of opinion that the subject of this competition, being the one-fourth which belonged to the late Mrs Burns of the fund *in medio* in the multiplepoinding, was heritable in the person of Mrs Burns, *quoad* the succession to her.

The entire fund, of which Mrs Burns had right to one-fourth, was, down to and after her death, unquestionably heritable *sua natura*, being the subject of a real burden. It constituted part of the heritable succession of the late Mr Orr, the father of Mrs Burns, and she aquired right to her fourth share of it by her elder brother, the heir-at-law, collating with her and the other younger children. Such was the position of the fund, and the nature of Mrs Burns' right to her share of it. The whole fund undoubtedly remained heritable *sua natura*, and Mrs Burns held a direct right to one-fourth of it in that state, although the formal title fell to be taken up by the heir-at-law, for the benefit of himself and the other next of kin with whom he had collated it. To that extent she held the benefit of the real burden, and she must have suffered the loss caused by a deficiency in the value of the subjects burdened if it had been necessary to have recourse to them in order to realise the fund. It does not appear to me that the fact that this right was obtained through collation, derogates from the rule of law that such a right is heritable as to the succession of the party holding it. Nor do I think that it can interfere with the heritable nature of the right, that in order to make it practically beneficial, the parties interested may require to realise it, and divide the proceeds. What they hold in the meantime, is, in my opinion, a direct right to the collated subject, though, in order to make it practically available, it may be necessary that it should be turned into money and divided. In the present case, there was no specialty in the mode in which collation was carried out which can be founded on as preventing the shares of the heritage acquired by the younger children from continuing to be heritage in their persons *quoad succession.*

2. I am of opinion that Mrs Burns' share descended to her heir of line.

I think this results from the peculiar nature of the right in the present case, which does not require or admit of seisine in the person of the creditor, or proprietor of the real right. It is therefore unnecessary to inquire whether the right of the next of kin to collated heritage is in any case conquest; or whether the substantial right is to be looked upon as taken by way of succession, though the formal title is originally in the heir, and can only be acquired from or through him. On this point I give no opinion.

Lord Mure concurred in the opinion of Lord Barcaple.

At advising—

Lord President—On the first question there is no difference of opinion, and I entirely concur in the answers returned by the consulted judges. I think the fund was undoubtedly heritable in the person of Mrs Burns, and went to her heir.

As to the other question, I am also of opinion, with all the consulted judges, that the subject descended to her heir of line. But, I think it right to say that my opinion as regards that matter rests on the grounds adopted by the majority of the consulted judges—*i.e.*, that it is not a feudal subject capable of infeftment, and therefore not one of those subjects which go to the heir of conquest. As to the other ground of judgment, that the right coming to the executor by collation is succession, I think that that is unsound in law, and I agree on that point with Lord Benholme, with whose opinion I entirely concur.

Lord Curriehill—I concur in the opinion of Lord Benholme.

Lord Deas—I concur. As regards collation, the only qualification I put on the opinions is, that I think it is a question of circumstances, and that what is collated is not necessarily heritable. Here I agree in the result of the opinions.

Lord Armillan—I agree with Lord Deas that the subject collated by the heir is not necessarily in every case heritable. It is possible that the proceedings may have gone on so far with a view to to sale and distribution as to change the character of the subject, and make it moveable by destination; but I agree with all the judges that here, looking to the state of progress which the collation had reached, there was no such change of character.

On the second question, I think that the subject goes to the heir of line, on the ground that it was not capable of being feudalised, and therefore not properly within the category of conquest, and therefore I agree with Lord Benholme.

Agent for Robert Orr—Wm. Milne, S.S.C.
Agents for W. S. Burns—Ferguson & Junner, W.S.
Agents for James Orr—Murray, Beith, & Murray, W.S.

Friday, January 24.

HANDYSIDE'S TRUSTEES *v.* SCOTT AND OTHERS.

Trust — Law-Agent — Trustee — Acquiescence. Circumstances in which the Court sustained charges for law agency by a trustee.

Handyside's Trustees brought an action of multiplepoinding, calling, among other parties interested in the fund *in medio*, William Scott, residing in Australia. On 24th May 1856 an interlocutor was pronounced in absence of Scott, approving of the fund *in medio*. Thereafter William Scott appeared, and lodged a note of objections to an accountant's report on the fund, but it was held that these objections were excluded by the interlocutor approving of the condescendence of the fund. He then brought an action to reduce that and another interlocutor. In this reduction he stated various objections, the principal of which were (1) that various sums of money had been paid to Mr Andrew Scott, one of the trustees, as law agent of the trust; and (2) that there had been a general mismanagement of the trust, causing loss to the beneficiaries.

The Lord Ordinary (Barcaple) sustained the first of these objections, holding that Mr Andrew Scott, being a trustee, was not entitled to charge for remuneration for business done by him as law agent of the trust, but only for outlay. In the note to his interlocutor the Lord Ordinary, referring to this objection, said—"The pursuer also objects to the sum of £177 or thereby, for business accounts incurred by the trusees to Mr A. Scott, as law-agent of the trust.

"The deed does not contain a power to appoint one of the trustees as law agent. The defenders justify the charge mainly upon the ground that the beneficiaries acquiesced in Mr Scott's acting as law agent for the trust. It is clear, from the correspondence of the truster's widow with Mr Scott, that she was aware he acted in that capacity, and neither she nor Mr H. G. Dickson, the agent whom she ultimately employed to act for her, ever objected to his doing so. The agents for the pursuer, on his getting an assignation to £300 of the arrears of the widow's annuity, also transacted with Mr Scott, as agent, without objection. The question is, Whether these facts constitute such acquiescence by the pursuer or his author as should exclude him from now taking the objection?

"If the Lord Ordinary could hold that the judgment in the case of *Ommaney* v. *Smith*, 16 D. 721, was to the effect that beneficiaries are barred from taking the objection where they have corresponded with the trustee on the understanding that he was acting as law agent for the trust in his professional capacity, he would consider it to apply to the present case. But though some parts of the report tend to such a construction, he is disposed to think that that is not the true import of the judgment. The party there taking the objection was, in the person of his wife, not only a special legatee, but also sole residuary legatee. It rather appears to the Lord Ordinary that the ground of judgment was that, in the special circumstances of that case, the residuary legatee, who had the sole interest in the matter, gave his virtual concurrence to the employment of the defender as law agent. The defender was sole executor of the testator. The husband of the residuary legatee appears to have intervened actively in the administration of the executry estate, and it was held that in doing so he gave his consent to the defender acting as agent. The Lord Ordinary thinks that this is different from the case of a beneficiary who does not interfere with the management of the trust, and against whom it can only be alleged that he has objected to one of the trustees acting as agent, when he may have had no reason to suppose that he would ever have an interest to take the objection. If mere *non repugnantia* is a bar to a beneficiary stating the objection, the rule against trustees making charges for agency will seldom receive effect.

"On these grounds the Lord Ordinary is of opinion that the objection must still receive effect. But Mr Scott is, of course, entitled to his outlay charged in the business accounts.

On the second objection the Lord Ordinary thought inquiry was necessary. "If it is to be held that at any time prior to 31st December 1854, the close of the period under consideration in this reduction, the trustees were acting contrary to their duty in continuing to hold the heritable property, other than the house in Montague Street, and to carry on the trust as they did, charging it with the expenses of management, and borrowing money from their factor at five per cent. to pay Mrs Handyside's annuity, that is a course of procedure which may have caused loss to the estate. If that shall prove to have been the case, the pursuer may have a good objection to the charges for expenses of management and interest on advances, which would otherwise have been unobjectionable. But at present there are not materials for determining that question. It must first be ascertained whether the course taken by the trustees has caused loss, and to what extent. The questions whether the trustees acted in violation of their duty by retaining the property unsold, and whether loss has ensued in consequence, are so intimately related that it does not seem proper to decide any point in regard to either of them until further investigation shall have taken place, if that is to be insisted on."

The trustees, defenders in the reduction, reclaimed.

HORN and GIFFORD for reclaimers.

SOLICITOR-GENERAL (MILLAR) and DUNCAN in reply.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders.

Agent for Reclaimers—Andrew Scott, W.S.

Agents for Respondents — Horne, Horne, & Lyell, W.S.

Friday, January 24.

SECOND DIVISION.

WATSON *v.* WILSON AND OTHERS (ALEXANDER'S TRUSTEES).

Adjudication in Implement—Conclusion of Summons. A creditor of a beneficiary entitled to the fee of certain heritable subjects vested in trustees adjudged these subjects in payment; *held* that adjudication in implement at his instance, conconcluding for an heritable and irredeemable conveyance from the trustees was competent.

Strachan v. *Whiteford*, M. "Adjudication" App. No. 7, commented on.

This was an action of adjudication in implement of a decree of adjudication in payment, dated 15th May 1866, obtained by the present pursuer against John Craik, grocer in Penicuik, the only surviving brother and nearest and lawful heir-at-law and of conquest of the deceased Joseph Craik, baker in Dunse, whereby certain heritable subjects in Dunse, to which Joseph Craig was entitled under the trust-disposition and settlement of Mrs Fanny Russell or Alexander, of date 5th August 1830, were adjudged to the pursuer for payment and satisfaction of a debt of £40 due by Joseph, and constituted against John Craik, as his heir, by decree of constitution dated 22d November 1865. The defenders were the trustees of Mrs Alexander, who, in consequence of the endurance of a liferent in the heritable subjects, had not denuded in favour of Joseph Craik. The liferenter died on 24th March 1865, predeceased by Joseph Craik, the fiar, who died intestate on 22d August 1863, and it was not disputed that John Craik, as Joseph's heir, was now in right of the fee. He had not, however, called upon the trustees to denude in his favour, and had allowed the decrees of constitution and adjudication in payment above-mentioned to pass against him in absence. He was not called, and did not appear in the present action. The conclusion of the summons was that the heritable subjects in Dunse, in which the trustees were infeft in virtue of a precept of sasine contained in Mrs Alexander's trust-disposition, "ought and should be adjudged from the defenders as trustees foresaid, and from all others having or pretending to have right thereto, and decerned and declared to pertain and belong to the pursuer and to her assignees and disponees, heritably and *irredeemably*, in implement and satisfaction to her of the said decree of adjudication obtained against the said John Craik as heir foresaid, and obligations therein contained." The pursuer