him, in which she obtained interim decree for a sum of £20 to account of expenses. Decree of divorce was subsequently pronounced in her favour, and decree for £33, 7s. 2d., being the balance of the taxed amount of the expenses of her action was granted in favour of Messrs Gordon, Petrie, & Shand, S.S.C., as agents disbursers. The total amount of expenses in which the petitioner was thus found liable with dues of extract was £56, 2s. 2d. Arrestments were laid on by the petitioner's wife and by Messrs Gordon, Petrie, & Shand against the petitioner, in the hands of his father's trustees, whereby it was sought to attach the income payable to the petitioner as stated above.

Answers were lodged in the present petition by Mrs Thomson and by Messrs Gordon, Petrie, & Shand.

At the date of the petition the petitioner, who had no means of subsistence other than the provision referred to, was married to a second wife, by whom he had one child. There were four children of the first marriage. It was stated at the bar that the petitioner was about 60 years of age.

At the calling of the petition in Summar Roll, argued for the petitioner—The alimentary provision was of reasonable amount and the arrestments should therefore be recalled —*Livingstone* v. *Livingstone*, November 5, 1886, 14 R. 43, 24 S.L.R. 30; *Dick* v. *Russell*, December 24, 1887, 15 R. 261, 25 S.L.R. 281; *Blackwood* v. *Boyd*, 1677, M. 10,390. The provision could not be cut down without inquiry, and the onus was on the respondents to show that it was excessive.

Argued for the respondents—The onus was on the petitioner to justify the amount of the provision in question, which could not be protected from creditors so far as beyond reasonable aliment—*Haydon* v. *Forrest's Trustees*, 3 S.L.T. 286; *A B* v. *Sloan*, June 30, 1824, 3 S. 133 (195); *Leslie* v. *Cumming & Spence*, February 20, 1900, 2 F. 643, 37 S.L.R. 444; *Hurst* v. *Beveridge*, March 3, 1900, 2 F. 702, 37 S.L.R. 501, Bell's Com. i. 125. £1 a-week had been fixed by statute as a reasonable allowance for a working man and the petitioner required little more—Wages Arrestment Limitation (Scotland) Act 1870 (32 and 33 Vict. c. 63).

Without delivering opinions the Court (LORDS KYLLACHY, KINCAIRNEY, and STORMONTH-DARLING, the LORD JUSTICE-CLERK absent) pronounced an interlocutor in the following terms:—

> "Recall the arrestment to the extent of £150 per annum, to which sum the petitioner is entitled as a suitable alimentary provision for him out of the annual income derived from the trust estate held for behoof of the petitioner in liferent by the trustees of the deceased Alexander Thomson."

Counsel for the Petitioner—Campbell, K.C. — Sandeman. Agent — George H. Boyd, S.S.C.

Counsel for the Respondents—Constable. Agents—Gordon, Petrie, & Shand, S.S.C.

Tuesday, July 11.

SECOND DIVISION.

GALLOWAY *v.* CAMPBELL'S TRUSTEES.

Trust—Testamentary Trust—Administration—Specific Legacy—Direction to Trustees to Hold Specified Stock for a Liferenter and Fiars—Railway Stock Held for a Liferenter and Fiars Ceasing to Yield Income—Power to Sell.

A testatrix directed her trustees to hold in their own name certain shares, and to pay the dividends or annual income thereof to G. during his lifetime, and immediately after G.'s decease to realise the said shares and to pay the price in accordance with a certain destination. The testatrix further authorised her trustees in general terms "to sell and realise . . . any part of my estate, heritable or moveable, in so far as may be necessary or proper, in their discretion." The testatrix acquired the shares in question in March 1898, and she died in January 1899, having received half-yearly dividends on the shares in June and December 1898. In June 1905 the shares referred to having yielded no dividend subsequent to that last received by the testatrix, G. requested the trustees to realise them, reinvest the proceeds, and pay him the annual income thereof. The trustees were advised by their stockbrokers that it would be proper to realise the shares in question. *Held* (*diss.* Lord Stormonth Darling) that the trustees had power to realise the shares during G.'s lifetime.

Mrs Jessie Galloway or Campbell, widow of John Campbell, sometime wine and spirit merchant, Caledonian Railway Inn, Slateford, died on 13th January 1899.

Mrs Campbell was survived by a nephew George William Galloway, and she left a trust-disposition and settlement whereby she provided, *inter alia*, as follows:—"(*Third*) I direct my trustees to hold in their own name my shares of the Great Central Railway Company, and pay the dividends or annual income thereof to the said George William Galloway during his lifetime, and immediately after the decease of the said George William Galloway I direct my said trustees to realise the said shares and to pay the price or value thereof to such child or children of the said George William Galloway, at such ages or times, in such shares, and in such manner and form, as the said George William Galloway shall by a writing under his hand direct and appoint, and failing such direction and appointment, to and in favour of the lawful child or whole children of the said George William Galloway, equally among them, share and share alike; and failing children of the said George William Galloway, to and in favour of his heirs, executors, or successors whomsoever."

Mrs Campbell conferred "the fullest powers and privileges, statutory and otherwise," upon her trustees, and particularly she empowered them as follows:—"They may sell and realise either by public roup or private bargain the whole or any part of my estate, heritable or moveable, in so far as may be necessary or proper in their discretion, and any of my trustees or beneficiaries may become purchasers. They may borrow money on the security of the trust estate or any part of it, and may grant bonds and dispositions in security and all other necessary deeds. They may invest the trust funds on heritable security or on mortgages or debentures of public companies or corporations or the purchase of feu-duties, ground-annuals, and heritable subjects, or retain the same in bank, or continue any of the investments made by myself, and from time to time to call up and vary the same."

After Mrs Campbell's death her trustees ascertained that she held a certificate for £500 of 5 per cent. preference stock of 1894 of the Great Central Railway Company, referred to in her trust-disposition and settlement as 'my shares of the Great Central Railway Company.' She had acquired the stock in March 1898, and had received two half-years' dividends of five per cent. thereon for the half-year ending 30th June and 31st December 1898.

In 1905, no further dividend having been paid on the railway stock referred to, which had been duly transferred to the trustees, a special case was presented for the opinion and judgment of the Court by (1) George William Galloway, Mrs Campbell's nephew, referred to in the third purpose of her settlement, and (2) the trustees thereunder.

In addition to the facts narrated above the case stated as follows:—"(7) The said railway stock, although a preference stock, is postponed in competition with all the preference stocks of the company created previous to 22nd June 1894, and since the death of the truster on 13th January 1899 the second parties have not received, and have not therefore been able to pay to the first party (the beneficiary entitled under the third purpose of the foresaid trust-disposition and settlement to receive the same) any dividend or annual income in respect of the said railway stock. (8) The first party having thus received no benefit from the gift to him by the truster has requested the second parties to realise the said railway stock, to hold and reinvest the proceeds, and to pay him the annual income thereof; and he maintains that the second parties have power to do this under the said trust-disposition and settlement. The second parties, while they consider that it would be proper now to realise the said stock, and have been so advised by the stockbrokers whom they have consulted, maintain that they have no power to realise the said railway stock during the lifetime of the first party."

The following was the question of law:—"Have the second parties power to realise the said stock of the Great Central Railway Company during the lifetime of the first party?"

Argued for the first party—Power was conferred upon the trustees to sell and reinvest the stock in question by the general powers of sale contained in the settlement. To compel the trustees to retain shares which were yielding no income would defeat the intention of the testatrix to benefit the first party. Though the testatrix had provided that the investment was not to be realised until the death of the first party, the question should be answered in the affirmative—*Downie, &c.*, June 10, 1879, 6 R. 1013, 16 S.L.R. 589; *Weir's Trustees*, June 13, 1877, 4 R. 876, 14 S.L.R. 564; *Birkmyre, &c.*, February 5, 1881, 8 R. 477, 18 S.L.R. 302.

Argued for the second parties—The third purpose of the truster's settlement imported a prohibition—if the trustees sold the shares in question they could not hold them and they could not sell them "immediately after the decease" of the first party. The cases referred to did not apply, being applications under the Trusts Act 1867.

LORD KYLLACHY—I am of opinion that we should answer in the affirmative the question that is put to us in this special case. The power of sale in the settlement is quite general. It applies in terms to "every part" of the trust estate. In other words, it applies in terms not only to subjects or investments held by the trustees as part of the residue, or for payment of general legacies, but also, I apprehend, equally to subjects which are held for behoof of particular beneficiaries, or, as is the case here, for a particular beneficiary in liferent, and his children, if he has any, in fee. Such subjects are of course parts of the trust estate, and I know of no rule to the effect that powers of sale generally expressed do not apply to them.

That being so, it appears to me that if it be proposed to except such subjects from the general power, it must be by reason of something deduced from the nature and object of the special bequest—something which makes it clear that the application to it of the general powers would be contrary to the truster's intention. And such truster's intention would have to be deduced from something more than the mere letter of the provision. It would have, I think, to be deduced upon a consideration of what appeared to be the truster's real purpose and object, and *in dubio* upon what appeared to be her main purpose and object.

The question therefore is, can it be fairly deduced from the terms and character of this special bequest that the truster's true purpose and object with regard to these Great Central Company Shares was really this—that having, for some reason, sanguine views as to the prospective value of these shares, she desired to commit her trustees and her nephew for, it may be, the next fifty years to what was seemingly a speculation? Is that to be held as her ruling intention? Or, on the other hand, should it not rather be held that the terms of the special bequest mean after all only this: That, having assigned to her nephew and

her nephew's children, as their share of her trust estate, this particular investment, the truster desired that it should not be handed over at once, but held in trust—held as part of her trust estate, and subject to all the powers of her trustees—for the purpose simply of securing in common form her nephew's liferent and his children's fee.

It appears to me that the latter is the true view. The question is not one as to an heirloom, or as to a family estate, or a family residence, or anything of that sort. There is no suggestion of any *delectus*, such as might be held in such cases. The case is, I think, just the same as if the subject of the bequest was a tenement of houses, or a range of shops, or some similar subject, which the truster had bought as an investment, and over which (as here is) she desired to create and secure a liferent by a trust set up in the usual terms. I do, I confess, think that with respect to such a bequest and relative trust it is easier to read into the bequest such words as "Or the proceeds thereof when sold," or such words as "Subject always to the powers herein expressed," than to read into the subsequent powers clause words of exception—words excluding an important part of the trust estate from the general power.

I may perhaps add, that although the cases cited to us under the Trusts Act may not be directly applicable, these cases, and particularly the case of *Birkmyre*, 8 R. 477, appear to me to show very distinctly that if there had been in this trust-deed no power of sale at all, the Court, if applied to, would have had no particular difficulty in granting the power of sale claimed. They certainly granted the power in the case of *Birkmyre* although the properties proposed to be sold formed, as here, the subject of a special bequest, and were, as here, directed to be held during a liferent and sold at its termination. And they did so upon the ground that even in such a case (a case where there was no power of sale at all) an immediate sale was (if found expedient) not inconsistent with the truster's intention. It rather appears to me that if that could be affirmed there, where the question was as to the creation of a power of sale, it may *a fortiori* be affirmed here, where the question is only as to the application of a particularly wide general power to a certain part of the trust estate.

I should perhaps also add that we, of course, assume that the trustees, in proposing to sell the shares in question are acting fairly and honestly and in the general interest. They state that they have been advised by their stockbroker that a sale is expedient, and we are not called upon even to consider the matter.

Lord Kincairney—I have found this a difficult case, as to which my opinion has wavered. I have ultimately come to think that the answer may be affirmative. No doubt the direction to hold during the life of the first party is definite and clear, and I do not suggest that it can be read as a power to realise. The general power to realise is also clear, and might no doubt cover the Great Central shares. Yet I do not consider that there is any inconsistency or repugnancy between the two parts of the deed. They are easily reconciled by holding that the general power of sale applies to the shares only after the first party's death. There would be no inconsistency if the general power to sell were so read, and that appears to me to be the true construction.

But I think that is not the whole case, and that the special character of the shares requires consideration, and also the limited nature of the first party's professed intention.

The truster acquired the shares in March 1898, and she received two dividends on 30th June and on 31st December 1898. Her trust deed was executed on 30th November 1898, so that when she bequeathed these shares she bequeathed them as a dividend-yielding subject, and she mentions the dividends specially. But her trustees inform us that the shares have never yielded a dividend since, so that it may be fairly concluded that they have proved a different kind of property than she intended and supposed. The testatrix died on 13th January 1899, before another term of paying dividend had arrived.

The first party does not venture on any prophecy as to the future of these shares. Had he been able to affirm that they were falling in the market, and would in all likelihood continue to fall, there might have been very plausible reasons for authorising a sale, on the principle of the case of *Downie*, which was quoted at the debate, in which heritable property which from change of circumstances had lost its value was sold by trustees with the authority of the Court, although the trust deed contained no power of sale. No statement to that effect has been made, but both parties have stated that they have been advised that it would be wise to sell.

The right and interest of the first party is really the only obstacle to the sale. If he were dead there would be no doubt about the power and the duty of the trustees. There seems no one else who has an interest to oppose a sale. There is no reason to suppose that the truster had any predilection for the shares, or looked on them otherwise than as an investment. It may be worthy of notice that the first party's professed object is not the conversion of the shares into cash, but only an alteration of the investment.

Lord Stormonth Darling — The first party to this special case is a nephew of the testatrix and a beneficiary under her will, the third purpose of which directs her trustees to hold in their own name her shares of the Great Central Railway Company, and pay the dividends or annual income thereof to him during his lifetime. The deed then goes on to direct that immediately after the decease of the said George William Galloway the trustees are to "realise the said shares and to pay the price or value thereof" to such

child or children of the said George William Galloway at such ages or times, in such shares and in such manner and form as he may appoint, and failing such directions, to such child or children equally, and failing children to and in favour of his heirs, executors, or successor whomsoever. The testatrix died in January 1899 possessed of £500 5 per cent. Preference Stock 1894 of the Great Central Railway Company, which she had acquired in March 1898, and on which she had received two half-years' dividends at the rate of 5 per cent. Since her death the trustees have received no dividend on this stock, which is postponed in competition with all the preference stocks of the company created prior to June 1894. The first party having thus received no benefit from the gift in his favour has requested the trustees to realise the said stock, to hold and reinvest the proceeds, and to pay him the annual income thereof. And the question of law is, whether they have power to do so during the lifetime of the first party.

I am sorry to differ on this question, especially as the proposal to sell the stock would undoubtedly be for the immediate advantage of the liferenter, who for more than five years has received no benefit from the bequest. There may be reason to suppose that if the testatrix had contemplated that the stock would so soon cease to be an income-bearing subject (whatever its ultimate fate may be) she would have worded her bequest differently. But we must take the will as we find it, and it seems to me that it gives the trustees no power to do what they are here asked to do. The third purpose admittedly gives no such power, for it contains a positive direction to the trustees to hold the stock and pay the dividends or annual income thereof to the first party during his lifetime, and to realise immediately after his decease. Moreover, this bequest, being of a certain amount of stock in a particular undertaking, is a special legacy which has some well-known characteristics and consequences. Its efficacy depends on the continued existence of the thing bequeathed, so that, if (for example) it had been sold by the testatrix during her life, it would have been adeemed, and its proceeds or value could not have been recognised as a substitute. Further, a special legacy does not abate like general legacies in the event of there being a deficiency of funds to meet the testamentary provisions as a whole. In short, the special legatee has some advantages and some disadvantages, and the characteristic which pervades both is that he must follow the fortunes of the thing bequeathed.

But the first party finds a justification for his demand in the powers of sale and investment given to the trustees towards the end of the deed. The power of sale is expressed in very wide terms thus—"They may sell and realise either by public roup or private bargain the whole or any part of my estate, heritable or moveable, in so far as may be necessary or proper in their discretion, and any of my trustees or beneficiaries may become purchasers." And later on, with regard to investment, it is declared that the trustees may invest the trust funds in a number of specified modes, including the power to "continue any of the investments made by myself, and from time to time to call up and vary the same."

Now, does this power of sale apply to the Great Central Railway stock at all? No power was required for the ultimate realisation of the stock at the death of the liferenter, because an absolute direction to sell is higher than a power, and involves it. It cannot therefore be said that this power answers the description of being "necessary," which is one of the qualifications under which it is granted. Neither can it be said to answer the other description of being "proper in the trustees' discretion," unless it can be held that it is a matter of discretion whether or not the trustees are to obey a positive direction of the testatrix. I confess that, with all the will to stretch this power to its utmost legitimate length, I cannot for my own part so hold. In other words, I cannot hold that this discretionary power, which of course must be construed as granted for the purpose of effectuating the other directions of the trust, is to be read as overriding one of these express and positive directions. It may be required to provide money for the payment of pecuniary legacies, just as the power of investment must certainly be required for the investment of pecuniary provisions which are to be held by the trustees, such as the sums of £1000 each which are given for the benefit of the first party's sisters in liferent and for their children or heirs in fee. But beyond carrying out these purposes, I cannot bring myself to think that either the power of sale or the power of investment was intended to go. I am therefore for answering the question in the negative.

I would only add that cases arising under the Trusts Acts do not seem to me to have any bearing. This is not an application of that nature, but brought simply to determine the powers of the trustees under the will, and if I am right in the view I have expressed as to the power of sale, the Court could not be asked to grant authority to sell, because it would be inconsistent with the intention of the trust.

The LORD JUSTICE-CLERK delivered no opinion, not having been present at the hearing.

The Court answered the question in the affirmative.

Counsel for the First Party — Munro. Agent—James Rorie, W.S.

Counsel for the Second Parties—J. S. Mackay. Agents—Douglas & Miller, W.S.