shares must be held to have belonged to the estate at the date of the decree-dative, and that the defender is bound to account for them as Scotch executry. The Lord Ordinary does not think it necessary to determine this point. Possibly, if jurisdiction were once constituted against the defender, it might be ascertained, on a consideration of the merits of the case, that the shares, and the sum for which the defender abandoned his claim in regard to them, constituted Scotch executry, taken up by his title obtained in Scotland, and for which he is therefore bound to account here. But the Lord Ordinary knows of no authority for holding that the mere obligation so to account, if it could be made clear, constitutes a ground of jurisdiction against a party who is in no other way subject to the jurisdiction of the Court. In the only case in which he can find the point to have been considered—*Magistrates of Wick* v. *Forbes*, 12 D., 299—the opinions of the Judges appear to him to be quite opposed to that view. In that case, two out of five Scotch executors resided in England, and the objection to the jurisdiction was, that no steps had been taken to found jurisdiction against these two in an action directed against the whole five. The Lord Ordinary repelled the defence, and the Court adhered. Lord Fullarton, who dissented from the judgment, said, 'I think it is going too far to hold that if a party confirm in the Scotch Courts, he thereby subjects himself to their jurisdiction in all cases, so that he may be called as a defender without the ordinary process to found jurisdiction.' The Lord Ordinary does not understand that the other Judges dissented from the principle thus announced by Lord Fullarton. The judgment appears to him to have proceeded mainly upon the view that the entire body of executors, who had been acting and litigating in Scotland in that capacity, and the majority of whom were resident here, were liable to be dealt with as a company or legal body. The interlocutor of the Lord Ordinary was adhered to in respect of the special circumstances. No such specialities exist in the present case, and the Lord Ordinary does not think that the jurisdiction can be sustained."

The pursuer reclaimed.

J. M'Laren for him. (*Erskine*, 10 Clark (H. L. Cases), 1; *Williams' Exrs.*, 1781; and Westlake Int. Law, 279, were cited for reclaimer.)

Fraser for respondent, was not called on.

Lord President—My Lords, I cannot have any doubt that the Lord Ordinary is right. The pursuer Mr Robson sues in the character of a creditor of a person named Garbett, who died in 1803. His claim is a simple claim of debt. The person against whom the action is directed is Sir John Walsham, who it appears was administrator of the deceased Garbett in England. He is a domiciled Englishman. He has no estate in Scotland, nor any funds there of any kind, and there are none of the ordinary means of founding jurisdiction against him. But it is said that this Court has jurisdiction to entertain this action, because upon 4th February 1863 the commissary of Edinburgh decerned this defender executor-dative *qua* next of kin to the said Francis Garbett, and "assigned next court to give up inventory, make faith and find caution." Nothing followed on that; and the simple question is, whether a foreigner, by reason of this decerniture in his favour by the commissary, is subject to the jurisdiction of this Court, in a suit by a creditor of the party to whom he has thus been decerned executor-dative. The question is simple and plain. There is no authority to support this jurisdiction, and no ground on principle.

The other Judges concurred

Adhere.

Agents for Pursuer—White-Millar & Robson, S.S.C.

Agents for Defender—Russel & Nicolson, C.S.

Tuesday, November 5.

SCOULAR'S TRUSTEES *v.* SCOULAR AND OTHERS.

Trust—Residue—Legatee—Next of Kin. Terms of trust deed under which *held* that any residue of estate which might remain after satisfying the special purposes of the trust, was not intestate succession, but was divisible proportionately among the legatees named in the deed.

The late James Scoular, engineer, Glasgow, who died in December 1865, executed a holograph testament whereby he appointed A. M. Robertson, R. Macalister, and J. Fraser his sole executors and administrators, with full powers as such; declaring that these parties "shall be accountable to the residuary legatees hereinafter named for their intromission in virtue herein." Certain legacies were appointed to be paid to various benevolent institutions, and various bequests made to different persons. The deed then ran thus:—"If there is as much money left after all the bequests is fully made, I appoint my executors to pay the Government legacy tax on all the legacies, and if any return ever comes from the Western Bank, as I paid all the calls in full, my executors is fully impowered to give in proportional parts to the above mentioned institutions and persons mentioned. And I do hereby expressly exclude all my half brothers and sisters, viz., Alexander Scoular and his heirs, and Andrew Scoular and his heirs, and my half sister Grisel or Grace Scoular, since deceased, and her heirs, and all my other relatives and next of kin from any right or interest in my moveable succession."

Alexander and Andrew Scoular and others, as next of kin of the deceased, now contented, in an action of multiplepoinding raised in the name of the trustees, that there was no nomination of residnary legatees in the said testament, nor any disposal by the testator of the residue of his estate, and claimed the whole find *in medio* as intestate succession, falling to the next of kin.

The claim was resisted by the institutions and persons named as legatees, who claimed proportional shares in any residue which remained after satisfying the special purposes of the testament.

The Lord Ordinary (Jerviswoode) found that the legatees named in the deed were also constituted the residuary legatees of the testator, and repelled the plea of the next of kin.

The next of kin reclaimed.

Scott and Strachan for reclaimers.

Watson, Lamond, W. A. O. Paterson, and Birnie, for respondents, were not called on.

The Court adhered, on the ground that the intention of the testator, as disclosed in the deed, was, that any residue should go to the legatees named; two of their Lordships being of opinion that that intention was very clearly expressed.

Agents for Reclaimers—Macgregor & Barclay, S.S.C.

Agents for Respondents—Webster & Sprott, S.S.C., and Campbell & Smith, S.S.C., and J. & A. Peddie, W.S.

Tuesday, November 5.

SECOND DIVISION.

MORRISON *v.* JEFFERIES AND OTHERS.

Written Contract—Extra Work—Triennial Prescription. Held that the plea of the triennial prescription did not apply to extra work executed under a written contract providing for such work.

This is an action at the instance of Alexander Morrison, contractor, Bellevue Terrace, Edinburgh, against Dr Jefferies, Dalkeith, and others, trustees of the Queen's Theatre and Opera House, Edinburgh, concluding for the balance of a sum of money alleged to be due to him for the mason work done by him on the theatre, under a written contract between, May 1854 and May 1856. The pursuer made the following statements in support of his claim :—

"In terms of, and upon the conditions of the said specifications, the pursuer, in or about the end of 1853 or beginning of 1854, give to Mr Bryce, on behalf of the defenders and the said John Brown, as trustees and committee foresaid, an offer, addressed to the latter, for the whole mason work, stating the difference of price between Sterlie Burn and Kenmuir Quarries for the hewn works of principal fronts. There was no time fixed by the specifications for the contractor for the mason work commencing or completing his operations, but the pursuer understood, and made up, and gave in his estimate and offer as aforesaid, on the footing that he was to be at liberty, and not to be prevented by the defenders and the said John Brown, or any of them, or any one for whom they were responsible, from commencing and carrying on continuously, and finishing and completing the mason work of the said building mentioned in the said specifications.

"The estimate and offer so made up and given in was retained by the said David Bryce, and he, in or about the end of 1853 or beginning of 1854, told the pursuer that he was to get the works, and would be told when to commence the same. The pursuer's said estimate and offer were thus accepted by the defenders and the said John Brown; and the pursuer was thus employed by them to commence, carry on, and finish and complete the mason work of the said building. And it was contracted and agreed between the pursuer and the then trustees or committee aforesaid, that the mason work which the pursuer was so employed to commence, carry on, and finish and complete, should be forthwith, or as soon as possible thereafter, commenced and carried on continuously, and be completed to the entire satisfaction of the said trustees or committee, or Mr Bryce, or Mr Hog.

"Shortly previous to 18th May 1854, the pursuer was told by Mr Bryce to prepare to commence the said works, and on or about 18th May 1854 the pursuer got access to the said site, and it was on or about 24th May 1854 that he commenced the said works. The pursuer's works were, however, after being so commenced, carried on continuously (with the exception of the period from 2d to 26th June 1854, during which he was not allowed by the defenders and the said John Brown, as the then trustees or committee, who communicated with the pursuer through the defender Thomas Scott, their clerk or secretary, and whose letter to the pursuer is produced, to proceed, in consequence of their having been served with an interdict), and finished and completed on or about 24th May 1856. The works, under the pursuer's contract, and extra works connected therewith, were completed under his said employment by the defenders, and in every respect to the entire satisfaction and under the instructions of Mr Hog. Mr Bryce was also entirely satisfied with the works completed by the pursuer in every respect. There was in the specifications to which the pursuer's offer referred, a provision as to the entry and signature in a book of all additions to, or deductions from, the works embraced in the specifications, but no book was provided by the defenders or any person for this purpose, and none such was kept, although there were both deductions from, and additions to, said works, and all such were executed by the pursuer under the instructions of Mr Hog or of some of the defenders, and to the entire satisfaction of Mr Hog. Neither the defenders nor Mr Bryce nor Mr Hog ever gave the pursuer any written orders; and from first to last, both as regarded original and extra work, the pursuer proceeded with the works he contracted to execute, and those he was verbally ordered to do, and was in part paid for, as after mentioned, by the defenders, in the full knowledge of the defenders and Mr Bryce and Mr Hog, and without objection on that score of the want of written orders or signed entries in any book therefor, under the instructions and to the entire satisfaction of Mr Hog. The provision in the specifications as to the entry and signature in a book was never acted on, but departed from and abandoned by the defenders and Mr Brown, as the pursuers' employers."

The defender maintained a number of pleas which the Lord Ordinary (BARCAPLE) repelled, holding that averments had not been made relevant to support them, and they pleaded the triennial prescription. His Lordship also repelled the latter plea, on the ground that it was not disputed that the extra work in question was performed under a written contract which provided for extra work being done, and that in such a case the triennial prescription did not apply.

The defenders reclaimed.

SOLICITOR-GENERAL and MAIDMENT for them.

THOMS in answer.

The Court adhered.

Agents for Pursuer—Lindsay & Paterson, W.S.

Agent for Defenders—J. Neilson, S.S.C.

Wednesday, November 6.

FIRST DIVISION.

MARQUIS OF AILSA *v.* PATERSON AND RONALD.

Property—River—Salmon-Fishing—1696, *c.* 33—*Prescription—Mill-dam.* In an action between A, proprietor of salmon-fishings and one bank of a river, and B, proprietor of opposite bank, *Held* that B had a prescriptive right to a dam-dyke across the river, but with a sufficient slap for the passage of salmon. Nature and dimensions of slap adjusted in accordance with report by engineer to whom remit made by Court.