papers relating to properties not of very great value loose, such papers are very liable to be mislaid. I think the case is quite as strong as many in which we have held that changes of residence on the part of the agents who had charge of a paper might account for its disappearance. As to the tenor of the deed there can be no doubt if you assume there was a valid will, because the copy in process has been identified as being in the handwriting of one of Mr Dempster's clerks—not the writer of the deed but a different clerk—and that is spoken to by Mr Glen, who knew his handwriting. Well, then, unless we were to suppose that they also were parties to the hypothetical fraud, the copyist must have had either the original will or the draft from which it was extended before him when he made the copy. It is important to observe that this copy (whether made from the draft or not) is not a copy of an uncompleted deed; it contains a testing clause, and bears to have been signed by the testator.

I therefore hold that all the points necessary to be made out in an action of this kind are satisfactorily proved. Indeed, I cannot help being surprised that long after the death of all the parties to the preparation and execution of this will so much evidence should have been found as has been adduced to set up this document.

LORD KINNEAR—I think the case proved for the reasons already given, and I have nothing to add.

The LORD PRESIDENT—I am of the same opinion.

The Court pronounced this interlocutor—

"Having considered the cause with the adminicles produced and proof adduced . . . find the *casus amissionis* of the disposition and deed of settlement libelled proven, and the tenor thereof as libelled proven, and decern and declare accordingly in terms of the conclusions of the summons."

Counsel for the Pursuers—Guthrie, K.C.—Macmillan. Agents—Wallace & Begg, W.S.

Counsel for the Defender—Orr—Duncan Millar. Agents—Inglis, Orr, & Bruce, W.S.

Friday, November 25.

FIRST DIVISION.

FORREST'S TRUSTEES *v.* REID.

Succession—Vesting—Fee or Liferent—Provision of Income of Share to Daughter as Alimentary Provision with Power of Disposal of Capital by Revocable Deed—Direction to Trustees to Hold—Repugnancy.

In a trust-disposition and settlement a testator left and bequeathed the residue of his estate for behoof of all his children equally, and directed his trustees to pay over to each of his sons as soon as convenient after his death the share of the residue falling to him, and to hold the shares of the daughters during their respective lives, and on the death of each to pay her share to such person as she might appoint by any revocable deed executed by her after she attained 21, and failing such appointment to her own nearest heirs. He further directed his trustees to pay half-yearly the free income of the trust-estate to his children in proportion to the capital sum due to each, the shares of income of such as were in minority being applied for their maintenance and education to such extent and in such way as the trustees might see best, and the shares of income of daughters after they attained majority being payable to them as alimentary provisions on their receipts alone, but declaring that in the event of a daughter becoming engaged to be married his trustees should have power to encroach to a certain extent on the share of capital of residue of which she was enjoying the income in order to provide her with an outfit.

Held that the daughters who survived the testator and attained majority were not vested with a full right of fee, but that their rights were limited to a liferent with a power to test on the capital.

Greenlees' Trustees v. *Greenlees*, December 4, 1904, 22 R. 136, 32 S.L.R. 106, *distinguished.*

Charles Laing Forrest, merchant, Leith, died upon the 29th July 1903 leaving a trust-disposition and settlement dated 30th December 1899, with codicils dated 18th March and 25th June 1903. He was survived by a widow, four sons and two daughters of his first marriage, three daughters of his second marriage, and a son of his third and last marriage. Another son of his first marriage had gone abroad and had not been heard of for many years.

By his trust-disposition and settlement the testator, *inter alia*, provided:—"(*Sixth*) I leave and bequeath the residue of my estate, means, and effects, heritable and moveable, for behoof of all my children equally, and direct my trustees to pay over to each of my sons, as soon as conveniently may be after my death, the share of said residue falling to him; declaring that notwithstanding the direction herein contained, full power is hereby given to my said trustees, if they shall think it necessary or expedient, to retain in their hands the whole or any part of the capital falling to any one or more of my said sons, and merely to pay the income thereof to the son or sons whose capital is so retained during their respective lives or so long as my trustees may think fit, and the capital so retained and the income thereof to be paid as aforesaid shall be alimentary, and shall not be affectable by the debts or deeds of the son or sons of whose share or shares it is the income, nor by the diligence of their creditors, nor shall it be assignable except by a revocable deed *mortis causa:* And my trus-

tees shall hold the shares of my daughters during their respective lives, and on the death of each shall pay her share to such person or persons as she may appoint by any revocable deed executed by her after she has attained the age of 21 years, and failing such appointment, then to her own nearest heirs: And my trustees shall pay half-yearly at Whitsunday and Martinmas the free income of the trust-estate to my children in proportion to the capital sum which may be due to each, the shares of income of such as are in minority being applied for their maintenance and education to such extent and in such way as my trustees may see best, and the shares of income of daughters after they attain majority being payable to themselves as alimentary provisions on their own receipts alone: But declaring that in the event of any one or more of my daughters being engaged to be married, my trustees shall have power to encroach on the share or shares of capital of residue of which such daughter may be receiving the income to an extent not exceeding £200 for each daughter who may be so engaged to provide her with an outfit on her marriage: And I declare that the issue of such of my said children as may have predeceased leaving issue shall succeed to the share to which their parent would have been entitled if in life." . . .

Upon April 28th 1904 a special case was presented to the Court in which the trustees under the trust-disposition and settlement were the first parties, and Mrs Margaret Smith Lindsay Sinclair Forrest or Reid and Clara Louise Forrest, the daughters of the testator's first marriage, being the only daughters who had at that time attained majority, were the second parties. The first parties maintained that under the sixth purpose of Mr Forrest's trust-disposition and settlement the right conferred upon his daughters with regard to their shares of residue consisted merely of an alimentary liferent coupled with a power to test upon the capital of their shares, and that as trustees they were bound to retain the said shares for the purposes (1) of maintaining the alimentary character of the liferent, and (2) of preserving the capital for those who might be entitled thereto upon the death of the liferenters. The second parties maintained that the trust-disposition and settlement conferred on them a vested right to the fee of the shares of residue bequeathed to them, and that they were entitled to immediate payment of their respective shares.

The parties submitted, *inter alia*, the following question of law for the opinion and judgment of the Court, viz.—"(1) Under Mr Forrest's trust-disposition and settlement are the second parties vested with a full right of fee in the shares of residue bequeathed to them? or Are their rights limited to a right of liferent coupled with a power to test on the capital of their shares?"

Argued for the second parties — The daughters here had a fee and were entitled to immediate payment. The sons undoubtedly had a fee, and similar terms, *e.g.* share, had been used of both sons and daughters' interests. Any restrictions the testator might have attempted to affix which were repugnant to a fee fell to be disregarded—*Greenlees' Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136, 32 S.L.R. 106, was exactly in point.

Argued for the first parties—No fee was conferred upon the daughters but only a liferent, and provision was made for the final disposal of the fee elsewhere. *Greenlees' Trustees* was to be distinguished, because in that case the fee was not finally disposed of. Even if a fee were conferred, the trust must hold in order to give effect to the alimentary provision of the liferent —*Hughes* v. *Edwardes*, July 25, 1892, 19 R. (H.L.) 33, 29 S.L.R. 911.

LORD PRESIDENT—The question which we have to decide is this—What was the nature of the right conferred upon the daughters by the testator's trust-disposition and settlement? By the sixth purpose of his testamentary settlement he bequeathed the residue for behoof of all his children equally in general terms, not stating the quality of gift to the daughters, but he afterwards stated his intention with regard to them in detail. After dealing with the case of the sons he gave the following direction with respect to the shares of the daughters—"My trustees shall hold the shares of my daughters during their respective lives." This is an imperative direction to the trustees to hold the daughters' shares during their lives. It is quite inconsistent with payment being made to them during their lives. He did not give them a fee, and the gift is in sharp contrast to the gift made in favour of the sons. He, however, directed that on the death of each daughter her share should be paid "to such person or persons as she may appoint by any revocable deed." This confirms the view that no right of fee was given to the daughters. If a right of fee had been given to them, it would not have been necessary to direct that the fee should be paid to their appointees. The direction does not stop there, but there is a destination-over, by which, "failing such appointment," each daughter's share is to be paid "to her own nearest heirs." The daughters' heirs do not take by succession to them, but as *personæ prædilectæ* to whom the testator gives an independent right. There is a further provision that "the shares of income of daughters after they attain majority" shall be "payable to themselves as alimentary provisions." This again emphasises the fact that they have no right of fee; they are only to receive the income of what are conveniently called their shares, and the income is declared to be alimentary. The testator further provides that "in the event of any one or more of my daughters being engaged to be married my trustees shall have power to encroach on the share or shares of capital of residue of which such daughter may be receiving the income, to an extent not exceeding £200 for each daughter who may be so engaged, to provide her with an outfit on her marriage." The testator does not say "the share belonging to such daughter,"

but the share of capital "of which such daughter may be receiving the income"—that is to say, of which she is the liferentrix. Every line of the deed shows that the testator did not intend that the daughters should have any right to the fee, but only a liferent with a power of disposal "by revocable deed."

If your Lordships concur in this view, the first alternative of the first question will be answered in the negative, and the second alternative in the affirmative.

LORD ADAM—I am of the same opinion. It is the intention of the truster as expressed in the deed that we have to give effect to, and for that reason the construction of one testament serves to throw very little light on that of another. Still we must observe the rules of construction laid down in previous judgments. What, then, was the intention of the truster in this case? In executing a settlement a truster may give a fee and then try to limit and restrict it, but such limitation and restriction will be of no effect if in fact he has given a fee. The question therefore here is, whether the testator has given a fee, for if so the restriction would be of no avail. The case resembles that of *Greenlees' Trustees*, but differs from it in that there is no direction "to pay" to the daughters. The testator says—"I leave and bequeath the residue of my estate . . . for behoof of my children equally, and direct my trustees to pay over to each of my sons." . . . While that is a distinct direction to pay to sons, there is no such direction in the case of daughters. Then the testator goes on to direct his trustees "to hold" the daughters' shares during their life, and to pay in a certain way on their death. We have therefore a direction to pay, but only when the daughters are dead. In this we have a clear direction as to the final disposal of the fee, and not as in *Greenlees'* case. The trustees here are to pay the income to the daughters and the fee to their testamentary or natural heirs. I think there can be no doubt that in this case there was no absolute fee given to daughters on the death of the testator, but that the fee was to be held until their death, and then to be disposed of as they should direct, and failing direction then go to their heirs.

LORD M'LAREN—This case touches, or at least comes very near to, a question that has been frequently commented on, and as to which I am not sure that the highest authorities are agreed — I mean as to the effect of a gift taking the form of an unqualified power to the grantee to dispose when there is superadded a provision as to what is to be done in the event of the power not being exercised. Observations as to this are to be found in the case of *Morris* v. *Tennant* (27 Scot. Jur. 546) by Lord St Leonards, and in the case of *Pursell* v. *Elder* (3 Macph. (H.L.) 68) by Lord Westbury. In *Morris* v. *Tennant* Lord St Leonards had to deal with a liferent with power to dispose either by will or by deed, and a destination-over in the event of failure to exercise the power. So the power there was a most general one, and the judgment of the House supported by Lord St Leonards was to the effect that a liferent with a power of disposal, however general, cannot be construed as a fee if there is a destination-over in the event of failure to exercise it. But in the case of *Pursell* v. *Elder* Lord Westbury said that to give a person an estate "with words indicative of the intention of the testator that he should have the absolute *jus disponendi*, then in any case these words are to be taken as indicating an intention that he should be the absolute owner." Lord Westbury does not directly deal with the case of a destination-over, perhaps because he was not quite in agreement with Lord St Leonards as to the effect of it.

In the present case it is hardly necessary to solve this troublesome question, for here we not only have a destination-over to heirs, but the power itself is not an unqualified power. It is a restricted power to the grantee to dispose of her share after her death by any revocable deed. This may include some deeds that are not strictly testamentary, but practically it means that what is here given is only a power to affect the succession to the estate, and not a power to disturb the trustees in the possession of it during the grantees' lives. The object of this limitation was no doubt that the income of the estate should thereby be secured to the beneficiaries. I have no doubt that under this instrument the daughters take only a liferent with a power to dispose *mortis causa*. I do not comment on the language of the disposition, because I agree with all that your Lordship and Lord Adam have said with regard to it.

LORD KINNEAR was absent.

The Court answered the first alternative of the first question in the negative and the second alternative in the affirmative.

Counsel for the First Parties—Constable. Agents—J. & J. Turnbull, W.S.

Counsel for the Second Parties—Morton. Agents—Skene, Edwards, & Garson, W.S.

Wednesday, November 30.

FIRST DIVISION.

STEWART *v.* CHALMERS.

Trust—Removal of Trustee—Indefensible Conduct of Trustee—Assumption of New Trustees—Objections to Sole Trustee.

Where a trustee, being a solicitor, demanded from his sole co-trustee, who was also the law-agent of the trust, one half of the fees of the agency, and upon refusal declined, without giving any reason, to approve of an investment of the trust funds, and thereafter refused to assume new trustees or to resign, the Court *granted* the prayer of a petition presented by the beneficiaries for his removal, and continued the cause until the sole remaining trustee had lodged in process a deed