord M'Laren's observations in the case of *Cunningham* warrant me in doing so. It does not seem to me that the survival of the beneficiary of the event certain was part of the scheme of the settlement. The scheme of the settlement (so far as the daughter is concerned) is that she should get the half. If she should die before the period of distribution, the testator, in his anxiety that there should be no dubiety as to how his estate should be divided, expresses what no doubt the law might have effected apart from his expression, viz., that her children should take her place.

"The wording of the latter part of the clause seems to me in favour of this view. The wording is, 'In the event of either of my said two children dying before *drawing* the portion *hereby provided* for them.' Drawing the portion indicates, to my mind, that the portion was there and was the child's, though she could not draw it until a certain event; and 'hereby provided,' also, to my mind, rather indicates an immediate vesting.

"On the whole, though I am bound to say with difficulty, I think I am entitled to hold that the vesting here was in the case of Mrs Stephen *a morte testatoris*, and that being so she is entitled to the half of the undisposed-of two-thirds of income.

"This practically disposes of the general objection to the account lodged, and there only remains the special objections.

"I should say, however, that it does not seem to me that the question of the disposal of the fee of the other half is involved in this case. I do not think there is any question that so far as it is concerned the payment of income, at least up to the death of Mrs Provost, must be governed by the provisions of the last codicil; and for the purpose of this case and the accounts involved in it Mrs Provost is still alive. Whether the disposal of the half of the fee could be competently settled in this Court I give no opinion upon. So far as this case is concerned, it is sufficient that I hold that Mrs Stephen is entitled to half of the undisposed of two-thirds of income.

"No one raises any question as to the payment of the other half to pursuer under the provisions and restrictions of the last codicil.

[*The Sheriff-Substitute then dealt with the detailed objections.*]

The pursuer appealed to the Sheriff (CRAWFORD), who, by interlocutor dated 13th November 1897, affirmed the interlocutor appealed against, adding the following

Note.—"The testator executed a trust-disposition of his whole estate, heritable and moveable, in March 1879. It was followed by four other testamentary writings of later dates making successive alterations, all quite intelligible, on the original purposes of the trust. If these five writings, of which the Sheriff-Substitute has given a description which I need not repeat, can stand together, they form a complete settlement at least of the heritable estate. The principle of the settlement, stated generally, is that after the death of his wife, who did not long survive, his son and daughter are, subject to a small annuity, the beneficiaries under the trust, and that to an equal extent. The trustees, of whom the defender is the sole survivor, have acted on the assumption that the writings are to be read together as composing the will, and it appears to be certain that in so acting, whether the assumption is in law correct or not, they have substantially carried out the real intentions of the testator, whereas the pursuer's claim, that during the period elapsing between the widow's death and that of the annuitant he is entitled to five-sixths of the rents, is quite inconsistent with the testator's wishes and intentions.

"1. If the daughter's share vested *a morte testatoris*, as the Sheriff-Substitute has (in my opinion rightly) held, it is practically immaterial to the result of the case whether all the testamentary writings or only some of them form part of the will. Still that question seems to require an answer, and I have found it to be attended with difficulty. It is, I think, clear that the codicil to the first trust-deed is to be

regarded as part of it, and was revised with it. For that there is sufficient authority in our own law, but perhaps the most striking case directly in point is that of *De la Saussaye* (1873), 3 Prob. and Div. 43, decided by Lord Hannen. With regard to the revocation of the second trust-deed and codicil, I have had much more difficulty, or rather of the trust-deed, because the codicil is clearly repugnant to the first trust-deed, which was revived, and therefore must be held to have been revoked. It is true that in one sense the date of the revived deed must be the date of the final codicil by which it was revived. But I am not sure that that is the case so literally as to make the clause of revocation in the first deed applicable to subsequent deeds which were not in existence or in contemplation when it was executed. There is a difference at least in fact, if not in law, between reviving a deed originally good, and adopting a deed originally bad, and it may be that in order to give effect to the intentions of the testator a stricter rule should be applied in the latter case than in the former. The second deed, *inter alia*, provides for the application of the rents during a contingent interval which the testator has omitted to provide for. Supposing the deed had gone a little further, and on the preamble that the testator had omitted to make this provision, and also to make provision for the disposal of his moveable property, and also of the residue, all of which were in fact omitted, and then proceeded to make a fresh conveyance to his trustees for the same purposes as before, it would plainly be contrary to his intention that those supplementary provisions should be revoked upon the grounds which have been sustained in the interlocutor. Yet the case under consideration is just the same, and although the supplementary provision appears in a new trust-deed, and not in a codicil to the original deed, I have very serious doubts whether it ought not to be given effect to. There are, however, some general observations to be found in the authorities though applied to quite different circumstances which tend to support the Sheriff-Substitute's judgment, and on the whole I do not differ from it.

"2. If there had been a clause of survivorship as between the brother and sister, or a destination-over from the one to the other, it would, I think, have been clear that vesting did not take place till the period of distribution. Such a clause would have been usual and natural, and its absence points very strongly to vesting. The elements which tell the other way are the alimentary restriction on Mrs Stephen's enjoyment of the proceeds of her share until the period of distribution, and more especially the destination to her children in the event of her predecease. In the case of *Hay's Trustees* a destination to a person and his heirs was held not sufficient to postpone vesting, although the heir who contested the point was the eldest son. A destination to children is no doubt a different thing. But the whole question turns upon intention, and I do not think it could have been the intention of the testator that his daughter should be prevented from disappointing the expectation of her children during the life of a small annuitant, but should be at liberty to do so when that event — a certain event — occurred. The annuitant was not even in a position analogous to that of the testator's widow and the beneficiaress's mother. There could be no reason or meaning in making vesting depend on the accidental circumstance of the date of her death. Therefore I do not think that the introduction of the children has any legal effect in the direction of overturning the strong presumption in favour of vesting, which is otherwise raised by the scheme of the settlement.

"3. On the specific objections to the account I do not think it necessary to say more than that I have come to the same conclusion with regard to all of them as the Sheriff-Substitute.

"The case has given me much consideration, raising as it does more than one point of law which has required considerable research. But I am of opinion that on the main question a good defence has been stated, at least on the ground on which the interlocutor proceeds, if not upon the other ground, which is disposed of by the first finding."

By interlocutor dated 24th December 1897, the Sheriff-Substitute decerned against the defender as trustee foresaid for payment to the pursuer of the sum of £3, 15s., being the sum referred to in No. 5 of the pursuer's detailed objections which had been sustained by the Sheriff-Substitute's previous interlocutor, repelled the pursuer's objections which had been reserved, and assoilzied the defender from the conclusions of the action, and decerned, finding both parties entitled to expenses out of the trust-estate up to the date of lodging the trust accounts in process, and finding the pursuer liable in expenses to the defender subsequent to that date.

The pursuer appealed to the Court of Session, and argued—(1) The only deeds which were entitled to receive effect were Nos. 1 and 5. The deeds Nos. 3 and 4 were revoked. To that extent the Sheriffs had decided in the pursuer's favour. When a settlement is revived after being revoked, it spoke from the date of the deed which revived it—*Ker* v. *Erskine*, January 16, 1851, 13 D. 492. The Sheriffs, however, had erred in holding that the codicil No. 2 had been revived by the codicil No. 5. The rule was that an operative codicil would not be held as revoked by a subsequent deed unless it clearly appeared that such was the testator's intention, and this was all that was decided in the case of *In the Goods of De La Saussaye* (1873), L.R., 3 P. D. 42; but, on the other hand, a codicil which had become invalid by revocation, or had been invalid originally for any reason, and was consequently in itself inoperative could not be validated by a deed referring specifically by date or otherwise to the instrument to which it was a codicil, and such revival could only be effected by a deed which revived, not a particular in-

strument, but generally the will of the testator; or, in other words, while an operative codicil could not be revoked without a clear intention to revoke it, an inoperative codicil could not be revived or validated without a clear intention to revive or validate it—*Burton* v. *Newbery* (1875), 1 Ch. D. 234, which overruled the earlier case of *Gordon* v. *Lord Reay* (1832), 5 Sim. 274; *In the Goods of Reynolds* (1873), L.R., 3 P. & D. 35; *Green* v. *Tribe* (1878), 9 Ch. D. 231, *per* Fry, J., at p. 236. Here there was no evidence of any intention to recal the revocation of the codicil deed No. 2. The codicil deed No. 5 was written on the same piece of paper as the deed No. 1, which alone was referred to, whereas the deed No. 2 was on a separate piece of paper, and was not referred to at all in the deed No. 5. The deed No. 1 spoke as from the date of the deed No. 5, and revoked all previous testamentary writings, including the codicil, deed No. 2. (2) The provision in favour of the daughter in the sixth clause of deed No. 1 did not vest in her until the period appointed for her share to be conveyed to her. The only gift here was by way of a direction to convey at a postponed date, and the testator's object in postponing conveyance till the death of the annuitant could not be merely to protect the annuity, for it was trifling in amount. In this case the substitution of issue was not a mere expression of the ordinary rule of law, for the subject of the gift was heritage, and the substitution was to the issue and not to the heir of the daughter. The issue must have been therefore special objects of the testator's bounty, and this clause operated as a destination-over. In these circumstances vesting was postponed—*Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142; *Brodie* v. *Brodie*, June 13, 1893, 30 S.L.R. 713; *Adams' Trustees* v. *Carrick*, June 18, 1896, 23 R. 828. They also referred to *Cunningham* v. *Cunningham*, November 30, 1889, 17 R. 218. The alimentary provision in favour of the son and daughter contained in the fifth purpose was entirely inconsistent with vesting *a morte testatoris*, and showed that such was not the intention of the testator, which in questions of vesting was ultimately the ruling consideration.

Argued for the defender and respondent —(1) All the testamentary writings of the testator should be read together and receive effect as his will—*Stoddart* v. *Grant*, June 28, 1852, 1 Macq. 163. The deed No. 3 was the only deed which dealt with the disposal of the rents during the period between the death of the wife and the death of the annuitant. (2) Apart from this, however, the deed No. 2 was revived along with the deed No. 1 by the deed No. 5—*In the Goods of De La Saussaye*, *cit.*; *Gordon* v. *Lord Reay*, *cit.* It was a question of intention, and it sufficiently appeared from the introductory clause of deed No. 5, and the general tenor of the deceased's testamentary provisions, that No. 2 was intended to be revived. It was clearly the intention of the testator to restrict the son and favour the daughter, but this intention would be frustrated on the pursuer's view. This had an important bearing on the question of intention. (3) The provision under the sixth clause vested in the testator's daughter *a morte testatoris*. There was nothing to show that the testator had any special predilection for his daughter's issue. They were simply put in as coming in place of their mother. This did not amount in law to a destination-over, or lead to postponement of vesting—*Ross's Trustees* v. *Ross*, November 16, 1897, 25 R. 65. *Bryson's Trustees* v. *Clark* was therefore distinguished, for in that case there was a proper destination-over. The testator by using the expression "before drawing the portion hereby provided" to the daughter showed that he meant the provision to vest as at his death.

LORD JUSTICE-CLERK—There are three matters before us here. The first is, which of the five deeds, copies of which are given in the print, are operative deeds, as being expressive of the will of the testator? Now, I am unable to accept the argument that the codicil and trust-disposition and settlement respectively of 3rd May and 17th May 1879 do form part of the testamentary writings left by him. He made a will on March 21st 1879. He then made some subsequent testamentary writings, and on the 30th of June 1881 he executed the last of his testamentary writings. By that last deed, which was written upon one and the same paper on which the trust-disposition and settlement of 21st March 1879 were written, he set up that trust-disposition and settlement again, making it his last will and settlement. It appears to me that the only reasonable construction of that deed, and of the way in which he proceeded is, that that settlement which he so set up, and the codicil which was his last testamentary writing by which he set it up, are the expression of his will at the time of his death; and that there was no ground for holding that the other testamentary writings, which are not referred to in that last testamentary writing at all, and which are inconsistent with it, are to be given effect to to any extent at all.

Then the next question is, whether there was vesting *a morte testatoris?* It had to be admitted in the course of the argument that if there was not vesting *a morte testatoris*, then there was, in a certain event, intestacy. It is quite certain that, upon the course of the decisions, and on every ground of sound policy, intestacy is not to be assumed by a particular reading of a deed if any other reasonable reading is possible. Now, I think this deed can, consistently with the decisions which have been given already, be quite well read in a sense which leads to vesting *a morte testatoris*. The only clause in it which created a difficulty in that matter is that which directs that the issue of the daughter are to take their parent's share if she predeceased the period of division. That clause seems to be expressive merely of what would have happened if there was a fee vesting *a morte testatoris*. Of course the rents in

that case would go to the heir-at-law of Mrs Stephen, but she was quite in a position if she thought proper, she having the full right, to give these funds to any one she chose; and if she did not do that pending the time of her getting possession, the testator expressed what he desired should be done in the event of her failing to exercise the right which she had. I think it may be reasonably read in this way, and that vesting *a morte testatoris* is the proper conclusion to come to upon that matter.

[*His Lordship then dealt with the detailed objections.*]

LORD YOUNG—The first and really the only question of any importance is, whether all, or if not all which, of the five testamentary deeds which were found in the testator's repositories upon his death are to have effect as governing the administration and division of his estate? I am of opinion with your Lordship that the administration of his estate must be governed by the first trust-disposition of 21st March 1879 with the codicil written thereon dated 30th June 1881. I do not quite follow the views of the Sheriff-Substitute and the Sheriff upon the matter of dates. The five testamentary instruments —I am counting the codicil which was written upon the first trust-deed as one of them, although written on the deed itself, which makes only really four deeds—were all in the custody of the testator—in his repositories—at his death; and so long as he lived none of them had any operation or effect whatever. They were in his power and operated nothing. He could have cancelled them all — indeed, extinguished them by putting them in the fire. The question what is the testamentary settlement must be determined as at the date of his death. What did he leave behind him as expressing his last will and intention as to the settlement of his estate among his relatives and friends? He died in 1883, and the date of the last of the testamentary documents found in his repositories is June 1881; and one naturally looks to that to see what was his intention then. That was the last date upon which he expressed any intention, and I accordingly look to that codicil of June 1881, and find that he begins it by saying, "Having reconsidered the foregoing trust-disposition and deed of settlement, I have resolved to make the following alterations and additions thereon." So that he is looking to the deed, viz., the disposition of March 1879, upon which he is writing, and that was a universal settlement—a settlement of his whole property —and after considering it carefully he makes certain alterations and additions, and winds up by saying, "and with these alterations and additions I hereby homologate and approve of said trust-disposition and deed of settlement in all other respects."

Now, the conclusion which I reach upon that, *prima facie* — there may be something to interfere with it—is that the deed of 1879 so homologated and approved of in 1881, with the alterations made in the codicil of 1881, is his last testamentary disposition and settlement. The other deeds he might have put into the fire or cancelled in any way. He did not do so, and the question is whether this does not cancel any others in so far as they are in any way inconsistent with or in any way differ from the disposition and settlement of 1879, as altered in 1881 with the alterations and additions thereby made.

I do not see anything here to suggest the idea that he has any other. He left them in his repositories, but it would have been quite consistent with all that is expressed here to have put the others in the fire. "This is my last will and settlement in 1881." And in coming to that conclusion I do not proceed upon these words in the deed of 1879 upon which the codicil is written—"and I hereby revoke all former trust-dispositions and deeds of settlement," because I think there is room for some argument from the use of the word "former." Plainly, what was meant when the deed was written was "any settlement prior to this deed." But it is a strong, and probably a just and irresistible argument, that when he homologates and approves of that in 1881, the word "former" is to be understood and consequently read and effect given to it, as meaning "prior to 1881." But I do not think it necessary to proceed upon that, although I do not at this moment see an answer to that view, that "former" although written in 1879 is to be considered with reference to the approbatory codicil which is appended to it. But irrespective of that I am satisfied with the view, and therefore proceed upon it, that this is a universal full settlement of his estate after his death, approved of by the last testamentary instrument which he wrote in June 1881, and must have effect accordingly.

With respect to the next question, viz., the question of vesting, I cannot say that I think it is unattended with difficulty; but in the special circumstances of this case I am not at all disposed to interfere with the conclusion at which the Sheriff has arrived, and which I am satisfied from the terms of the deed—and I have nothing else to look to—is in accordance with the testator's intention. I do not think he intended to die without having disposed of the whole income of his estate after his death until the estate came to be divided. I think the deed must be read upon the footing that he had disposed of it, and that his son and daughter were the fiars in whose favour he had disposed of it, although he limits them to the income until the death of the survivor of his wife and his half-sister. In that view I reject the contention of the pursuer here, that with respect to that income, or four-sixths of that income, during the period between the death of the wife in 1884 and the death of the half-sister the annuitant, which happened after this action was brought, he died intestate. I cannot accept that view. And the other is, that not having disposed of it in favour of any others, it is divisible between the

two flars, the son and daughter. Now, if these views prevail and are given effect to in the judgment, which I suppose will be the result, there will be no difficulty in adjusting the accounts. I quite agree that the pursuer of the action, the son, was entitled to have the income during that period paid to him periodically upon the footing that he was entitled to it, and that his rights now must be so dealt with accordingly. It will only affect a small amount of interest in addition to the income which will have to be paid to him now, because he would be entitled to that interest. But the parties will have no difficulty in adjusting that so that it may be put into the interlocutor which will finally dispose of the case.

With respect to the other objections in this action of accounting, to the trustees' accounts, I agree with your Lordship in thinking that there are no satisfactory grounds for interfering with the judgment of the Sheriff.

LORD TRAYNER—The first question here is, what are the testamentary writings of the deceased to be taken into account as governing the administration of his estate? I agree with your Lordships in the result you have reached, that the estate must be administered under the terms of the trust-disposition of 1879 and the codicil of 1881. I do not go into details about the other testamentary writings, because your Lordships have already done so; but I may say in a word that my view is this—that when the testator came to write the codicil of 1881 he had before him (as he says) what had been the abandoned settlement of 1879, but having reconsidered it he preferred it to any other writing that he had executed as the expression of his will and intention, with the alterations and additions thereon which he made by the codicil of 1881. I think the result of the codicil of 1881 is to revive—in the words of the testator "to homologate and approve in all other respects" of the settlement of 1879, and among these is a revocation of any other testamentary deeds that he had executed. I think that revocation must be read as of the date of the codicil in June 1881.

The question of vesting is not so clear or so easily disposed of as the one which I have just spoken to. But there again, on the best consideration I have been able to give to the case, I think the result which your Lordship and the Sheriff has reached is the sound one. The general principle is, that vesting under a settlement of this kind takes place *a morte*. One looks then to the deed itself to see whether there are any provisions in it, or indications of intention on the part of the testator, to take it out of that general rule. Now, the trust was created, so far as I can see, for the purpose of protecting the interests of the liferentrix and the annuitant, and no other. That would not *per se* postpone vesting. Another thing which postpones vesting is a clause of substitution or a destination-over. But I think there is no such thing here, because the substitution which we find in the deed of the issue of the son and daughter to their parents' share in the event of the parents dying before they get payment of the beneficial interest which the testator destined to them, is not a proper substitution at all. It is certainly not regarded as a substitution which has the effect of postponing vesting. Accordingly I find in this deed, if I eliminate the substitution of the children, nothing to interfere with the application of the general rule, that vesting takes place upon the death of the testator. There was a difficulty suggested—I think quite reasonably suggested — and very clearly and forcibly pressed upon us by Mr Brown and the Solicitor-General—arising from the peculiar terms of the clause in which the testator substituted his grandchildren to their parents in the income of the estate in the event of their (the parents) predeceasing the liferentrix and the annuitant; it is difficult to see why there should have been this destination to the grandchildren on the view that the daughter had already become vested fiar in part of the estate. But I think the testator, in his anxiety to provide that the children should succeed to their parents' interest if the parents did not get it, introduced that clause for that purpose of protecting the children's interests in the event of the parents not having made any disposition of the estate to which they were entitled under his deed. On the whole matter I think there is nothing here to interfere with the general rule.

Upon the whole matter I have come to be of opinion that here there was vesting *a morte*, and that the rights of parties must be determined on that footing.

[*His Lordship then dealt with the detailed objections.*]

The result, as it appears to me, would be that the only difference upon the Sheriff's findings that we should make is to recal the first finding of the Sheriff-Substitute in his interlocutor of 29th July, and instead thereof, find that the testator's will is, and his estate must be, administered under the trust-disposition and settlement of 31st March 1879 and the codicil of 30th June 1881: *Quoad ultra* the appeal should be dismissed.

LORD MONCREIFF was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute of 29th July and 24th December 1897 and the interlocutor of the Sheriff, 13th November 1897: Find that the estate of the deceased Thomas Mellis falls to be administered in terms of the trust-disposition and settlement of 21st March 1879 and the codicil endorsed thereon of 30th June 1881, included in No. 33 of process, and that the codicil of 3rd May 1879 in No. 33 of process, and the writings in No. 34 of process, are revoked: Find further that the provision to the testator's daughter in the sixth head of the first deed dated 21st March 1879 vested *a morte testatoris*," &c.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C.—W. Brown. Agents—Henry & Scott, W.S.

Counsel for the Defender—Guthrie, Q.C.—E. B. Nicolson. Agents—Morton, Smart, & Macdonald, W.S.

Wednesday, March 9.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

ROME *v.* WATSON.

Slander—Judicial Slander—Privilege of Person Acting as Advocate.

The Court will protect any person exercising the function of advocate in a judicial proceeding against an action founded upon what he has said or done in the course of his exercise of that function, and will not enter into the question of its relevancy or pertinency.

An action was raised against an agent to recover damages for slanderous statements averred to have been inserted by him in the pleadings of an action, maliciously and without the instructions of his client, and also in respect of a verbal statement made by him to the judge in an examination of the pursuer in a process of cessio, which it was averred had been made by him as an individual, and not as agent for anyone having an interest to be represented at the inquiry.

The Court, following the rule stated above, *held* that the defender had an absolute privilege, and that no action lay against him.

Williamson v. *Umphray & Robertson*, June 11, 1890, 17 R. 905, *approved.*

This was an action at the instance of Mr Henry Flockhart Rome, chemist, Annan, against Mr Charles Watson, solicitor, Annan, concluding for damages in respect of slander.

The pursuer averred that in an action of relief which had been raised against him in the Sheriff Court by Miss Martha Ensor, the defender had acted as agent for Miss Ensor, and had introduced into the record certain slanderous statements. He averred —"(Cond 3) In condescendence 5 of said action of relief it is stated that 'On said 3rd day of May 1894, while the pursuer' (Miss M. A. Ensor) 'was at defender's' (the present pursuer's) 'house, a clerk from the defender's law-agent's office arrived with said bond and assignation, and the pursuer was asked to adhibit her signature thereto, and she did so;' in condescendence 6 that 'the pursuer, although the deed was formally read over to her, was not aware of the real nature of the obligations she was undertaking, and she had no opportunity of consulting her legal adviser before signing the deed. The nature and effect of the deed were not explained to the pursuer—indeed, pursuer was asked by the defender not to inform anyone of what had passed, or that she had signed any document.' These statements were irrelevant and unnecessary, and were falsely and maliciously made by the defender, of his own motive and out of his own conception, without the instructions of his client. The defender taking an undue and unwarranted advantage of his position as an agent, thus falsely and maliciously traduced the pursuer's actings and character. A copy of the record in said action of relief will be produced and is hereby referred to. Both before and since the raising of said action, and especially in the course of the cessio proceedings after mentioned, the defender herein has persisted in repeating the charges contained in said articles of condescendence. (Cond. 5) In consequence of the foresaid decree and charge for payment of said sums, the pursuer on or about the 22nd May 1896 presented a petition to the Sheriff for *cessio bonorum*, so that all his creditors might participate in the division of his estate. In the course of the proceedings in the cessio, after the pursuer had been examined as to his means and estate, the defender, who appeared as agent for Miss Ensor, a creditor, attempted to question the pursuer at an adjourned diet, held in the Sheriff Court-House at Dumfries on the 30th March 1897, as to his refusal to resign office as trustee, as to the circumstances under which Miss Ensor signed the said bond and assignation in security, and as to her recent mental condition. The Sheriff declined to allow such a line of examination, on the ground that it was irrelevant and extraneous to the cessio proceedings. The defender then desired to be put upon oath and give evidence himself, but this request the Sheriff also refused. The defender thereafter in open Court, and in the presence and hearing of most of the solicitors practising in the town and others, made a statement in the following words, or in words to a like effect:—'I wish at least to be allowed to say this—the great bulk of Mr Rome's (the pursuer) statements, so far as I am concerned, are without foundation, entirely untrue, and he knows it.' Said statement was made by the defender personally, as an individual, and not as agent for anyone having an interest to be present or represented at the inquiry."

As regards the first of these averments the pursuer proposed an issue—"(1) Whether the said statements, or part thereof, are of and concerning the pursuer, and falsely, calumniously, and maliciously represent that the pursuer, taking advantage of the said Miss M. A. Ensor, did by fraudulent representations or concealment, induce her to adhibit her signature to a deed, the meaning and effect of which she did not understand." As regards the second he proposed—"(3) Whether the said statement is of and concerning the pursuer, and falsely and calumniously represents that the pursuer had no regard for the truth, and had made statements which he knew to be entirely untrue."

The defender pleaded—"(3) The pursuer's