that would involve still further cost, and accordingly I propose that we should modify them at two guineas.

LORD ADAM—I understand that the interlocutor in this case finds the pursuer entitled to "the expenses of the stated case." I also understand that the Auditor has not considered the particular items in question separately, but has struck out all the charges connected with the preparation of the stated case. I agree with your Lordship that there are certain expenses incurred in preparing the stated case which are necessary and legitimate, such as the cost of the application to the Sheriff to state a case, and the adjustment of the draft. I also agree that, so far as these necessary expenses are concerned, the successful party is entitled, under such an award as the present, to recover them from his opponent. I do not think that this case is ruled by *M'Govern* v. *Cooper & Co.* In that case the respondent was found entitled to the expenses, not of the "stated case," but of "the appeal," and this included only the expense of the proceedings after the action had been brought into the Court of Session, and not expenses incurred prior to that date. Then it is said that the charges in question are covered by the fee which has been allowed for taking instructions, and which is included in the account of expenses in the Court of Session. I do not think that this is meant to cover the expenses of the proceedings in the Sheriff Court connected with the preparation of the case. As regards the particular items in this account, they have not been, as I have said, separately considered by the Auditor, and I think that the amount charged is too large. I agree that in this case the amount should be modified to two guineas.

LORD KYLLACHY concurred.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the Auditor's report on the respondent's account of expenses and note of objections thereto for the respondent, Sustain the objections by adding the sum of £2, 2s. to the amount of £27, 14s. 6d. allowed by the Auditor: *Quoad ultra* approve of the Auditor's report, and decern against the appellants for payment to the respondent of the sum of £29, 16s. 6d. of expenses: Further, find the respondent entitled to the expenses of the discussion, which modify at the sum of £2, 2s., for which also decern."

Counsel for the Appellants—Salvesen, K.C.—Jameson. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Respondent—Younger—W. T. Watson. Agents—Beveridge, Sutherland & Smith, S.S.C.

Tuesday, January 31.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

GRIFFITH'S JUDICIAL FACTOR *v.* BRATHWAITE.

Succession — Testament — Foreign — Testament Executed in Foreign Country — Words Habile to Dispose of Heritage in Scotland—"Effects."

A testament, executed in British Guiana by a person resident there who was proprietor of heritage in Scotland, disposed of the testator's "effects in and out of the colony." *Held* (1) that the testament, being in ordinary language and containing no technical words, fell to be construed without the necessity for inquiry as to its construction by the law of British Guiana; and (2) that the terms of the testament were not effectual to convey the heritable property in Scotland belonging to the testator.

William Martin Griffith, a native of British Guiana, died upon 9th July 1903, leaving a will executed in British Guiana, and dated 11th August 1891. The will was in the following terms:—

"Last Will and Testament—Colony of British Guiana.

"In the name of God. Amen.—Be it known that I, William Martin Griffith, residing in the city of Georgetown, county of Demerara, and Colony above named, being about to leave the Colony, and in order to prevent any doubts or disputes arising after my demise as to the disposition of my effects in and out of the Colony, do make, publish, and declare this to be my last will and testament, hereby expressly revoking all former wills and codicils, and I now order as follows, viz.—

"*Firstly.* I request that all my funeral expenses and just and lawful debts be paid as soon after my demise as possible.

"*Secondly.* I will and bequeath to my brother John Henry Brathwaite, my sister Mary Rose Beete (born Lynch), and my unborn babe (mother Blanche Ezepha Chapman), all my effects, to be divided equally between the three as soon as possible after my demise.

"In the event of the first (my brother) dying, his portion must go to his present wife and her heirs.

"In the event of the second (my sister) dying, her portion must go to her children; and in the event of my unborn babe dying, its portion must go to its mother, above named.

"*Thirdly.* I nominate, constitute, and appoint John Henry Brathwaite and M'Lean Ogle as executors, with power of assumption, substitution, and surrogation."

Griffith, who was illegitimate, came to Scotland in 1891, and spent the last years of his life in Scotland. He was possessed of heritable property in Glasgow valued at £2000.

William Gair Chrystal, chartered accountant, Glasgow, having upon the 26th August 1903 been appointed judicial factor on the deceased's estate, raised a multiplepoinding in which the fund *in medio* was the heritable property of the deceased in Glasgow and the rents thereof.

The Lord Advocate, representing the Crown as *ultimus hæres*, claimed the fund *in medio*, and averred—"The will of the deceased William Martin Griffith was not habile to dispose of, and did not dispose of, the deceased's heritage situated in Scotland. The succession to the deceased's Scottish heritage falls to be determined according to the law of Scotland, and the will of the deceased falls to be construed according to the law of Scotland, in the same way as if it had been a will executed in Scotland in Scottish form by a Scotsman. The said William Martin Griffith left no heir, and he died intestate *quoad* his Scottish heritage."

The deceased's executors Brathwaite and and Ogle also claimed the fund *in medio*, and averred—"(3) The will of the said William Martin Griffith is effectual to carry heritage in Scotland. It is effectual to dispose of real estate in British Guiana, where it was made. The document falls to be construed according to the law of British Guiana. The said will purports to dispose of the testator's whole 'effects in and out of the colony' of British Guiana. According to the law of the said colony the term 'effects' includes the whole estate, whether real or personal, and wheresoever situated, belonging to the testator. By that law the will validly disposes of the whole estate, heritable and moveable, which belonged to the deceased. The averments of the other claimant, in so far as not coinciding herewith, are denied."

Upon the 17th June 1904 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor repelling the executors' condescendence and claim, and ranking and preferring the Lord Advocate to the fund *in medio*.

Opinion.—. . . "The fund *in medio* consists of the heritable estate in Glasgow, together with the accruing rents, and the competition is between the executors under the will and the Crown as *ultimus hæres*, Mr Griffith having been illegitimate. The executors maintain that the will ought to be construed according to the law of British Guiana, and that by that law the term 'effects' includes the whole estate, whether real or personal and wheresoever situated, belonging to the testator. The Lord Advocate, on the other hand, maintains that the will falls to be construed according to the law of Scotland, as the law which regulates all questions affecting the succession to the testator's Scottish heritage.

"Now, the question whether a foreign will was intended to pass and does pass heritable estate in Scotland is, primarily at all events, a question of Scots law. This depends not only on a well settled rule of international law but upon section 20 of the Titles to Land Act of 1868, by which it was for the first time made possible to settle the succession to heritable subjects in Scotland by testament; for the first requirement of any such testament is that it shall 'purport to convey or bequeath' Scottish lands. Similarly, in a later part of the section, which substitutes for the old words of style in a conveyance of Scottish lands such words as would be sufficient to confer upon an executor a right to moveables, it is provided that the words must be used 'with reference to such lands.' If this be a question to be determined by the law of Scotland there can be no doubt of the answer, for it has been twice decided —*Pitcairn*, 8 Macph. 604, and *Edmond*, 11 Macph. 348—that the word 'effects' is not sufficient to carry heritage.

"But then the executors maintain that the thing to be got at is the intention of a testator who made his will in a foreign country, and they offer to prove that by the law of that foreign country the term 'effects' would include the testator's whole estate of every description. They also point to the fact that the term 'effects' was followed by the words 'in and out of the colony,' which, they say, must have been intended to cover real estate, inasmuch as *mobilia situm non habent*. I am not sure whether this argument is used as strengthening the likelihood that the law of British Guiana would pronounce the will as habile to carry heritage, or whether it is urged as a reason why even a Scottish court should declare it to have that effect. If it be used for the latter purpose, then I must decline to ascribe so important an effect to the words 'in and out of the colony.' While it may be true in a legal sense that personal estate has no locality, there is a popular and very real sense in which it has, and that is the sense in which the testator must be understood as having described his 'effects' as both in and out of the colony. I cannot imagine any testator who really wished to affect his real estate describing it in so obscure a fashion.

"*Studd* v. *Cook*, 10 R. (H.L.) 53, was the only case on which the executors were able to found as at all supporting the strange proposition that a Scottish court is not to decide for itself the question whether Scottish land is carried by a foreign will, but is to resort to the courts of the country where the will was executed to determine that question, even although the words to be construed are simple English words and not terms of art. But *Studd* v. *Cook*, when properly examined, affords no countenance to such a proposition. The will under construction in that case purported to convey Scottish lands in express terms about which there could be no dubiety, and the only purpose for which English law was invoked was to interpret certain technical words of English conveyancing, in order that they might be translated into the nearest analogue afforded by the law of Scotland. That is all that Lord Watson really meant when he spoke (at p. 61) of the Legislature having intended that the intention of the testator should be 'gathered from the whole context of the will interpreted by the rules of English law.' Indeed, his Lordship treated the whole question as turning on the pro-

visions of section 20 of the Titles to Land Act, and one of the curious results of the executor's argument would be that the construction of an Act relating to Scotland should be relegated to the courts of a foreign country. I quite admit that if this will had been expressed in a foreign language, or had used technical words unintelligible in Scotland, it would have been competent and necessary to resort to the *lex loci actus* for their interpretation. But there are no such words in this will. The primary question is whether it 'purports to convey or bequeath lands' in Scotland, and that is a question for the courts of Scotland, and for no other.

"I shall therefore sustain the claim of the Crown and repel the claim of the executors."

The executors reclaimed, and argued—There should be a proof or an inquiry into the averment that by the law of British Guiana the will validly disposed of the deceased's whole estate, heritable and moveable. The Lord Ordinary had erred in confusing two questions—(1) whether the will carried Scottish heritage; and (2) whether it was intended to do so. The second question was to be decided by the testator's intention and by the law of British Guiana, that being the system of law which it was to be presumed the testator had in his mind—*Hamlyn & Company* v. *Talisker Distillery*, May 10, 1894, L.R. 1894, A.C. 202, 21 R. (H.L.) 21, 31 S.L.R. 642. That was necessary in order that the will might have the same meaning everywhere. The first question would still remain over for the decision of the Scottish courts. The intention of the testator was to be gathered through the law of the domicile, which here was the same as that of the place where the will was made, for where the *lex domicilii* and the *lex loci rei sitæ* differed in the meaning to be put on any term used, it was the former which ruled. And that was so although the language of the will in question was not technical—Storey's Conflict of Laws (8th ed.), pp. 663-5 and 671, secs. 479*a* and 479*h*; Burge's Commentaries, vol. ii, 857-8, vol. iv, 590-1; Philimore's International Law, 3rd ed. vol. iv, 711 and 712; *Trotter* v. *Trotter*, June 10, 1829, 3 W. & S. 407, at p. 414. This proposition was admitted if the term in question was in a foreign language; it was equally applicable if not—*Di Sora* v. *Phillips*, 1863, 10 Clark & Finelly H. of L. Cases, 624, at pp. 638-9. Inquiry was therefore necessary.

Argued for the Lord Advocate, claimant and respondent—The will must be interpreted by the law of Scotland—M'Laren, vol. i, pp. 31-32—and "effects" would not carry heritage in Scotland. It was said to have been the testator's intention to convey his heritage, but there was no expression of such intention and no words in the will applicable to heritage. The 1868 Act, section 20, had consequently no bearing, for while it abolished the necessity of using words of style it left it still necessary to use words to describe what was to be conveyed. There was nothing here to show that heritage was in the testator's mind, *e.g.*, no power given to sell, and the bequest was to executors only, not to trustees—*Grant* v. *Morren*, February 22, 1893, 20 R. 404, 30 S.L.R. 447; *Urquhart* v. *Dewar*, June 13, 1879, 6 R. 1026, 16 S.L.R. 602; *Campbell* v. *Campbell*, November 30, 1887, 15 R. 103, 25 S.L.R. 97. Wills might be construed by means of the *lex domicilii* or *lex actus*, but the question whether heritage was carried was ruled by the *lex situs*—Gillespie's Bar's Private International Law, 2nd ed., p. 830: *Yeats* v. *Thomson*, June 5, 1835, 1 S. & M'L. 795, at p. 837. The Court of the *situs* was entitled to construe for itself ordinary words—*Studd* v. *Cook*, May 8, 1883, 10 R. (H.L.) 53, 20 S.L.R. 566; *Thomson's Trustees* v. *Alexander*, December 18, 1857, 14 D. 217. The passage in Storey quoted by the reclaimers was much too widely stated and was not supported by the authorities cited, while in *Trotter's* case the law of the *situs* was adopted whenever heritage was dealt with.

At advising—

LORD M'LAREN—This case comes before us on a reclaiming note against an interlocutor of Lord Stormonth Darling, and it relates to the disposal of the heritable estate in Scotland of the late William Martin Griffith, who was a native of British Guiana, but had latterly resided for some time in Scotland. He left a will, executed in British Guiana, the subject of the argument here, by which he appointed executors, but it was found advisable to appoint a judicial factor for the administration of the executry estate, and he has raised this action of multiplepoinding. The claimants are the executors appointed under the will, who claim the whole estate of the deceased, and the Lord Advocate, who appears for the Crown as *ultimus hæres*, and claims the heritable estate in Scotland as not effectually disposed of by the terms of the will. It appears that Mr Griffith was illegitimate, and failing lawful issue any estate undisposed of by him would fall to the Crown as *ultimus hæres*. The will itself is brief and clear in its terms, and is expressed in ordinary language. In it the testator sets forth that, being about to leave the colony, he has made this will "in order to prevent any doubts or disputes arising after my demise as to the disposition of my effects in and out of the colony." There is nothing in the will in the nature of a conveyance to executors, but I assume that this was not necessary. Then he proceeds to dispose of his "effects" to certain beneficiaries, and the will concludes with a clause of substitution, in the event of the death of any of the beneficiaries, and a nomination of executors.

I remark on the use of the word "effects" that it appears to have been deliberately chosen, for it is the only word employed both in the narrative clause and in the clause disposing of the testator's property, and what we have to consider is whether a will, expressed as this one is in ordinary language and purporting to devise "effects," is available as a disposition of heritable estate in Scotland. It was alleged for the executors that by the law of Guiana a will

so expressed is a valid disposition of the whole estate, heritable and moveable, of the testator, and we were asked to ascertain the law of the colony for the purpose of determining the meaning of the will. In considering the decisions relating to the effect of foreign law with respect to testamentary bequests it is necessary to keep in mind that this branch of law, like some others, must be considered historically, and note must be taken of the steps in the development of the principles that have come to be established. It is impossible to solve a question of this kind by referring only to the older decisions or by quoting isolated expressions from the works of the text writers. The law as finally formulated may be taken to be in terms of the judgment in the case of *The Duchess di Sora* v. *Phillips*, and that exposition of it has been recognised as sound both in the House of Lords and in the Judicial Committee. It is to the effect that it is always for the court of construction or administration to interpret a will expressed in ordinary language. If the will is not expressed altogether in ordinary language, then the court may, if necessary, have a translation of the will, and may have evidence or an opinion explanatory of any terms of art in it, and of any rules of foreign law that may take effect upon it. With such assistance it is the function of the court to construe the will for itself. The only point on which the parties are at variance is as to the meaning of the word "effects." Now, I am of opinion that, regarded as a question of intention, a will that disposes of a man's "effects" is not a disposition or devise of his heritable property. No one in correspondence or in conversation would ever describe landed property as "effects." No one who had bought a house would say "I have purchased some effects in Princes Street." Now, in construing this will we have to follow no other rule than to give to the testator's words their ordinary meaning, and to interpret this will according to its grammatical significance and according to the ordinary use of the words employed. Therefore if the will is to be construed by this Court, I am of opinion that it is not expressed in terms which are effectual to act as a conveyance of heritable property in Scotland.

We have, however, to consider whether there are any relevant averments as to the effect of foreign law which would have to be ascertained before we could proceed to construe the will. It is to be noted that there is no averment that the word "effects" has, according to the jurisprudence of this British colony, any technical meaning, nor is it said that there is any rule of law of the colony which would have the effect of making a will which only purports to dispose of moveable estate effective to convey heritable estate in Scotland. As to the first of these, I do not suppose that the word "effects" is a word of technical meaning under any system of law, but that point does not require to be considered, as there is not here any relevant averment to that effect. As to the second point, I do not think that in dealing with estate within the territory we are at liberty to give effect to a rule of foreign law so as to include within the provisions of a will more than appears on the face of it to be dealt with. The result of all the decisions is to the effect that for the protection of heritage in this country a foreign will, however clearly expressed, is not operative to prevent the *lex situs* from deciding whether heritable estate has or has not been validly conveyed. I do not find here any sufficiently definite averment that a will which on the face of it is only valid to carry personalty in this country is really by the operation of foreign law effectual as a conveyance of heritage. The averments are altogether too vague to entitle us to institute an inquiry for our guidance in construing this will, and it is contrary to settled practice to put the interpretation of a will affecting heritage in Scotland into the hands of a foreign expert, which is practically what we are asked to do in this case.

LORD KINNEAR—I agree, and for the reasons given by Lord M'Laren. I think, indeed, that there was force in Mr Campbell's argument that the consideration to which the Lord Ordinary had attached so much weight—to wit, that it is for this Court to construe the Titles to Lands Consolidation Act of 1868—is not conclusive, because all that that statute requires is, that in order to bequeath land words of bequest must be used in reference to such lands "which would if used in a will or testament with reference to moveables be sufficient" to convey such moveables, and therefore the consequence of the statute, which it is said that it is for us alone to construe, is simply that we must go on to construe the terms of a will executed in British Guiana. I therefore assent to the argument that the Conveyancing Act of 1868 is out of the way.

I must also assent to the proposition which was stated by the reclaimer's counsel to the effect that when a will is executed in a foreign country by a person domiciled in that country it must be interpreted according to the law of that country. It was so laid down by the Lord Chancellor in the case of *Trotter* v. *Trotter*, 3 W. & S. 407, at p. 414, and I think we must accept it as a general rule.

But then also, I consider, as was pointed out by Lord M'Laren, that when a will which is written in ordinary language contains no technical words, and is not subject to any technical rule of construction by the law of the place where it is made, the intention of the testator must be gathered from the instrument by the judge of any court conversant with the language in which the will is written. We cannot refuse to construe a will written in ordinary English language or remit the question of its interpretation to a foreign Court or to foreign experts. It was decided in *Thomson's Trustees* v. *Alexander*, 14 D. 217, that as soon as it is ascertained that the will is written in ordinary language the Court must take the construction upon itself, and

is not to defer to the opinion of foreign experts. It is true that in that case the Court first ascertained by reference to English counsel that there was no technical rule of English law to govern the interpretation of the will; but then every reference to foreign counsel or to an English court necessarily involves a preliminary decision that there is matter which falls to be determined by foreign law and is not capable of construction in this Court. This was clearly the case in *Trotter* v. *Trotter* (3 W. & S. 407), on which the reclaimers' counsel relied. The question was as to the sufficiency of words of conveyance in an Indian will to carry real property in India, and Lord Cunninghame says—"No one who looks at the case could doubt that the legal construction of Colonel Trotter's will was unintelligible to any but an English lawyer. It was as purely a technical question of English law as ever was submitted to a court." I agree with Lord M'Laren that if there had been in this case any relevant averment of any technical rule of construction peculiar to the law of British Guiana inquiry might have been necessary, but nothing of that kind is suggested. I cannot agree with the reclaimers' argument that the word effects has a technical meaning peculiar to the law of Scotland or that any such technical meaning has been recognised by the decision in this Court. The word is one of ordinary language and has been construed in the decisions according to its ordinary meaning. I agree with the Lord Ordinary that this will is expressed in ordinary language, and that there is no relevant averment that it contains any technical terms or that it must be construed in accordance with any technical canon of construction peculiar to the place where it was made. I think we are bound to construe the will according to its plain meaning, and so construing it I agree with the Lord Ordinary and Lord M'Laren.

LORD ADAM concurred.

The Court adhered.

Counsel for the Claimants and Reclaimers—William Campbell, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Claimant and Respondent—The Solicitor-General (Dundas, K.C.)—C. N. Johnston, K.C.—Howden. Agent—W. G. L. Winchester, W.S.

Counsel for the Real Raiser—J. A Christie. Agents—St Clair Swanson & Manson, W.S.

Friday, February 3.

FIRST DIVISION.

HEPBURN, PETITIONER.

Burgh — Burgh Register of Sasines — Authentication of Minutes in Minute Book of Burgh Register of Sasines—Town-Clerk.

A town-clerk on entering upon the duties of his office found that certain minutes in the minute book of the burgh register of sasines had not been authenticated by the signature of his predecesssors. He presented a petition in which he asked authority to authenticate and subscribe all such unsigned minutes. The Court *granted* the prayer of the petition.

John Scrymgeour Hepburn was appointed town-clerk of Rothesay upon the 7th December 1903. On entering upon the duties of his office he discovered that the minute of a deed presented for registration in the burgh register of sasines on the 19th March 1896, and all the minutes of deeds presented for registration between and including 1st April 1896 and 7th February 1901, and between and including 3rd March 1902 and 10th March 1902, although entered in the minute books, had not been authenticated by the signature of the town-clerk for the time being, as it was his duty to have done. The deeds so unauthenticated numbered 434.

Hepburn presented a petition in which he asked the Court "to authorise the petitioner to authenticate and subscribe the minutes entered in the minute books of the burgh register of sasines of the royal burgh of Rothesay on the 19th day of March 1896, and between and including the 1st day of April 1896, and the 7th day of February 1901, and between and including the 3rd day of March 1902, and the 10th day of March 1902, and any other minute or minutes which may hereafter be discovered not to have been subscribed by the town-clerk for the time being, to the same effect as the said town-clerk for the time being might have done himself; and to authorise the petitioner to record this petition, and any warrant following thereon, in the said burgh register of sasines."

The Court granted the prayer of the petition.

Counsel for the Petitioner — Morton. Agents—Scott & Glover, W.S.

Tuesday, February 14.

SECOND DIVISION.

[Sheriff-Substitute at Hamilton.

SNEDDON *v.* GLASGOW COAL COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (2)—*Injury Attributable to Serious and Wilful Misconduct — Meaning of "Attributable."*

A stated case in an appeal under the Workmen's Compensation Act 1897 set forth that four miners, in direct contravention of the regulations of the mine, were riding upon the top of loaded hutches in a tunnel of the mine; that in so doing they were guilty of serious and wilful misconduct; and that one of