

partners. There was therefore necessity for edictal citation, and admittedly there was none. Amendments have been made upon the record since the case was before the Lord Ordinary, but the pursuers have been unable to aver more than that they were "unaware of the presentation of" the petition for sequestration. There is no averment that they were prejudiced because they were unaware of its presentation. They do not say that they were without knowledge of the sequestration for forty days after it had been granted. They fail to deny the defenders' statement at the end of answer 5, that the individual pursuers were aware of the sequestration shortly after it was granted. Edictal citation is merely a means of giving intimation, and if knowledge exists it then becomes mere technicality to say it was not conveyed by the appropriate means. It is in my opinion impossible to entertain an action of reduction of a sequestration upon such a ground, and I therefore agree with the Lord Ordinary.

LORD SKERRINGTON—I agree with the Lord Ordinary in thinking that an action to reduce an award of sequestration is not incompetent. There is no reason, for example, why sequestration obtained by fraud should be immune from challenge by reduction. Again, reduction would probably be competent if in awarding sequestration the Judge had disregarded the Act of Parliament either intentionally or by inadvertence. Suppose that a Sheriff sequestrated an individual without having before him any evidence whatsoever of citation as required by the 28th section of the Act, I should be disposed to regard that as an altogether lawless proceeding which could be set aside by reduction unless protected by personal bar—a plea not open to the real defender in the present action. In the present case the circumstances were entirely different. The Sheriff had before him evidence of citation which in his judgment was sufficient. He did not disregard the statute. On the contrary he construed it, and he construed it rightly in the opinion of the Lord Ordinary and of your Lordship in the chair. His legal view was that where a firm has been duly cited that is equivalent to the citation of the partners for the purposes of sequestrating their individual estates. With that view I am unable to agree, but it was a question as to the construction of a clause, or rather of two clauses, in an Act of Parliament, the 25th and 26th sections of the Bankruptcy (Scotland) Act 1913. It was the duty of the Sheriff to construe these two clauses, and he did so. It may be that he misconstrued them. In that case on a suitable opportunity I should have been prepared to review his judgment, but that is the very thing which is prohibited by the 30th section of the same statute. Accordingly I hold that this section fails because the pursuers have not relevantly averred that the Sheriff disregarded the Act of Parliament.

I do not need to consider what would have been the position if the pursuers had averred not merely that the Sheriff misconstrued

the statute but had also alleged with proper specification that it was impossible in the circumstances for them to make use of the special remedy provided by the 30th section—a petition for recal of the sequestration. They would then have argued that upon a just construction of this section a deliverance awarding sequestration was not final unless the debtor had a genuine opportunity to present a petition for recal. To such a case there would have been two formidable answers, the one on the facts and the other on the law. It would have been argued that as the pursuers were engaged in trade they ought before leaving Great Britain to have appointed some person to attend to their interests during their absence, and that if they were unaware of the sequestration proceedings their ignorance was due to their own fault. In point of law it would have been argued that even if the pursuers had been able to aver a case of real hardship the maxim applied that "Hard cases make bad law," and that a case of injustice occurring once in a century afforded no good reason for departing from the primary and natural meaning of a statute. As to both these questions I reserve my opinion.

The Court sustained the second plea-in-law for the defender Antony Edmund Gibbs and dismissed the action.

Counsel for the Pursuers—Chree, K.C.—Moncrieff, K.C.—Leadbetter. Agents—Webster, Will, & Company, W.S.

Counsel for the Defender Edmund Antony Gibbs—Macphail, K.C.—M. P. Fraser. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender William Brodie Galbraith—C. H. Brown. Agents—Simpson & Marwick, W.S.

Saturday, June 29.

SECOND DIVISION.

SMITH'S EXECUTORS v. SMITH.

Succession — Testament — Construction — Heritage — Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap 101), sec. 20.

A lady in possession of heritable as well as moveable property died leaving a holograph will whereby executors only were appointed. They were, *inter alia*, directed to distribute the residue of the testator's "estate." No express conveyance of or reference to the deceased's heritable property was made. There was more than sufficient moveables to satisfy all the pecuniary and specific legacies. *Held (dis. Lord Salvesen)* that as the word "estate" was a general word habile to convey, if not primarily applicable only to, heritable property, and there was nothing in the deeds to show that it was used in a restricted sense, the testator's heritable estate was carried by the deceased's testamentary writings.

Robert Waugh Fordyce and others, executors of the late Miss Emma Isabella Smith, who resided at 35 Marchmont Crescent, Edinburgh, and who died there on 8th December 1917, acting under her will and codicils dated respectively 16th February 1916, 15th April 1916, and 12th November 1917, of the first part, Henry Watson Smith, Westbrook, Higham Road, Woodford Green, Essex, heir-at-law of the deceased, of the second part, and the United Free Church of Scotland and the minister and Deacons' Court of St Paul's United Free Church congregation, of the third part, presented for the opinion and judgment of the Court a Special Case dealing with the disposal of the heritage belonging to the deceased.

The deceased's will provided, *inter alia*—“I, Emma Isabella Smith, spinster, of 35 Marchmont Crescent, Edinburgh, make this my last will and testament on this the sixteenth day of February in the year Nineteen hundred and sixteen. I hereby revoke all former wills (16th February 1916). I appoint the following as executors of my will:—Mr Robert William Fordyce, hosier, residing at 80 Dalkeith Road, Edinburgh, Miss Jessie Eliza Allan, retired teacher, 22 East Preston Street, Edinburgh, and Miss Mary Nielson Allan, teacher, 22 East Preston Street, Edinburgh, and I give to each of these three executors who shall accept office the sum of fifty pounds (£50). I desire them to distribute the rest of my estate, after payment of funeral expenses and debts, as follows:— . . . [Here follow certain pecuniary bequests and legacies of corporeal moveable property] . . . I desire the residue of my estate, if any, to be divided into six equal parts, viz.—One-sixth to the Central Fund of the United Free Church of Scotland; one-sixth to the Foreign Mission Fund of United Free Church; one-sixth to the Women's Foreign Mission Fund of United Free Church; one-sixth to the Home Mission Fund of United Free Church; one-sixth to the Jewish Mission Fund of United Free Church; one-sixth to the minister and Deacons' Court of St Paul's United Free Church Congregation, Edinburgh, to be used for the poor or as they think best.”

The codicil to the deceased's will, dated 12th November 1917, provided, *inter alia*—“I have left the furniture to my cousin Mrs Harriet Simpson or Gordon, wife of Alex. R. Gordon, now residing at 77 Albert Drive, Crosshill, Glasgow, and I mean that to include all contents of the furniture and personal belongings (as clothes, jewellery, &c.) not otherwise bequeathed. If the estate admits of it, without diminishing other legacies, I leave her an additional one hundred pounds (£100), making £300 (three hundred pounds) in all.”

The Case stated—“ . . . 4. The deceased left moveable estate amounting to £2949, 9s. 2d., and after payment of debts, Government duties, and expenses the balance is estimated to be more than sufficient to meet all the legacies left under her testamentary writings. The deceased also left heritable estate consisting of two houses, one at 35 Marchmont Crescent, Edinburgh, of the estimated value of £300 or thereby, and the

other at 29 Lutton Place, Edinburgh, of the estimated value of £190 or thereby. 5. No express conveyance of or reference to the deceased's heritable estate is contained in her testamentary writings. . . . 8. The second party maintains that the will of the deceased is a mere testament in the strict sense of that term, and that the word estate as therein used connotes purely moveable estate. He accordingly contends that he as the heir-at-law in heritage is entitled to succeed *ab intestato* to the heritable property belonging to the deceased. 9. The third parties maintain that the testamentary deeds of the deceased are habile to carry her heritable property, and that her whole estate, heritable and moveable, was thereby conveyed to the first parties, and falls to be disposed of by them in terms of the directions contained in the said deeds.”

The questions of law were—“1. Are the testamentary writings of the deceased habile to convey her heritage thereunder to the extent and effect of vesting the same in the first parties for the purposes contained in the said writings? or, 2. Did the deceased die intestate *quoad* her heritage?”

Argued for the second party—The question here was whether the deceased's will carried the heritage belonging to her, or whether she had died intestate as regards it. The legacies could all be paid without touching the heritage, although no doubt the will by its terms showed that the deceased was not sure that she had sufficient money wherewith to pay them all. No trustees had been here appointed, but only executors, who could not deal with heritable estate which had not been conveyed to them. A last will and testament was peculiarly appropriate for the disposal of moveables. The will contained no direction “to realise all my estate” or words of such intention, such as a power of sale of heritage. The deceased had used the words “estate” and “money” as synonymous. A testament could not at common law convey land, and under statute words of conveyance had to be used which purported to convey or bequeath the land—Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. c. 101), section 20; Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sections 27 and 46. The word “money” was not sufficiently wide a term to include heritage—*Easson v. Thomson's Trustees*, (1879) 7 R. 251, 17 S.L.R. 259; *Dunsmure v. Dunsmure*, (1879) 7 R. 261, 17 S.L.R. 134. The following authorities were also cited:—*M'Laren on Wills and Succession*, vol. i, p. 332; *Hardy's Trustees and Others*, (1871) 9 Macph. 736, 8 S.L.R. 499; *Edmond v. Edmond*, (1873) 11 Macph. 348, 10 S.L.R. 210; *Urquhart v. Dewar*, (1879) 6 R. 1026, 16 S.L.R. 602; *M'Leod's Trustee v. M'Luckie*, (1883) 10 R. 1056, 20 S.L.R. 714; *Grant v. Morren*, (1893) 20 R. 404, 30 S.L.R. 442; *Copland's Executors v. Milne*, 1908 S.C. 426, 45 S.L.R. 314; *Jack's Executor v. Downie*, 1908 S.C. 713, 45 S.L.R. 545; *Crowe v. Cook*, 1908 S.C. 1178, 45 S.L.R. 904; *Bell v. Bell*, (1916) 14 S.L.T. 244; *Bryden v. Cormack*, 1913 S.C. 209, 50 S.L.R. 76.

Argued for the third parties—Prior to

the Titles to Land Consolidation (Scotland) Act 1868 persons were presumed to know that in order to bequeath heritable estate they had to use the appropriate words of style. The distinction, however, between heritage and moveable, for purposes of *mortis causa* dispositions had become less and less a living thing until now, when no special words were required for the disposal of heritage. The Court merely required to be satisfied that the testatrix was dealing with her whole estate. This she had shown by using the word "estate," which in its primary sense was applied to land just as the word "effects" was applied to moveables. The heritage passed to the deceased's executors if the meaning of the words employed was sufficiently wide to cover it—*Urquhart v. Dewar* (cit.), per Lord President Inglis; *Campbell v. Campbell*, (1887) 15 R. 103, 25 S.L.R. 97, per Lord Mure and Lord Adam. The word "estate" covered heritage—*Grant v. Morren* (cit.). The second party had failed to discharge the *onus* upon him of proving that the will did not cover the whole of the testatrix's estate.

At advising—

LORD JUSTICE-CLERK—The answers to the questions submitted in this Special Case depend on the construction of the will of the late Miss E. I. Smith, having regard particularly to the provisions of sections 20 and 21 of the Titles to Land Consolidation Act 1868.

Various authorities were referred to in the course of the argument, but in my opinion this is one of the cases where little assistance can be derived from decisions as to the interpretation of other wills. I think Lord Halsbury's observations in *Bowman*, 1 F. (H.L.) 69, 36 S.L.R. 959, express the sound view, where he said—"I have looked at this instrument as a whole. I have always protested, and still protest, against reading one man's will in the light of another man's will when they are in construction, in design, and in language often extremely different." And I respectfully agree with what Lord Dundas said in the case of *Bryden v. Cormack*, 1913 S.C. 209, at p. 212—"I think it would be idle to review the authorities, which are very numerous. Every time they are cited, as they were to-day, it strikes one how fertile they are in judicial doubts, dissents, and reversals. This is not surprising, for it just shows how largely all these cases depend on impression. They are at best illustrations of the application of general rules which are well understood, and are explained in many of the cases. But each individual case has its own special features, which were sufficient to bring down the balance on one side or the other."

Our duty is to construe the particular deed before us, and I think little, if any, assistance can be derived from decisions as to the construction of other deeds.

The party of the second part, who is Miss Smith's heir-at-law, maintains that the will is not so expressed as to affect the succession to her heritable estate, and accordingly that he is entitled to succeed thereto as heir

ab intestato of the deceased, while the third parties contend that the will is habile to dispose of the deceased's whole estate, heritable and moveable alike.

Various considerations were urged in support of these respective contentions. The Titles to Land Consolidation Act 1868, by sections 20 and 21, sets out the law necessary to be applied in this case.

The will in question is described as the testator's "Last Will and Testament," and revokes "all former wills." It then appoints executors and gives to each of them who "accept office the sum of £50." The testator thereafter desires her executors to distribute the rest of her estate by making sundry pecuniary legacies to eleven individuals and to two institutions. These legacies are to be paid free of legacy duty, and "if the money left by" the testator is not enough to pay all these legacies they are to be proportionately reduced.

Thereafter the will provides for certain corporeal legacies, and then the testator desires "the residue of my estate, if any, to be divided into six equal parts, viz., five to certain funds of the United Free Church of Scotland and the remaining sixth to St Paul's United Free Church Congregation.

What then is the meaning of the words "the residue of my estate"? "Estate" has been frequently interpreted judicially. In a passage often quoted with approval Lord Brougham said—"The principle is now (whatever it may have been anciently) perfectly recognised, nor do I understand it to be substantially disputed on the part of the appellant at the bar, that the word 'estate' is *genus generalissimum*, and will, by its own proper force, without any proof *aliunde* of an intention to aid the construction, carry the realty as well as personalty, and is not to be confined and restrained to personalty only unless there is a clear intent expressed in other parts of the will, to be gathered either from the whole will, which . . . you are always to look to, or from the way in which the word is used in the particular part of the will where the contested use of it arises, or in some other way it is shown to be restricted to mere personal estate, contrary to the strict, usual, and now established force, effect, and value of the word"—*Hamilton v. Hodson*, 6 Moore, P.C. 76. Lord McLaren's opinion in the case of *Crowe v. Cook*, 1908 S.C. 1178, is to the same effect, and in the third edition of his work on Wills and Succession he said, p. 332, such words as "property" or "estate" "cover everything that is disposable by will," and on p. 333 "'property' and 'estate' are in fact the only perfectly general words which have to be considered, and there can be no doubt as to their sufficiency to carry heritable as well as moveable estate." Similar authoritative expressions might be multiplied. In my opinion, therefore, when the testator desired "the residue of my estate" to be divided as aforesaid she used words which were habile to affect her heritable as well as her moveable estate. I can find no sufficient reason in the deed to give any restricted meaning to the word "estate" so as to deny to it its proper primary signifi-

tion. I am therefore of opinion that the will in question purports to bequeath the testator's heritable estate as well as her moveable property, and that it should receive effect accordingly. The result is that in my opinion we ought to answer the first question in the affirmative and the second in the negative.

LORD DUNDAS—The question here raised is a very short one, whether or not this will is habile to carry the heritage belonging to the testatrix. In my judgment it is. I think she intended to deal, and has effectually dealt, with her whole estate of every kind.

The will begins by the nomination of executors. There is no great significance in that either way. It was a necessary act in relation to the moveable estate, but it would be neither ineffectual nor inappropriate if the language subsequently used sufficiently imports, as I think it does, a conveyance of the heritage to the executors. The testatrix gives £50 to each of the executors, and proceeds—"I desire them to distribute the rest of my estate, after payment of funeral expenses and debts as follows," and after making a considerable number of pecuniary bequests, and some of corporeal moveables, she resumes—"I desire the residue of my estate, if any, to be divided into six equal parts," which are duly specified. Now I find in Bell's Law Dictionary that "the term 'estate' in its most ordinary acceptation signifies a person's land estate, but it is also frequently applied to moveables." In the recent case of *Crowe v. Cooke*, 1908 S.C., at p. 1183, Lord McLaren said—"As to the word 'estate' I have never had any difficulty. It is not ambiguous. It has been described as *genus generalissimum*, and it includes heritable estate not in virtue of a special meaning derived from the context, but because in its primary and proper meaning the word applies to immoveable as well as moveable subjects." And in *Urquhart v. Dewar*, 1879, 6 R., at p. 1041, Lord Shand said he agreed with Lord Mure "that where the general term 'estate' occurs in a testamentary writing, in such circumstances as show that it is not used in a limited sense, it ought to be read as meaning heritable as well as moveable estate. The word is broad enough in itself to include heritable as well as moveable property, and must be taken as including both in a settlement where it is not obviously used in a limited sense." I find nothing in this will to make me think that the word "estate" was used in other than its primary and proper signification. It seems to me therefore that we have here, within the meaning of section 20 of the Act of 1868, words used with reference to lands which if used with reference to moveables would be sufficient to confer upon the executor a right to claim and receive the same. Even if the case seemed to me to lie nearer the line of demarcation than I think it does, I should be disposed towards the view I hold, *ut res magis valeat quam pereat*.

There are a great many cases on this topic of the law, some of which are not

easy to reconcile with others. I do not think one derives much aid from a study of them. We must read this instrument as a whole, and decide what the intention of the testatrix was, and whether she has expressed it so that it can receive legal effect. I think she intended to dispose of her whole estate, heritable and moveable, and that she has effectually done so. I shall only say a word with regard to two of the cases cited to us. In *Urquhart v. Dewar* it is true that upon a construction of a holograph will containing the appointment of an executor, and the words "the residue of my estate shall be divided equally," a majority of the Court held that heritage was not conveyed. But the decision proceeded upon a consideration of the whole terms of the deed and of the special circumstances surrounding it, and I do not think it can be prayed in aid as decisive of the present question. Each case must be determined with regard to the language of the particular instrument before the Court. The learned Judges in *Urquhart's* case found grounds for holding that the word "estate" must be read in a limited sense. I do not find such grounds here. The case of *Bryden v. Cormack*, 1913 S.C. 209, recently decided by this Division, which was founded on by the second party, seems to me to be, so far as one such case can be a guide for the decision of another, adverse to his contention. I remember the case well, and on reading over the report I see no reason to find fault with what I there said or with the judgment pronounced. But that judgment seems to me to confirm by way of contrast the view I take of the present case. I will not quote my own opinion, but I see that Lord Guthrie, after observing that a slight alteration of words may make all the difference, referred to "the words 'whole estate and effects' used in the clause of reservation of lifeent, which if they had occurred in a clause of conveyance would have carried the heritage. The trouble is that that clause, by the addition of the words 'hereby conveyed,' merely throws you back to the clause of residue, which says—'I further declare that if there be any residue after all expenses and legacies are paid, I bequeath the said residue to my three nieces.' That seems rather to indicate that what was in the testator's mind was moveable estate." I do not find in *Bryden's* case what in my judgment are found in this will, words importing a conveyance to the executors of the whole estate, heritable and moveable, of the testatrix.

I am for answering the first question put to us in the affirmative, and the second in the negative.

LORD SALVESEN—The question in this case is whether the heritable estate of the late Emma Smith as well as her moveable estate passed under the will of 16th February 1916. The will is a very simple one and does not contain any express conveyance of her property. It begins with an appointment of three persons as executors with a direction to give each of them who should accept office the sum of £50. The testator

then goes on—"I desire them to distribute the rest of my estate after payment of funeral expenses and debts" amongst certain legatees named. After enumerating the legatees she proceeds—"I desire my executors to pay all legacies free of legacy duty, and if the money left by me is not sufficient to pay all these legacies to reduce the amount of each proportionally." After some directions which are unimportant comes the following clause—"I desire the residue of my estate, if any, to be divided into six equal parts," and then she names the residuary legatees.

There is ample moveable estate to satisfy all the specific legacies and to leave a balance for the residuary legatees; but the testator also left heritable estate to the value of approximately £500. This estate is claimed by the heir-at-law on the one hand and the residuary legatees on the other.

If matters were open I should consider that there was great force in the views that have commended themselves to a majority of this Court, but in my opinion the case is ruled by the decision of the First Division in the case of *Urquhart*, 6 R. 1026, which appears to me to be the most authoritative decision on the point involved. There, as here, there was an appointment of an executor with a direction to pay the testator's debts and certain legacies, and a clause disposing of the remainder as follows:—"The residue of my estate shall be divided equally" amongst certain beneficiaries. It was held by a majority of the First Division in considered judgments that this will did not convey the heritage to the executor named although he was in a later part of the will designed as trustee, and although there was a special clause dealing with the profits of his business which was conducted in heritable property belonging to him. The Lord President said that it was not enough to say that perhaps he may have meant to convey his heritable estate. "Under the section of the statute a distinct intimation is required, and I should consider it most unfortunate if such a doctrine received any countenance. Nothing in my opinion can satisfy the statute except distinct words or distinct implication."

I understand your Lordships find such distinct words in the two clauses that I have quoted in which "estate" occurs. In *Urquhart's* case, however, as I have pointed out, there was a direction to distribute the residue of the testator's estate in a certain way. The use of the word "estate" was, however, not thought to imply a conveyance of land. If it does not do so in one instrument I cannot understand how it can do so in one expressed in almost identical terms. There, as here, the moveable estate was ample to satisfy all the specific legacies, and it appears to me mere conjecture to say that the testator intended to convey the heritable estate. I have had an opportunity of reading the opinion of Lord Dundas, which appears to me to proceed on exactly the same considerations as moved Lord Mure to dissent from the judgment of the majority, especially as regards the import-

ance that is to be attached to the use of the word "estate."

If there is any distinction between the two cases it appears to me to be unfavourable to the contention of the residuary legatees, for the testator uses the word "money" as the source from which the legacies are to be paid, and that word certainly does not imply, but rather excludes, the notion of her having her heritage in view. Further, I am unable to reconcile the decision which your Lordships propose to pronounce with the case of *Bryden*, 1913 S.C. 209, decided in this Division, and I think it is unfortunate that a new element of uncertainty should be introduced in the construction of such a will as this. The effect of your Lordship's decision is, in my opinion, to overrule the judgment of the First Division in *Urquhart's* case, and to hold that the appointment of an executor for payment of certain legacies and the distribution of the residue imports a conveyance of heritage to the executor. It is true that in *Bryden's* case the word "residue" was used by itself, but there was a clause of reservation in which there occurred the words "the whole estate and effects hereby conveyed." I should have thought that these words were in the circumstances a mere amplification of the word "residue," but even so I think the judgment in *Bryden's* case was right as it followed the decision in *Urquhart's* case.

My judgment may be summed up very shortly thus—the appointment of an executor imports *prima facie* only a conveyance of moveable estate. It may be held to cover heritable estate if it is clear from distinct words used by the testator in the rest of the instrument, or distinct implication from its terms that the testator intended that his heritage also should pass to the executor for distribution by him. The word "estate," in my opinion, may mean moveable estate or heritable estate or both, but its use *per se* in such a will where there is no direct conveyance to the person who is to administer does not imply an intention to make a conveyance of lands as well as moveables.

LORD GUTHRIE—I am of opinion that it was the intention of the deceased that her will should carry heritage, and that she has sufficiently expressed that intention. The question is one on which it is not surprising to find difference of judicial opinion, because it depends on the impression to be derived from the words employed, from the collocation and sequence of the different provisions, and from the view that may be taken between words that are ambiguous or contradictory as to which are to rule. There are also contrary presumptions to be considered, and opinions may differ as to which presumptions are to be held most powerful.

If it be held that there is a presumption in favour of the heirs-at-law arising from the use of the words "will and testament" and the appointment of executors, and that that presumption is to control the construction of the whole document, then it may be that the *onus* is cast upon the third parties,

an *onus* which there may not be sufficient in the rest of the deed to enable them to discharge. I do not so hold. On the contrary, if there be such a presumption at all, I hold there is a stronger presumption arising from the use of the word "estate" in the clause at the end of the will dealing directly with the residue in question, coupled with the use of the same word in the general clause of distribution occurring immediately after the bequests to the executors. Lord Dundas has shown that there is some authority for the view that the word "estate" primarily and properly means, legally as well as popularly, heritable property. It is at all events certain that it belongs to a *genus generalissimum*, and primarily and properly includes heritable as well as moveable estate. That being so, it appears to me that the *onus* is thrown upon the heir-at-law to show from the other parts of the deed and the surrounding circumstances that the testatrix obviously meant the word only to include moveable estate, and I do not think they have succeeded in doing so. The view seems to me highly improbable. If it is sound, suppose the moveable estate had been insufficient to satisfy all the pecuniary legacies, the deceased's heritable estate could not have been made available, and her heir-at-law *ab intestato* would have been preferred to her specially favoured legatees.

Such cases turn on fine distinctions. The word "estate" occurred in the case of *Urquhart*, 6 R. 1026, as here, and was held by a majority of the Court not to include heritage. But while the clause as to the residue of estate at the end of this will had its exact equivalent in *Urquhart*, the same clause did not also appear, as in the present case, as a general clause of distribution at the commencement of the will before all the bequests except the legacies to the executors. Its position in the present will seems to me to give it an importance which it did not have in the case of *Urquhart*. I do not think that *Urquhart's* case, which turned partly on special circumstances not present here, compels us to decide against the residuary legatees, and I am not disposed to apply *Urquhart's* case except in cases absolutely indistinguishable. The case of *Urquhart* was decided in 1879, when the Court was naturally disposed to apply the Statute of 1868 strictly. The subsequent case of *Croue v. Cook* in 1908 (1908 S.C. 1178) shows the tendency of the Court wherever reasonably possible to give greater effect to the presumption that a deceased does not desire to die intestate, and in a case like the present (where there is a holograph settlement so elaborate in its provisions that it is evidently meant to be exhaustive, and where in addition the residuary legatees are many in number and carry on operations involving large expenditure) to hold that a deceased would in Miss Smith's circumstances, presumably not intend to deal with her estate piecemeal, disposing only of moveable estate and leaving over the disposal of her heritable estate for after consideration, or to the law of intestacy.

The Court (*dis. Lord Salvesen*) answered the first question of law in the affirmative, and the second in the negative.

Counsel for the First Party—Wilton. Agents—Curror & Buchanan, W.S.

Counsel for the Second Party—Chree, K.C.—W. T. Watson. Agents—Curror & Buchanan, W.S.

Counsel for the Third Parties—Macphail, K.C.—R. C. Henderson. Agents—Cowan & Dalmahey, W.S., and Cuthbert & Marchbank, S.S.C.

Wednesday, July 10.

FIRST DIVISION.

[Lord Hunter, Ordinary.]

ROBERTS & COOPER, LIMITED v. CHRISTIAN SALVESEN & COMPANY AND OTHERS.

Contract — Sale — Ship — Concluded Contract — Homologation — Clause Added by Sellers after Written Contract Signed by Buyers.

In negotiations for the sale of a ship the sellers, while prepared to deliver the ship with Lloyd's 100 A1 class maintained, were unwilling to have her dry docked to be examined, and made it clear that if the ship had to be dry docked elsewhere than at Leith full payment must be made before the ship left Leith. The buyers were anxious that the vessel be dry docked for examination before they accepted her. The written contract was framed and sent to the buyers for signature. After being signed by them the contract was sent to the sellers, who added before their signature a clause to the effect that if there was no dry dock available at Leith immediately on the steamer's discharge the buyers were to take delivery there and pay the price. *Circumstances* in which held that the purchasers by their subsequent actings must be held to have abandoned any right to plead that the addition of the added clause excluded *consensus in idem*.

Opinion per the Lord President that the pursuers were bound to accept the added clause, as it really expressed the bargain of the parties.

Contract — Sale — Deposit — Ship — Clause of Forfeiture — Liquidate Damages or Penalty — Earnest.

In a contract for the sale of a ship it was provided that in the event of failure in the due payment of the purchase money of £30,000 by the purchasers, a deposit of £3000 made by the purchasers "shall be forfeited to the sole use of the vendors, and any deficiency [on a re-sale] between the amount realised and the amount due [under the contract] shall be borne by the purchasers, together with interest... and all expenses of such