[*5th June* 1835.]

JACOB YEATS, Appellant.—*Lushington—J. Parker.*

ALEXANDER THOMSON and others, Respondents.—*Lord Advocate (Murray)—Kenyon Parker.*

Foreign—Deed, Construction of—Clause. A domiciled Englishman, who was debtor in an heritable bond over a Scotch estate, the contents of which bond he had consigned in the Bank of Scotland, having executed an English will, by which he declared that the consigned sum should belong to certain trustees; having thereafter executed a Scotch trust deed and settlement, in which he stated that he had, in a separate will as to his property in England, directed that the consigned sum should be transferred to his trustees; and having thereafter executed another English will, which had the effect generally of revoking the first will, and which bequeathed all his personal estate to an executor:—Held (affirming the judgment of the Court of Session,) 1. That the Scotch Court had a right, and were bound to look at the first will in the same way as it would have been looked at in England, in order to discover the testator's intentions as to the consigned sum. 2. That the deeds contained a sufficient declaration of the intention of the testator to appropriate the consigned sum to his trustees; and, therefore, that the trustees fell to be preferred to that sum, and not the executor.

2D DIVISION.
Ld. Mackenzie.

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THE late James Yeats was a native of Glasgow, but left Scotland when young, and became a merchant in London. In the year 1815 he purchased from Mr. M'Donald of Lynedale the island of Shuna in Scot-

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land, at the price of 10,500*l.*; but as the lands were burdened with debt Mr. Yeats paid only 5,000*l.*, the remainder, amounting to 5,500*l.*, being declared in the disposition to be a real burden on the lands.

He at the same time executed and delivered a personal bond which bore this narrative:—

Considering that Alexander M'Donald, Esquire, of Lyndale, by his disposition bearing date the 24th day of March 1815, has sold, &c. to me all and whole the lands and island of Shuna, &c., at the price of 10,500*l.*, and that I have made payment to the said Alexander M'Donald of the sum of 5,000*l.* to account of said price, and that the balance of the said price is, by the said disposition, declared to be a real burden affecting the said property aye and until full payment thereof in manner therein specified, and it was covenanted and agreed upon that I should grant bond for the balance of said price;—he therefore bound himself to pay to the said Alexander M'Donald of Lyndale, his heirs, executors, or assignees, the sum of 5,500*l.*, being the balance of the price of the said lands and island of Shuna, and that at the term of Candlemas 1819, with a fifth part more of penalty in case of failure, and interest of the said principal sum, from and after the term of Candlemas 1815, to be paid half-yearly at the terms of Lammas and Candlemas, &c. And it is expressly declared, that notwithstanding the payment of the said principal sum is postponed to the term of Candlemas 1819, that it shall be in the power of me, the said James Yeats, and my foresaids, to make payment to the said Alexander M'Donald and his foresaids of the said principal sum in such proportions and at such periods,

previous to the foresaid term of payment, as may be convenient for us, I and my foresaids being always obliged to give three months' previous notice when the said payment is to be made, and the amount thereof; declaring always, that these presents shall not hurt or prejudge the real security created over the foresaid lands, for the price thereof, with interest and penalty as above specified; but that the said sum of 5,500*l.*, with interest and penalty, shall continue a real lien and burden over the said lands and island of Shuna aye and until full payment thereof be made in terms of this bond and the disposition before mentioned: As also declaring, as it is hereby specially provided and declared, that, in the event that the said sum of 5,500*l.* is not completely paid at the term before specified, it shall be in the power of said Alexander M'Donald and his foresaids to sell and dispose of by public roup, after due previous advertisement, the said lands and island of Shuna, and others, for payment and satisfaction of the foresaid sums of money, penalty corresponding thereto, and interest that may be due thereon; the said Alexander M'Donald and his foresaids, in the event of such sale, being obliged to account to me, the said James Yeats, and my foresaids, for any reversion there may be after payment of the sums of money before mentioned: Declaring always, that all incumbrances affecting said lands and island of Shuna shall be extinguished and purged before payment of the balance of the said price, as above mentioned.

The reason for withholding payment of the balance, and granting bond for it, arose, not from any inability by Mr. Yeats to pay the amount at the time, but in

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consequence of the existence of objections to the titles, and burdens which could not be at once cleared off.

This bond was, in 1817, assigned, with the real burden, to the Leith Banking Company. On the term of payment approaching, a correspondence took place between the Leith Bank and the law agent of Mr. Yeats, in Edinburgh, as to depositing the money in their bank, as the titles were not in a state to admit of payment; but Mr. Yeats preferred placing it in the Bank of Scotland, in name of his friend Mr. Samuel Rose. This was accordingly done at Candlemas 1819, (2d February,) and on the following day Mr. Yeats's agent wrote to the agent of the bank in these terms:

" Agreeably to what I stated to you, I wrote to " Mr. Rose, and communicated to him your wish, that the " money should be paid into your bank. I have not " yet seen or heard from Mr. Rose in answer; but, in " pursuance of the arrangement with that gentleman, " the amount of Mr. Yeats's bond, with interest, was " paid into the Bank of Scotland yesterday, before three " o'clock.

" While I am very desirous to close this matter " without a day's delay, and with every wish to prevent " any unnecessary trouble to you and Colonel M'Don- " ald, I am so situated, that I do not feel at liberty to " act differently from that line of procedure which the " state of matters appears to render necessary. The " estate of Shuna appears to have been overloaded " with debt, and it is quite evident, both from the " nature of the thing, and from the express terms of " the bargain, that there must be legal evidence of the " extinction of the debt produced previous to payment

" of the bond. If the evidence alluded to be ready to be
" produced, I am ready, at half an hour's notice, to pay
" the money; and I do hope this will be immediately
" done.

" All, I presume, which can be asked of Mr. Yeats,
" is payment of the contents of his bond, and interest
" up to yesterday, and which I was ready to pay.
" Matters not being ready to close the transaction,
" Mr. Yeats had no alternative but to consign the
" money, and which has been accordingly done. Any
" loss arising from interest, subsequent to yesterday,
" surely cannot attach to Mr. Yeats, and therefore your
" recourse will be against Colonel M'Donald. The
" bond is quite explicit, in the point that all incum-
" brances must be cleared before payment, and in so far
" as this is not done, Mr. Yeats is entitled to retain
" from the price. He has, however, not the most distant
" wish to do so; but if he is obliged, for safety's sake, to
" do it, he cannot consent to keep the money and to pay
" five per cent., consequently it must be consigned.
" I am perfectly willing, however, to pay any sum to
" account, on a proper discharge, and on a sum suffi-
" cient to pay all apparent incumbrances and expenses
" being allowed to remain deposited in the bank."

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Therefore, on 12th March, 4,000*l.* were paid to the Leith Bank, and the balance, being 1,649*l.* 2*s.* 5*d.*, was left in the Bank of Scotland. Mr. Rose being desirous to withdraw his name, the following memorandum was made between him and Mr. Yeats, on the 11th August 1826:—

" On the 2d February 1819 the sum of 5,649*l.* 2*s.* 5*d.*
" sterling (supplied by James Yeats of Salcombe,
" county of Devon,) was deposited in the Bank of

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" Scotland in the name of Samuel Rose, Esquire, com-
" missioner of excise in Edinburgh, but, as settled be-
" tween the parties, in trust for and to be under the
" direction of Mr. Yeats.

" This sum was part of the price of Shuna in Argyll-
" shire, which had then been lately purchased by
" Mr. Yeats from a Colonel M'Donald, and was retained
" by him till some defects in the title deeds of the
" property were removed, and certain stipulated agree-
" ments were fulfilled. It was lodged in the above
" bank, partly for security, and placed in Mr. Rose's
" name, partly in consequence of the distance of
" Mr. Yeats's residence in England,—but chiefly to show
" to M'Donald, or others concerned, that he (Mr. Yeats)
" derived no benefit whatever from the deposit, or by
" withholding the money

" On the 12th March 1819 Mr. Yeats authorized
" Mr. Rose to advance 4,000*l.* sterling, in further pay-
" ment of the purchase money, to the Leith Banking
" Company, which had then, by assignment from
" M'Donald, become entitled to receive it. The balance
" left in the bank was therefore 1,649*l.* 2*s.* 5*d.*, with the
" interest of the whole original deposit.

" Unwilling to continue longer in such a protracted
" trust, Mr. Rose has this day, with the consent of
" Mr. Yeats, given up the receipt or document granted
" by the bank when the deposit was made; and the latter
" has taken in his own name two receipts, one for the
" above balance of 1,649*l.* 2*s.* 5*d.*, and another for
" 387*l.* 12*s.* 6*d.*, the interest now due.

" Mr. Rose stands, therefore, clear of all concern in
" the transaction, and both parties have subscribed this
" memorandum explanatory of it."

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In 1827 Mr. Yeats had a correspondence with his friend, Mr. Alexander Thomson, banker in Greenock, (afterwards named one of his trustees,) and on the 13th January wrote to him :—

" I have received the newspaper with the advertise-
" ment of the sale of Lynedale. I wonder it has been
" retained so long. The deposit on account of Shuna
" (1,500*l.*) is still in statu quo, and will for some
" time, I suspect, remain so. He can have no interest
" whatever in it; if he had, the very walls of the Royal
" Bank[1] would run some risk of being stormed."

Again on 28th May 1827 he wrote to Mr. Thomson:—" I had heard of Colonel M'Donald's death
" before. There is 1,500*l.*, with several years' interest,
" lying, in my name, in the Bank of Scotland, till
" certain defects in the title deeds of Shuna are
" removed. The Leith Bank have an assignment of
" the sum, and it is odd that, though only 3 per cent.
" is allowed on the deposit, they seem to be careless
" about the business. He, the Colonel, could not, I
" suppose, have any interest in it; but why did not
" they push him to purge the titles?"

In another letter to the same gentleman, dated 23d January 1828, Mr. Yeats says:—" My law agent in
" Edinburgh (for unhappily I am obliged to have one
" there, too, solely on account of Shuna and the late
" owner, M'Donald,) writes to me that there is likely
" to be litigation between the trustees of that gentleman
" and the Leith Bank, with respect to the part of the
" purchase money (1,500*l.*, with interest,) which is
" deposited with the Bank of Scotland. I think you

[1] Mr. Yeats was under the erroneous idea that the money was in the Royal Bank, or rather, that the Royal Bank and the Bank of Scotland, which he called the Royal Bank of Scotland, were one and the same.

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" once said you, or a friend of yours, had some money " connexions with this ripp. Does it at all concern " you? The principal and interest now lying in deposit " must exceed 2,000*l*. I think the Leith Bank has the " right; but, if you wish it, I will give you all the " intelligence I can."

In this state of matters Mr. Yeats, on 15th April, executed a will, at Salcombe in England: it was in these terms:—" The last will of me, James Yeats " of Salcombe, in the parish of Malborough, Devon- " shire, as it respects the island of Shuna, near " the island of Luing in Argyllshire, which first-men- " tioned island is my sole property: I hereby appoint " as executors or trustees of this my will Alexander " Thomson, Esq., banker in Greenock Thomas " Waller, Esq. of Crosslane, St. Mary's in the East " London, wine merchant, and Mr. Henry Strong of " Salcombe aforesaid, and their heirs and assigns, to " whom I give and devise my said island of Shuna, with " all its appendages, in trust to assign and convey the " same, as soon after my decease as conveniently can be, " and in the proper legal mode required by the Scotch " law, to the Lord Provost and principal Magistrates " of the city of Glasgow (my native place) for the time " being, and to their successors for ever, in trust, to them " and their said successors, for the uses and purposes " herein-after mentioned; and in the interval between " my death and such conveyance I authorize my said " executors or trustees first mentioned to receive the " rents and profits of the said estate, and to manage " it in the manner they may think best, but to be " accountable to the trustees last named for the net " produce of what they do receive, after deducting, of " course, the charges necessarily incurred." He then

stated the purposes he had in view; after which he proceeded thus: "As the island of Shuna appeared, "from the public registers, to be greatly incumbered "when I bought it in 1815, and the title deeds were "in consequence very defective, a moiety of the pur- "chase money was retained till these defects were "purged, and there still remains a balance of 1,500*l.*, "with interest, amounting together to about 2,000*l.*, "deposited in my name in the Royal Bank of Scotland, "for which I possess the bank's notes or receipts. My "will is, that after my decease, these notes or receipts "shall become the property of, and be indorsed or "transferred by my executors in another will respect- "ing my property in England, to my trustees, the "magistracy of Glasgow; but that the money should "remain where it now is till the defects in the title "deeds, as above mentioned, are cured, or till the said "trustees are fully satisfied with respect to the same, "and till an entry is made with Lord Breadalbane, the "superior of Shuna, to whom a yearly feu-duty of 8*l.* "is payable, of a new vassal after the death of Maclean, "the existing one, according to a stipulation made by "me with Colonel M'Donald, my predecessor in Shuna. "These done, the sum held in deposit will become the "property of his successors or assigns (for he is dead), "and must accordingly be given up or transferred to "them on discharging an heritable bond by me to the "Colonel, for the unpaid price of the original price."

On the 1st of May of the same year he made another will, in which, without revoking that of the 15th of April, he gave and bequeathed, subject to payment of certain annuities, "all my chattels and "effects of whatever nature to Jacob Yeats, (the appel-

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" lant,) son of my brother William Yeats, together with
" the liferent of all my lands and houses in the above
" parishes and other places, except the island of Shuna
" in Argyllshire, which I have otherwise disposed of, on
" condition that he does pay the above-mentioned
" annuities, together with all my lawful debts, for which
" latter purpose I do hereby authorize him to sell, by
" public sale, my property at Camlachie, near Glasgow,
" which I reckon worth 5,000*l.*, and, after discharging
" such debts, to appropriate the remainder to himself."

He concluded in these terms: " and I appoint executors
" of this my will, Thomas Waller of London, wine
" merchant, and Henry Strong of Salcombe, maltster,
" whom I have likewise named executors and trustees in
" a separate will which disposes of Shuna, and of a deposit
" of money which lies in deposit with the Royal Bank of
" Scotland, and is to remain there till certain defects in
" the title are cured."

This will was found cancelled by a pen being drawn through it, and with this note subjoined:—

" Cancelled by another will. (Initd.) J. Y."

In January 1829 he wrote to Mr. Thomson:—" The
" death of my predecessor, M'Donald, has not pro-
" duced, what I expected, a settlement of that part of
" the price of Shuna (1,500*l.* with accumulating interest
" at 3 per cent.), which, for a series of years, has lain
" in deposit with the Bank of Scotland. I fancy, as it
" has not been settled now, there is some defect which
" cannot be cured till the decease of an old Highlander,
" the present vassal, and that the money must remain
" in deposit till then. Is there no removing it to your
" bank, and will it be any advantage to you? I have
" the bank's note; but can it be legally done?"

Mr. Thomson replied, " The residue of the price of " Shuna (1,500*l.*) must remain as it is. At this office " we are quite overstocked with deposit money, and " would rather pay out 50,000*l.* or 100,000*l.* than re- " ceive any more."

He appeared to have been made aware by Mr. Thomson, that the will of April 1828 was inept to convey heritable property in Scotland, and, having got a form of a disposition, he himself wrote a draft deed, with a proper dispositive clause, in which he inserted the purposes set forth in the will of April 1828, and also this declaration :—" As the island " of Shuna appeared from the public records to be " greatly incumbered when I bought it from Colonel " M'Donald, 5,500*l.* of the price was retained by me, " and lodged in the Royal Bank of Scotland till the " estate was cleared of these defects in the titles. Of " this sum there still remains, in the same depository, " of principal and interest, about 2,000*l.* Besides " clearing the incumbrances, Colonel M'Donald is " under obligation to me to enter at his expense a new " vassal with the superior Lord Breadalbane,—a new " one instead of M'Lean the old one, who is still alive. " This will cost M'Donald's creditors or successors a " year's rent of Shuna. But the titles, that is, the " incumbrances cleared, and the entry with the " superior made, the notes or receipts I hold of the " Royal Bank will become, with the interest due " upon them, the property of Colonel M'Donald's " creditors, or successors or assigns, and must be " given up on delivery or discharge of my heritable ' bond for the balance of the price of Shuna. One of ' these bank notes or receipts is for 1,649*l.* 2*s.* 5*d.*,

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" and the other for 387*l.* 12*s.* 6*d.*, being the interest " which had accrued at the time of settling with the " Bank in 1826. Now, if this transaction should not " be closed before my death, I have, in a separate will, " which respects my property in England, di- " rected my trustees or executors in that will to " assign or indorse the notes or receipts of the Royal " Bank to my said trustees, the Lord Mayor and " Bailies, to be kept by them in the same depository " where they now are till the above defects are cured, " and till the entry stipulated to be made with the " superior is implemented; or if the latter is called for " before the titles are purged, it may, with no impro- " priety, be taken from the sum in deposit." It was not disputed that this deed effectually vested Shuna in the trustees. On the 17th of this same month he made a will, but which did not contain any clause of revocation. He there stated, " It may be proper to " observe, that by a will made by me in this present " month and year I have disposed of the island of " Shuna in Argyllshire, Scotland;" and after various bequests there was this provision: " As to my goods " and chattels, wherever situated, I give and bequeath " them to the said Jacob Yeats, his heirs and assigns, " requesting, but not enforcing, his observance of some " private instructions which accompany, but are not to " be considered as any part of this, hereby appointing " him, and his aforesaid, my sole executor and resi- " duary legatee. It may be well to mention, that I " include in this bequest my stock of cattle and other " effects in Shuna, which are considerable."

He died in August of the same year, whereupon the appellant obtained probate of the will dated the 17th

April 1829, in the English courts, and was confirmed executor in Scotland. A dispute then arose as to the money deposited in the Bank of Scotland; the appellant claiming it under the will; and the Shuna trustees maintaining that they had right to it, for the purpose of disburdening the lands of Shuna of the real security constituted over it, for the balance of the price. To settle these competing claims a summons of multiplepoinding was brought in name of the Bank of Scotland, to which the appellant and the trustees were called as parties. The Leith Bank were not called as parties, but they raised an action against the appellant, as executor of Mr. Yeats, in which they set forth that Mr. Yeats had granted the bond and security for 5,500*l.* which had been assigned to them; that in 1819 Mr. Yeats had paid to them the sum of 4,000*l.* sterling, " in part payment of the foresaid sum of 5,500*l* sterling, " contained in the foresaid bond by him to the said " Alexander M'Donald, and of which sum of 4,000*l.* " and foresaid real burden to that extent," the bank granted a discharge to Mr. Yeats in the year 1827, " and that the said sum of 1,500*l.* sterling, being the " balance of principal contained in the said bond after " deduction of the foresaid payment, with the interest " of the whole of the said principal sum of 5,500*l.* from " the term of Lammas 1818 to the said 15th day of " March 1819, when the said payment of 4,000*l.* was " received, and also the interest of the balance of " 1,500*l.* from and since the said 15th day of March " 1819, with the penalties corresponding thereto re- " spectively, are still resting and owing to the said " Leith Banking Company: That the aforesaid sum " of 5,500*l.*, as the balance of the price of the island of

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" Shuna, was deposited by the said deceased James " Yeats in the Bank of Scotland, upon an express un- " derstanding and agreement, that it should be applied " in payment of the price as soon as the incumbrances " over the estate, which then existed, were cleared. " That the above-mentioned sum of 4,000*l.* was paid to " the aforesaid trustees of the Leith Banking Company " out of the money thus deposited with the Bank of " Scotland, and that the remaining sum of 1,500*l.* was " again deposited, on the same understanding and " agreement, in the hands of the Bank of Scotland, " and the receipts therefor taken in the name of the " said James Yeats." After also stating, " that the " incumbrances were now cleared," they concluded that the appellant should be ordered to pay the amount to them. On the dependence they arrested the money, and then entered a claim in the process of multiplepoinding.[1]

The Lord Ordinary pronounced the following interlocutor:—" (17th Jan. 1832.) The Lord Ordinary, having " heard parties' procurators, &c., prefers the claimants, " the trustees of the late James Yeats of Shuna, to the " fund in medio, and the interest that has accrued there- " on; and repels the claims for the other claimants; and " decerns in the preference, and against the raisers of " the multiplepoinding accordingly: Finds no expenses " due to any of the claimants."

Against this interlocutor the appellant reclaimed to the Inner House; and the trustees and the Leith Bank

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[1] The bank stated that if decree were pronounced in favour of the trustees it would be satisfactory to them; and therefore it is unnecessary to state the pleas of the bank, as the judgment of the Court of Session preferring the trustees was affirmed.

also reclaimed upon the point of expenses. Their Lordships thereupon pronounced the following interlocutor: "(24th May 1832.)—The Lords, having considered this "note with the three other reclaiming notes, &c., adhere "to the Lord Ordinary's interlocutor; find the trustees of "the late James Yeats entitled to the fund in medio, and "the interest that has accrued thereon, and decern; with "this explanation, that the said trustees shall apply the "fund in medio, and interest thereon, in payment of "the heritable debt over the island of Shuna, held by "the Leith Banking Company, upon their clearing the "incumbrances on the property, and performing any "other stipulations that may be incumbent on them; "and remit to the Lord Ordinary to hear parties "thereon, and also as to the question, whether the "expenses of the confirmation obtained at the instance "of the claimant, Jacob Yeats, as executor of the "deceased James Yeats, and claimed by him, should "be paid out of the fund in medio; and to hear parties "thereon, and do therein as he shall see cause."[1]

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[1] 10 S. D. B. p. 569. In deciding the case *Lord Glenlee* said: "I am "for adhering, but with this qualification, that, after discharging any "incumbrances remaining over Shuna, the fund should be paid over to "the Leith Bank, who are now in right of Colonel M'Donald."

Lord Cringletie.—"The fund having been arrested by the Leith Bank, "I did not see what we had to do with the question of appropriation, or "how the trustees can compete with onerous creditors having arrested. "Lockhart's trustees' arrestments are posterior to those of the Leith "Bank, and I would give decree in favour of the bank, subject to the "burden of paying incumbrances."

Lord Glenlee.—"That is the more correct form, but it will not really "alter the case."

Lord Meadowbank.—"I think so too; at the same time, unless the "Leith Bank desire it, I would allow the interlocutor to stand, prefer-"ring the trustees, subject to the qualification proposed by Lord "Glenlee."

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Jacob Yeats appealed.

Appellant.—1. The first point of inquiry is, what would be the rights of parties under the terms of the deeds, leaving out of view any special direction regarding the deposited money.

It is clear that the will of 17th April 1829, bequeathing to the appellant the "goods and chattels, wherever "situated," and appointing him sole "executor and resi- "duary legatee," followed by confirmation, is sufficient to vest in the appellant all the testator's funds, whether in England or Scotland. On the other hand, it is equally clear that by disponing to trustees the island of Shuna, burdened with a heritable lien for payment of a certain sum, the testator gave to these trustees the lands with every incumbrance of a real nature attaching to them, as vested in his own person; and that the parties acquiring the lands so burdened would, under the general rule, have no relief against any other party with reference to that burden. At all events, the appellant, as executor, could never be called on to pay out of the moveable funds a debt which was not moveable, but which had been made heritable by the testator himself.[1]

Anderson for Leith Bank.—"We are satisfied with the proposed quali- "fication, and do not require the decree of preference to be in the name of "the bank."

Lord Justice Clerk.—"Then we adhere, subject to the qualification."

Jameson, for the Executor, craved "that the Court should introduce "into the interlocutor, 'In respect of the arrestment by the Leith Bank "'adhere,' &c.; but the Court declined so to limit the grounds of deci- "sion, and adhered, subject to the qualification, that on the incumbrances "being purged, and the obligations come under by Colonel M'Donald "fulfilled, the balance should be paid over to the Leith Bank."

[1] Stair, B. III., tit. 5. sect. 17; sect. 13; tit. 8. sect. 65. Erskine, B. III., tit. 8. sect. 52; tit. 9. sect. 48. Robertson's Creditors, 13th Dec.

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2. The next inquiry is, whether any such special direction subsisted at the testator's death, or formed part of the settlement of his succession, as to supersede the general rule.

There are two ways in which it may be contended that the money deposited in bank was set aside for the relief of the trustees. It may be said that the testator by destination devoted the money for this purpose; or that the money was so appropriated, not merely by the will of the testator, but by some previous arrangement with third parties, creating a vested interest in this deposited money. But it is obvious that these two grounds are distinct and independent. The question of destination or testamentary disposal is different from an arrangement inter vivos, and indeed in one sense the two things are incompatible, since an appropriation inter vivos would have superseded any question of will, and the allegation of an expression of testamentary will, seems to imply that there had been no previous agreement for appropriation of a similar kind.

On the point whether in the testamentary deeds by which the succession of Mr. Yeats is to be regulated, there is a destination of the deposited money in favour of the trustees, to the exclusion of the appellant as executor and residuary legatee, it is conceived little difficulty can be entertained.

It is obvious that the will of 15th April 1828 was superseded by subsequent deeds, so that it has not now any influence on the question. It was inept by the law of Scotland to carry heritable property, and a new deed

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1803. Morrison, Competition, Appendix, No. 2. Clayton v. Lowthian, 3d March 1826. 2 Wilson and Shaw's Appeal Cases, p. 40.

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was framed by the testator on 1st April 1829, by which the provisions of the first were virtually cancelled.

Again, the will of 1st May 1828 was actually cancelled by the testator, and marked as being so by his own initials; and therefore it is only necessary to consider the effect of the trust disposition of 1st April 1829, which it is admitted is in part at least an effectual deed for regulating the succession.

On attending to the terms in which the subject of the deposited money is introduced, it is impossible to say that there is a substantive or direct bequest of it in any particular way. The disposal of that money was not intended to be regulated by that deed, and it is mentioned merely by relation to another will, the terms of which, if it can be found, and if it still subsists, can alone be considered as containing the testator's positive and ultimate declaration of his intention upon the subject. The testator says,—" I have in a separate will, " which respects my property in England, directed my " trustees or executors in that will to assign or indorse " the notes or receipts of the Royal Bank to my said " trustees, the Lord Mayor and Bailies."

He here refers to the will of 1st May 1828. But subsequent to the execution of the trust disposition, the testator, on the 17th of April 1829, executed another will cancelling the will of 1st May 1828, and containing the ultimate declaration of his intentions as to his English property, and as to his personal funds generally. It is impossible, therefore, in this state of the case, that the allusions made in the trust disposition to the will then subsisting can be founded on as declaratory of the

testator's ultimate intentions, as that will itself was subsequently recalled, and another substituted in its place.

But the will of 17th April 1829 is in favour of the appellant's pleas. It gives him the whole goods and chattels of the testator wherever situated. It appoints him sole executor and residuary legatee. It subjects him in payment of certain bequests, but it contains no legacy or provision of any kind as to the deposited money. It does not, as pointed at in the trust disposition of the 1st April preceding, direct the appellant, as executor, to assign or indorse the notes or receipts of the bank to the trustees, nor does it qualify the general bequest in the appellant's favour by any condition or exception on the subject.

3. The next inquiry to be made, is, whether there was any previous arrangement inter vivos as to the appropriation of this money, so as to create a vested interest in third parties, of which the Shuna trustees might be entitled to avail themselves.

In considering how there could be any specific appropriation of this subject it is obvious that it could only arise in consequence of an express agreement with the creditors holding the bond and real lien over Shuna. There could be no agreement with the Shuna trustees, because their interest in the succession was altogether mortis causâ, and there were no other parties, except the Leith Bank, with whom any agreement of appropriation could be made.

Now, the whole evidence and history of the case show unequivocally, that there never was, as between the testator and the Leith Bank, a valid or concluded agreement for appropriating this fund to the payment of the debts over Shuna.

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It may be true that Mr. Yeats at first deposited the money in bank in the hope that it would either bring about a settlement of the transaction, and lead to an immediate clearing of the incumbrances on the Shuna titles, or would stop the currency of legal interest upon the debt. But the Leith Bank, the creditors in the bond, never closed with this proposition, nor recognized the deposit as affecting them or made for their behoof. Indeed, during Mr. Yeats's life, they never alluded or referred to the deposit. In the discharge of the 4,000*l.* which was paid out of the deposit not the least allusion is made to that fact. Then, after Mr. Yeats's death they did not commence any process to have this special fund declared to belong to them, or even to have the executor ordered to asssign it to them. They brought an ordinary action against the executor, concluding generally for payment of the debt due by Mr. Yeats's bond, to be recovered out of all or any of the effects of the deceased, and upon this action they used an arrestment, attaching all sums whatever in the hands of the Bank of Scotland belonging to the appellant as executor, in the very same way as any ordinary or general creditor of the executor's would have done. Further, they did not limit their claim merely to such interest as arose and had accumulated in the hands of the Bank of Scotland, but they claimed the full legal interest upon the amount of their debt from the time when it became due to them till paid, with a fifth more as the penalties of failure.

Besides, the money was plainly at the risk of Mr. Yeats. If the bank had failed he alone must have suffered. The Leith Bank had in no way sanctioned

this deposit, so as to limit their original claim against their debtor.

Further, the claim of the Leith Bank was in no ways restricted to the fund deposited, either as respects the principal, or the interest which it was yielding. They were not precluded from claiming their money, either out of the lands of Shuna themselves, or from the general estate of their debtor.

Supposing also that Mr. Yeats had become insolvent in his lifetime, or had died in that state, the Leith Bank had obviously no such vested interest in the money deposited in bank as would have enabled them to compete preferably with his general creditors, or with any individual creditor using diligence by arrestment or otherwise; and under a sequestration or other process of distribution in bankruptcy, this fund would have been divided as a part of his ordinary moveable estate; or, supposing that claims had arisen on the part of the Bank of Scotland against Mr. Yeats, they would have been entitled to retain the money deposited with him after the receipts were taken in his own name in payment or security of their claims, and any pretence of appropriation in favour of the Leith Bank would have been disregarded.

All these circumstances are inconsistent with the idea, that there was a completed arrangement as to the appropriation of this money, in which any person whatever had a right or vested interest.

This case is entirely different from that of Lord Minto against Sir William Elliot, decided in the House of Lords, 29th June 1825, relied on by the respondents.[1]

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[1] 1 Wilson and Shaw's Appeal Cases, p. 678.

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An attentive consideration of that case, and of the grounds on which it was affirmed by your Lordships, will show that, so far from being a parallel, it is in all its circumstances a direct contrast to the present case.

In the first place, in so far as regards the question of testamentary intention, the testator's operations regarding the money were, in Lord Minto's case, subsequent to the will and other mortis causâ deeds; while in the present instance the will on which the appellant founds is subsequent to the acts on the testator's part from which a contrary destination is attempted to be inferred. And as to the alleged agreement of appropriation inter vivos, there was, in Lord Minto's case, a contract entered into, and an equitable right conferred on a third party, which cannot be pretended here. Even in such circumstances, Lord Gifford considered the case as attended with the utmost difficulty.

Respondent.—1. On the first point, raised by the appellant, that of intent, the whole of the testator's conduct, connected with the disputed fund, most clearly shows that it never at any moment of time was his purpose to bestow it upon the appellant, but that it was his settled determination throughout, that it should be employed in the disincumbrance of his property of Shuna.

Mr. Yeats made his purchase of Shuna in January 1815. The price was to be 10,500*l*; but the property being heavily burdened with debt, and the seller, in consequence, not in a situation to give a sufficient title, it was arranged that only 5,000*l*. should be instantly paid, and the remainder not until Candlemas 1819; Mr. M'Donald being bound, in the meanwhile, to clear the property from all incumbrances affecting the same;

and the last moiety of the price remaining a burden on the lands until that could be accomplished.

This postponement was necessary solely from the inability of the seller to give an unfettered title, and it was never doubted that before Candlemas 1819, the eventual term that was fixed for payment, all would be clear. Mr. Yeats was from the first ready to pay the price, and if the price had been paid, the estate would have descended at its utmost value to his heir. He could not mean this state of things to be infringed upon, merely because the seller was not ready to receive the price. On the contrary, he granted a personal bond, binding his executor, and not his heir, to pay; and so little is the monies remaining on the footing of a real burden an object with Mr. Yeats, that it was deemed necessary expressly to declare, in the personal bond, "that these presents "shall not hurt or prejudge the real security;" obviously implying that the personal bond was truly the predominant obligation in the sight of both parties.

Matters thus remained until 2d February 1819, when the second moiety of the price had been stipulated to be paid. Mr. Yeats was ready with funds to discharge the debt, and he was, through his agent, in communication with the bank to this effect. He actually tendered payment. A draft of the requisite deed of discharge was even prepared, transmitted for revisal, and returned revised. It was no act of Mr. Yeats's, that payment was not made; the hindrance arose now, as it had arisen from the first, on the seller's side; he and those in his right had not yet succeeded in fulfilling their obligation "to clear the property from all incumbrances "affecting the same." Mr. Yeats, accordingly, had no

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alternative left him but to withhold payment; he did not, however, retain the money in his own hands, but, adopting the equipollent nearest to payment, he consigned it with the Bank of Scotland under an arrangement duly notified to the creditor.

It was so deposited in the name of Mr. Samuel Rose, as in some sort a trustee for all concerned. The sum consigned was not a slump or random sum which left any thing for after discussion and adjustment among the parties; it was the precise and exact amount of the debt due, with interest down to the very term day stipulated in Mr. Yeats's bond. There is no dispute, that had this sum being actually paid, instead of being merely consigned, it would have completely and for ever extinguished the debt out of which the present litigation has arisen.

The Leith Bank applied for, and instantly obtained, a sum of 4,000*l.* out of the deposited fund, as the amount of incumbrances extinguished; while the remaining 1,649*l.* 2*s.* 5*d.* was "allowed to remain deposited in the "bank," as a sum sufficient to meet those incumbrances which were yet unextinguished.

It is true, that the deposit which had been originally made in Mr. Rose's name was transferred into Mr. Yeats's own name. But Mr. Yeats, considering himself as divested of all substantial power over the money in its character of a deposited fund, a formal memorandum was drawn up and executed between him and Mr. Rose, explanatory of all that had taken place.

It was more than a year and a half after this when Mr. Yeats executed the first of that series of testamentary deeds on the construction of which the present question has arisen; and all these deeds imply that it

was the testator's intention to vest the island in his trustees, free from every burden; while the consigned money was not to remain part of the residuary estate, but was destined to the special purpose of disincumbering the property of Shuna; and it was the property of Shuna, thus disincumbered, which he meant to vest in the trustees. Nay, there is an actual devise of the consigned money itself, and the notes or receipts by which it is vouched against the depository, in favour of the respondents as trustees.

The question then comes to be, whether Mr. Yeats, having once unquestionably conferred upon the respondents a right to the deposited money, and having by the very fact of doing so, as well as in more direct terms, excluded the appellant, his residuary legatee, from all right to that fund, did ever afterwards change his mind as to the disposal of this portion of his property, so as (for that is the result of the appellant's argument) directly to invert the position of the parties in regard to it.

Now, whatever may be said as to the deed of 1st May 1828, it is undoubted, that Mr. Yeats never either cancelled or revoked his first will of 15th April 1828.

It is true that, in so far as that deed had relation to the disposal of the estate of Shuna, as a Scotch heritable estate, Mr. Yeats came to entertain doubts how far the deed of 15th April 1828 might be technically sufficient to carry heritage. In this view accordingly, and for the purpóse of strengthening the grant which he had made, he prepared and executed a formal deed, in which he inserts a clause almost exactly similar to

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that which had been contained in the first deed in regard to the deposited money.

But it has been contended that the deed of 1st May 1828 is the will referred to in that of 1st April 1829 as the "separate will which respects my property in "England," that it was subsequently cancelled, and that, of course, any directions contained in it for the assignment or indorsation of the deposit receipts must have fallen to the ground along with it. This is an entirely mistaken view of the matter. For the will of 1st May 1828 is not the deed which contains the directions in question. These are contained in the deed of 15th April 1828,—the deed of 1st May merely containing the nomination of the executors upon whom the directions were to be binding. Now, the deed of 15th April was never revoked, and, of course, the directions contained in it stand at this moment in full force. Besides, in order to get at the meaning of the deed of 1st April 1829, it is nowise necessary to resort to any argument connected with the cancellation of the will of 1st May 1828, for as that will was not cancelled until after the date of the deed of 1829, it follows, that, even were it necessary to refer to the will of 1st May 1828, in order to get at the directions which the testator refers to in his deed of 1st April 1829, the will of 1st May 1828, which still existed at the date of that deed, might competently be resorted to.

The only other deed which he executed was the will of 17th April 1829; that day being exactly sixteen days posterior to the deed which the respondents have just been commenting upon; and it cannot be pretended that within this short interval Mr. Yeats had changed

his mind upon a matter which had so long been the favourite scheme of his life. The contrary appears from the correspondence.

Besides, this deed contains no express words of revocation, applicable to the former deeds, or to any of them; and, therefore, in so far as it is not absolutely irreconcileable with and in open contradiction to these deeds, it must be construed in conformity. And not only does it not contain any words of express revocation, but it contains words of positive recognition. Thus it says, "it may be proper to observe that, by a "will made by me in this present month and year, I "have disposed of the island of Shuna in Argyllshire, "Scotland."

The only clause which affords the appellant the slightest pretence for maintaining his present claim, is that which is contained in the deed of 17th April 1829:—"As to my goods and chattels, wherever situ-"ated, I give and bequeath them to the said Jacob "Yeats, his heirs and assigns, requesting, but not en-"forcing, his observance of some private instructions "which accompany, but are not to be considered as "any part of this, hereby appointing him, and his "aforesaid, my sole executor and residuary legatee."

But this clause is nowise stronger than the corresponding clause which devised the testator's "chattels "and effects of whatever nature" in the deed of 1st May 1828. Yet that clause was not held by the testator to have been at all inconsistent with a grant of the deposited money in favour of the respondents, as it certainly was nowise intended by the testator to confer any right to that deposited money upon the appellant. On the contrary, it was contained in a deed which dis-

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tinctly referred to the Shuna trust, as having already disposed both "of Shuna and of the deposit" in question.

2. The next question is, whether Mr. Yeats's intention has been legally carried into effect.

There is no difficulty of a technical kind, and this is not disputed. Therefore, as in a question with the appellant, who can of course take no more than the testator intended to give him, it is plain, that if the respondents have succeeded in proving the intention of the deceased to have been in their favour, there is at once an end to the dispute. There being here no question of succession ab intestato, and the parties taking hinc inde all that they are entitled to take, solely and exclusively under the testamentary deeds, which are admitted to carry to one or other of them the whole property belonging to the deceased, there cannot possibly be any inquiry except as to the testator's intention; for when it is fixed what he intended to give to the one, and what he intended to give to the other, the distribution must of course be made accordingly; or else this absurdity would arise, that a portion of the estate would be given contrary to the testator's intent.

Indeed, they apprehend that there is a direct bequest of the fund to them for the purpose of the trust. But, independently of this, there is such a plain appropriation and destination of it for their benefit in the setting of it apart for the discharge and extinction of the unpaid balance of the price of Shuna, as completely to take it out of the residuary portion of the estate conferred upon the appellant, and to entitle the respondents to insist that it shall be applied to the special end for which the testator had thus destined it.

'Even had there been no testamentary deeds whatever, and had the question arisen between the heir and executor of Mr. Yeats ab intestato, the very peculiar destination which exists in the present case as to this deposited money would have entitled the heir-at-law to have insisted upon its being applied in extinction of the price of Shuna.'[1]

It is true, that in the ordinary case where the price is converted into a real burden, at the instance, and for the ends of the purchaser, it might be said that the heir, and not the executor, must pay it. The purchaser, in such a case, is in the same situation as one who borrows money upon his estate. By so doing, he knows that the debt becomes the debt of his heir, and the law necessarily gives effect to this destination against the heir, just as in the other case it gives effect to the correspondent contrary destination against the executor.

But here the postponed payment of the price was not rendered necessary for any end, or from any fault of Mr. Yeats. It was a thing that he could not avoid, inasmuch as it arose wholly from the incapacity of the seller to give an unincumbered title.

This, so far from giving an heritable destination to the price, left it in Mr. Yeats's hands, with as much of a moveable or personal character attached to it as if both parties had been ready, hinc inde, to give and receive instant payment.[2]

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[1] Johnston, 25th February 1783. (Mor. 5,443.); Ersk. 2, 2, 14, citing Robertson, 19th January 1637. (Mor. 5,489.); Stair, 2, 1, 3. Arbuthnot, 23d June 1773. (Mor. 5,225.); M'Nicol, 16th June 1814. (Fac. Coll.); Dick, 4th July 1828. (S. D.) Clayton, 3d March 1826, 2 W. S. 44.

[2] Waugh, 17th Feb. 1676. (Mor, 5,453.)

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But it might even be conceded that, in the outset, the obligation to pay the price was of an heritable character. That it was originally by Mr. Yeats's fault, and not by that of the seller, that any arrangement for giving to it an heritable character became necessary.

This, however, would only bring the operation of the respondent's argument down to the stipulated term of payment, at Candlemas 1819. For, whatever was the previous character of the liability, there can be no doubt whatever that Mr. Yeats was entitled to pay up and discharge the debt at the stipulated term of payment; and that, therefore, when this payment was tendered, and would not, or could not be received, the sum so appropriated became heritable destinatione, and no longer formed a part of the moveable estate descending to the executor.

From the moment a tender of payment has been made, and much more from the moment that the fund has been actually placed in deposit, or consigned in bank, and set apart from the debtor's other estate, with a view to such payment and extinction, the fund becomes heritable destinatione. The executor, if the original debtor dies whilst the money remains in this situation, is not entitled to demand it as a portion of the executry; but, on the contrary, the heir who would have benefited by the payment, if the creditor's refusal or incapacity to receive payment had not rendered consignation unavoidable, is entitled to insist that he shall not be deprived of this benefit through the act of the creditor, but, on the contrary, that the deposited fund shall be applied to the purpose for which, from the moment of its deposit, it had been destined, viz., the

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payment and extinction of that heritable debt which would otherwise fall a burden upon him as heir.

A very satisfactory illustration of this principle is to be found in the recent case of E. Minto v. Elliot, where it was decided that the debtor in an heritable debt, having sold a part of his landed estate, and invested a portion of the price in the public funds, and intimated to the heritable creditor his intention of paying the debt in six months, but having died before the expiration of that period, and consequently before payment, his residuary legatee was not entitled to take the investment in the public funds as a part of the free succession, leaving the unpaid heritable debt a burden upon the heir, but was bound, out of the amount, to free and relieve both the landed estate and the heir of the heritable debt in question.[1]

LORD BROUGHAM,—My Lords, it is not my intention at present to state to your lordships the grounds upon which I may be disposed to advise you in dealing with this case, because I consider the points raised to be very material to the law of Scotland. The case is material enough to the parties, for there is some 6,000*l.* in dispute; but it is so much more material to the law of Scotland and the practice of the Scotch Courts,—among other things, with respect to the admission and rejection of evidence, and therefore material as to the supposed conflict in the practice of the two countries, and especially as there is a legislative measure now in progress for amending the English law on this matter,

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[1] E. Minto, 4th Feb. 1823. S. & D.; and affirmed on appeal, 29th June 1825; 1 W. & S. 679.

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that I think it requires further consideration, if not upon the ground of the decision to be pronounced (upon which, I confess, I feel very little, if any, doubt), but at least on the manner in which I should state my reasons to your lordships; for I shall adopt on this occasion,—as I have done in all the other cases that I have helped your lordships to decide here in the course of this session,—the plan of reducing my reasons into writing, in order that they may be furnished to the parties, and taken to the Court below. My Lords, another reason, besides the importance of the matter, for which I wish to reduce my reasons into writing, and to postpone the further consideration of this question, is,—though the subject is of great importance,—though some parts of it are not without difficulty, —though undeniably the decision, if pronounced, will be for the first time pronounced in this House upon those points,—though undeniably, also, the decision upon the same points in the Court below has been pronounced for the first time, either in any court of England or any court of Scotland;—though, therefore, these points are matters of the very first impression in this case, I desiderate what is a great help to any court,—a great comfort to any court of review dealing with the judgment of a court below brought before it by appeal,— I desiderate the reasons of the learned judges who pronounced the decision in the Court below. I find four learned judges have given their opinions, but not one of them has given one tittle of reason for stating those opinions. It is very true, that in former times the reports of the Faculty Collectors (what is called the Faculty Collection) used not to give any but the argument on each side of the bar, and used not to give any

report of the reasons upon which the learned judges grounded their opinions; but, in that case, although the Faculty Collection contained none, the profession had access to the reasons, they were given in open court, they were taken notes of by the bar, as well as by the members of the bench itself; and many of those collections have afterwards seen the light, giving the decisions with the reasons, although the Faculty Collections omitted to give those reasons. I need only refer to the valuable work of my Lord Hailes, which contains large, and I think most voluminous decisions, with the reasons given by the court, some of those reasons exceedingly important and very beneficial to the students of the law, as well as useful to the courts which have to administer that law in after-times. The grounds of the decision were known to the profession,—not so well known, nor so well preserved, as they would be if the Scotch reporters kept the rule which we follow here of recording the reasons of the bench as well as the bar in their collection of reports; but of late years that practice, that silence of the reporters, has been broken,—that practice of omitting the reasons has been altered; and of all the cases decided in Scotland, however unimportant, however trifling in point of amount, and however easy in point of law, there is not now, I believe, a single decision of the Court of Session which does not find its way into the Scotch volumes of reports, if not of the Faculty Collectors, at least of the other reporters of the decisions; and reporting seems to have prevailed in Scotland, and to pervade the profession there, as much as it does the profession here. Therefore, it makes the regret I feel the greater, that now that we have the reasons recorded by the reporters, the

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reasons should not, in so important a case as this, have been given by the very learned persons who disposed of this case. It is very much to be regretted, because one is very desirous to know the practice of the Court of Session. The question that arises here, and which brings the laws of the two countries into conflict, is this first and general question, Shall the Scotch practice or the English practice respecting the law of evidence, as well as the Scotch principle or the English principle in respect of the construction of the instrument, prevail as the governing rule for this question? That is the first and general question; for that one should look to the opinions of learned judges for their reasons, to know the view they take of so important a matter. But that is not the only question; there is another, and a much more material one, and without which the application of former to recent cases would not be had, and that is this, upon which, above all things, it was material to know the views of the Scotch judges. Granting that the Scotch law is to prevail in construing the instrument, and the Scotch practice of admitting or rejecting evidence,—granting that to prevail, and not the English, what is the Scotch practice, and what is the Scotch law,—the Scotch law respecting construction, and the Scotch law respecting the admission or rejection of evidence? I desiderate the statement, the authority, the authentic, and consequently the most valuable statement which can be had as to what is the Scotch law and the Scotch practice, but particularly the Scotch practice as to admitting or rejecting evidence,—I desiderate that the more, because one wishes to know how these things are dealt with there, and one wishes to see exactly what the difference is, and upon the highest authority, as

between the Scotch and English courts, in the administration of the important law of evidence. However, we are left unfortunately without any lights from that quarter from which, above all others, I should wish to receive them; and that is an additional reason for wishing your lordships to postpone the further consideration of this case, I am very far from complaining that the learned judges do not give their reasons; but I am only applying to the Court of Session a regret and a complaint which has been felt and urged for the last fifteen years, indeed I may say more, against the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer in Westminster Hall,—that when cases are sent to them from the Court of Chancery, they certify their opinion, and certify no reasons. That has been matter of great regret, and has been the subject of much complaint for the last fifteen or twenty years, which I myself have certainly very often urged in this place, as well as the Court of Chancery. I believe, of late, the practice has been altered, and the old and the sound method has been reverted to, of giving reasons, even in a certificate,—the ground for refusing to give reasons having been, that Chancellors were apt to carp at the reasons, and the Courts did not like being cavilled at; but the answer to that was, that, although that might save their being cavilled at in one case in fifty, namely, when the case was brought back to the court which sent it, it never could save the reasons being cavilled at by every other court, and by all the other counsel, in the other forty-nine cases, where they habitually give their reasons, and which cases, with the reasons, are habitually cited, and sometimes treated in that sort of way by the freedom of

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discussion which, as applied to the bench, and to all other persons, is the most wholesome mode of dealing with all important subjects, and which must cease to be applied to the bench if the bench wraps itself up in impenetrable mystery and unapproachable dignity, and refuse to be dealt with like the rest of mankind, while at the same time they will not become infallible, which I at present am willing to admit they are not. Therefore, I do regret in other cases, as well as in this, that the reasons are not given, wishing by no means to lay it down as a general rule, that they ought always to argue cases at length; still I think, when a case is important and novel, the least one can expect is, that they should state the grounds on which, in a decision upon novel points, they proceed. For these reasons, I shall feel it more necessary to give my reasons, and I shall beg your lordships to postpone, for that purpose, the further consideration of this case.

On a future day, LORD BROUGHAM read his opinion as follows:—

My Lords, the question which I considered it right to give reasons upon in this case, relates rather to the first than to the second part of the subject, as taken in the order of the argument at the bar: The manner in which the instruments executed in England by a domiciled Englishman are to be construed and dealt with in respect of evidence by a Scotch court, in so far as these instruments relate to the distribution of personal property situated within the territory of Scotland, rather than the question of valid or effectual appropriation. James Yeats, merchant in London, and residing always in England, had purchased the island of Shuna,

one of the Hebrides, at the price of 10,500*l.*, of which only 5,000*l.* was, by agreement, left as a burden upon the estate. The transaction took place in 1815, and at Candlemas 1819 the remaining part of the price was to be paid, the parties having no doubt of the seller being able to clear off the incumbrances before that time. Meanwhile, an heritable bond was granted for that residue, and was duly recorded, so as to constitute an effectual lien by the laws of Scotland. At the stipulated period, the 2d of February 1819, the payment of the bond was tendered, but the seller was still unable to give a clear title, and Mr. Yeats accordingly consigned the money with the bank of Scotland. Before this period the rights of the vendor had been transferred to the Leith Banking Company, who now stood in his shoes, and to whom, accordingly, Mr. Yeats's agents gave notice of the consignment, in order that their client might be relieved from any claim of interest after the consignment was notified. The bank acted upon this notice; for Mr. Yeats having intimated to them that they might draw out a sum of the deposit, equal to the debts upon the estate which they should pay off and produce discharges for, they actually paid off 4,000*l.*, or, at least, produced discharges to that amount, and received so much of the fund out of the bank, leaving only 1,649*l.* 2*s.* 5*d.*, the balance still deposited, and now in dispute. The deposit had originally been made in the name of Mr. Rose, as a kind of trustee or stakeholder for all parties; but in August 1826 it was, at Mr. Rose's desire, transferred to Mr. Yeats's own name, and in April 1828 the first of the instruments in question was executed. I shall here only stop to observe, that the whole course of the trans-

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action, as I have stated it, from the facts admitted on all hands, plainly shows Mr. Yeats's desire from the beginning to finish the affair,—to pay the price,—to receive the title and possession, and his intention of keeping the whole business apart from his general concerns; nor can any thing be more contrary to probability than the supposition that he should allow it to be mixed up with the arrangement of his affairs, and to influence the testamentary disposition of his property. With this strong probability arising from the conduct of the parties, and from the course of the transactions generally, we come to consider that which forms the whole question in the cause: Whether any appropriation of the fund deposited with the Bank of Scotland was effectually made by Mr. Yeats? And, first, let us see how far the trust disposition of the 1st of April 1829 will carry us, without any regard to the will of the year before. The island of Shuna seems to be the subject of that deed; the maker having probably discovered, since April 1828, that the devise of real property situated in Scotland, which he had in that will endeavoured to make by executing it so as to pass lands in England, was wholly ineffectual for his purpose. He appears, however, to have deemed that will sufficient for executing his intention respecting his personality as connected with the island, as it indeed was while unrevoked; and accordingly it is said that he rather refers to it as having declared those intentions, than repeals his declarations. I cannot, however, either consider the passage of the trust deed to which I am alluding as a mere reference to the will, nor can I think, even if it were, that this circumstance would destroy its force. If it were a mere reference, nothing

is more certain than that, by words of recital, you may validly bequeath or devise, and that saying you have done so, if you say it distinctly, is as valid a gift as if there was no reference or recital in the passage at all. But granting that the subsequent cancelling of the will to which reference is made would have the effect of cancelling also this reference, the last words of the passage appear substantive, and not relative to the will: "Now, if this transaction should not be closed before "my death, I have, in a separate will which respects "my property in England, directed my trustees or "executors in that will to assign or indorse the notes "or receipts of the Royal Bank to my said trustees, the "Lord Mayor and Bailies, to be kept by them in the "same depository where they now are till the above "defects are cured, and till the entry stipulated to be "made with the superior is implemented; or if the "latter is called for before the titles are purged, it "may, with no impropriety, be taken from the sum in "deposit." These words, "or if the latter," &c. do not, in form, relate to the will previously made; but, what is of more importance, they contain a direction, or the declaration of an intention nowhere to be found in the will. They are, therefore, an addition to the declaration there contained. But let us consider the last will which was admitted to probate. It is dated 17th April 1829, less than three weeks after the trust disposition, and it clearly refers to the English property only,—he considered that in the trust deed he had disposed fully of his Scotch property,—and the will is addressed to the English. This circumstance, and the express reference to the provision of the deed in the will, appear to me sufficient to render them both parts

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of one conveyance; for he says, "It may be proper to "observe, that by a will made in this present month "and year I have disposed of the island of Shuna in "Argyllshire;" and he expressly mentions his "stock "of cattle, and other effects in Shuna," as part of the residue. Now, supposing this last will to have, which it undoubtedly has, generally speaking, the effect of revoking the first will, it seems by no means so clear that it revokes whatever part of that first will is, by reference to it in the trust deed, re-published and imported into that trust deed; for the sounder view of the matter seems to be, that the trust deed and the will of 1829 being taken as one, the will 1829 only revokes so much of the will 1828 as is not imported into or referred to by the deed. Indeed, if the disposition and last will be regarded as one conveyance, the last will no more revokes the part of the disposition referring back to the generally revoked will 1828, than if the reference had been contained in the last will—that of 1829. This consideration goes far to satisfy me, that the revocation operated by the last will, after the date of the trust disposition, renders the passage in the disposition, which refers to the will of 1828, substantive and not relative, and prevents the general revocation, subsequently effected, from having any force to destroy the import of that passage as a valid declaration of the testator's intention. It might even be argued, that you would, upon this ground, have a right in our courts, and according to our strict practice, to look at the revoked will by means of the reference, first in the trust deed to that will, and next in the last will to the trust deed. But this needs not now be considered. Although, therefore, I

am of opinion that there is no necessity for admitting the first will in order to dispose of this case and to support the decree below, yet the importance of the question connected with its admission in evidence is sufficient to require that I should state in what light I view it. It is on all hands admitted, that the whole distribution of Mr. Yeats's personal estate must be governed by the law of England—his domicile through life, and both at the time of his decease and at the date of all the instruments executed by him. Had he died intestate, the English statute of distributions, and not the Scotch law of succession in moveables, would have regulated the whole course of the administration. His written declarations must therefore be taken with respect to the English law. I think it follows from hence, that those declarations of intention touching the property must be construed, as we should construe them here, by our principles of legal interpretation. Great embarrassment may no doubt arise from calling upon a Scotch court to apply the principles of the English law to such questions, and those principles, many of them among the most nice and difficult known in our jurisprudence. The Court of Session may, for example, be required to decide whether an executory devise is void as being too remote, and required to apply, for the purpose of ascertaining this, the criterion of the gift passing or not passing what would be an estate tail in reality, although, in the language of the Scotch law, there is no such expression as executory devise, and, within the knowledge of Scotch lawyers, no such thing as an estate tail. Nevertheless, this is a difficulty which must of necessity be grappled with, because in no other way can the English law be applied to personal property situated

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locally within the jurisdiction of the Scottish forum; and the rule which requires the law of the domicile to govern such succession could in no other way be applied and followed out. Nor am I aware that any distinction in this respect has ever been taken between testamentary succession and succession ab intestato, or that it has been held either here or in Scotland, that the court's right to regard the foreign law was excluded, wherever a foreign instrument had been executed. It is therefore my opinion, that in this, as in other cases of the like description, the Scotch court must inquire of the foreign law, as a matter of fact, and examine such evidence as will show how in England such instruments would be dealt with as to construction. I give this as my opinion upon principle, for I am not aware of the question ever having received judicial determination in either country. But here, I think, the importation of the foreign code (sometimes incorrectly called the Comitas) must stop. What evidence the courts of another country would receive, and what reject, is a question which I cannot at all see the necessity of. The courts in any one country entering into those principles which regulate the admission of evidence, are the rules by which the courts of every country guide themselves in all their inquiries. The fact, the truth with respect to men's actions, which forms the subject matter of their inquiry, is to be ascertained according to a certain definite course of proceeding; and certain rules have established, that, in pursuing this investigation, some things shall be heard from witnesses, others not listened to, — some instruments shall be inspected by the judge, others kept from his eye. This must evidently be the same course, and governed by the same rules, whatever

be the subject matter of investigation; nor can it make any difference whether the facts concerning which the discussion arises happened at home or abroad,—whether they related to a foreigner domiciled abroad, or a native living and dying at home. As well might it be contended that another mode of trial should be adopted, as that another law of evidence should be admitted in such cases. Who would argue that, in a question like the present, the Court of Session should try the point of fact by a jury, according to the English procedure, or should follow the course of our depositions or interrogatories in courts of equity, because the testator was a domiciled Englishman, and because those methods of trial would be applied to his case were the question raised here. The answer is, that the question arises in the Court of Session, and must be dealt with by the rules which regulate inquiry there. Now, the law of evidence is among the chief of these rules. Nor let it be said that there is any inconsistency in applying the English rules of construction, and the Scotch ones of evidence, to the same matter, in investigating facts by one law, and intention by another. The difference is manifest between the two inquiries; for a person's meaning can only be gathered from assuming that he intended to use words in the sense affixed to them by the law of the country he belonged to at the time of framing his instrument. Accordingly, where the question is, what a person intended by an instrument relating to the conveyance of real estate situated in a foreign country, and where the lex loci rei sitæ must govern, we decide upon his meaning by that law, and not by the law of the country where the deed was executed, because we consider him to have had that

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foreign law in his contemplation. The will of 1828 has not been admitted to probate here,—it has not even been offered for proof; consequently there is no sentence of any court of competent jurisdiction upon it either way. But in England it never could be received in evidence, nor seen by any court: so, however, neither could it be seen even if it had been proved ever so formally. Our law holds the probate as the only evidence of a will of personality, or of the appointment of executors; in short of any disposition which a testator may make, unless it regards his real estate. Can it be said that the Scotch court is bound by this rule of evidence, which though founded upon views of convenience, and, for any thing that I know to the contrary, well devised, is yet one which must be allowed to be exceedingly technical, and which would exclude from the view of the court a subsequent will, clearly revoking the one admitted to probate? The English courts could never look at this, although proof might be tendered that it had come to the knowledge of the party on the eve of the trial. A delay might be given, to enable him to obtain a revocation of the probate; but for that time, at least, the proceeding must either go upon the wrong will, or be delayed altogether, and at the cost of the party who is in the right by the supposition. It is absurd to contend that the Court of Session shall admit all this technicality of procedure into its course of judicature as often as a question arises upon the succession of a person domiciled in England. Again, there are certain rules just as strict, and many of them not much less technical, governing the admission of parole evidence with us. Can it be contended, that as often as an English succession comes in question before the

Scotch court, witnesses are to be admitted or rejected upon the practice of the English courts; nay, that examination and cross-examination are to proceed upon those rules of our practice, supposing them to be (as they may possibly be) quite different from the Scotch rules? This would be manifestly a source of such inconvenience as no court ever could get over. Among other embarrassments equally inextricable, there would be this, that a host of English lawyers must always be plying in the purlieus of the Scotch courts, ready to give evidence at a moment's notice of what the English rules of practice are touching the reception or refusal of testimony, and the manner of obtaining it; for those questions, which by the supposition are questions of mere fact in the Scotch courts, must arise unexpectedly during each trial, and must be disposed of on the spot, in order that the trial may proceed. The case which I should however put, as quite decisive of this matter, comes nearer than any other to the one at the bar; and it may with equal advantage to the elucidation of the argument be put as arising both in an English and in a Scotch court. By our English rules of evidence no instrument proves itself unless it be thirty years old, or is an office copy, authorized by law to be given by the proper officer, or the London Gazette, or is by some special act made evidence, or is an original record of a court under its seal, or an exemplification under seal, which is quasi a record. By the Scotch law all instruments prepared and witnessed according to the provisions of the Act 1681 are probative writs, and may be given in evidence without any proof. Now suppose a will of personality, or any other instrument relating to personal property, attested by two witnesses, and executed in

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England according to the provisions of the Scotch Act, is tendered in evidence before the Court of Session, it surely never will be contended that the learned judges, on being satisfied that the question related to English personal succession, ought straightway to examine what is the English law of evidence, and to require the attendance of one or other of the subscribing witnesses, when the instrument is admissible by the Scotch law as probatio probata. Of this I can have no doubt. But suppose the question to arise in England, and that the deed is executed in Scotland, according to the Act 1681, by one domiciled there, would any court here receive it as proving itself, being only a year old, without calling the attesting witnesses? It would have a strange effect to hear the circumstance of there being two subscribing witnesses to the instrument, which makes it prove itself in the Parliament House of Edinburgh, urged in Westminster Hall as the ground of its admission, without any parole testimony. The court would inevitably answer,—Two witnesses. Then, because there are witnesses, it cannot be admitted; but they must one or other of them be called to prove it. The very thing that makes the instrument prove itself in Scotland, makes it in England necessary to be proved by witnesses. I have therefore no doubt whatever, that the rules of evidence form no part of the foreign law, according to which you are to proceed in disposing of English questions arising in Scotch courts. It by no means follows from hence, that where a sentence of a foreign court is offered in evidence,—the probate, for example, of an English will, —it should not be admitted; nor do I think it should be denied its natural and legitimate force; but that it

must, like all other instruments, be received upon such proof as is required by the rules of evidence followed by the court before which it is tendered, I hold to be quite clear. It will follow, that though a probate striking out part of a will would be received, (and the Court of Session would have no right to notice the part struck out, for this would be reversing, or at least disregarding the very sentence of the court of probate,) yet the non-probate of a person's will could not prevent the court from receiving and regarding it, if its own rules of evidence did not shut it out. It is unnecessary here to decide what would be the course in the Scotch courts were an English will of personality in question, attested by one witness, after an Act should have passed requiring two. I think that though it must be admissible in evidence, by the rules of evidence which then govern, yet that no effect could be given to its disposition, because of the rules of English law requiring two witnesses,—that being a requisition not of form, in order to make the paper evidence, but of substance in order to protect testators on their dying beds. Upon these principles I am of opinion that the Court of Session had a right to receive and to look at the first will, with a view to examine the testator's intention regarding this fund in medio. Upon the effect of that first will it is unnecessary to dwell further. The trust disposition seems to me a sufficient declaration of intention to appropriate. But the will leaves that intention free from all doubt. No doubt if that will was revoked by the subsequent one of April 1829, there would be an end of such a declaration in Scotland as well as in this country. But I have stated why I think the trust deed, and even the connexion between

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that and the last will, cannot be regarded as revoking any intention respecting the fund and the island expressed in the earlier will; and why quoad that intention, it cannot be held revoked. The whole course of the transaction, and the whole circumstance of the parties, confirm this view of the case. Under these circumstances, I move your lordships that the judgment of the Court below be affirmed, but without costs.

The House of Lords ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be, and the same are hereby affirmed.

A. H. M'DOUGAL—RICHARDSON and CONNELL—
GEO. WEBSTER, Solicitors.