this process, as I understand the fund to be very small, and no less than two sets of parties are here to prove whether they are next of kin of the testatrix; but, as the case stands, there is no course open to us but either to adhere or alter the interlocutor on the merits and proof for the claimant Ogg, the claimant Wilson, who sought to establish his propinquity, having acquiesced. The Lord Ordinary has found that these claimants have failed to establish their propinquity as alleged by them respectively to the testatrix, the late Isabella Wilson, and I entirely agree in that conclusion. I never saw such a shadow of proof as this, for it is merely proof that this Mrs Ogg herself says she once heard her grandmother say that she was first cousin of a certain George Wilson, who was grandfather of the testatrix. No doubt hearsay evidence is admissible in cases such as this, where the party whose statements are given is dead. But I never heard that the hearsay of one party, reported by another, is enough to make out a case. But that is all we have here. The proof is weak, not only in what it presents, but in what it does not present. There is no family in Scotland that for three or four generations has not some scrap of written evidence to offer in the way of proving the descent of some member of the family. I never saw such a meagre case of evidence as this.

LORD CURRIEHILL—I concur.

LORD DEAS—I agree that this case is not in a shape in which we can put an end to it as it might have been. This lady left the residue of her estate to the Society for the Conversion of the Jews. This Society says it is the society designated. The only answer to that is, that this Society had been merged into another. That is denied. If there had been a proof of the averments about that, and it had appeared that this was the Society, and that it was not extinct, even though it had joined another Society, the result would have been that the Society would have got its money, and none of the next of kin would have had anything to do with it. In place of that, the parties claiming as next of kin are put to prove their propinquity in order that they may have a title to try the question with the Society. The result is that neither party is next of kin, and now their money must go to the Crown or the Society. The question whether this is the Society is only beginning. If the Society had been allowed a proof at the same time as the other parties, we should have had proof whether this was the Society or not. If it was, it would have been in a position to be preferred to the fund, and there would have been an end of the matter. While it is unfortunate that this is the shape of the case, I agree that, in the position of matters, we cannot do anything but adhere.

LORD ARDMILLAN concurred

PATERSON moved for expenses.

MACLEAN opposed, on the ground that the title of the Society had not been established, and the reclaimer if found liable in expenses to the Society, might in the end be found to have paid to a party who had no title to appear at all.

The Court gave expenses.

Agent for Reclaimer—Wm. Miller, S.S.C.

Agents for Respondent—J. & A. Peddie, W.S.

Thursday, February 6.

MARTIN'S TRUSTEES *v.* MARTIN AND OTHERS, YOUNGS *v.* MARTIN AND OTHERS.

Succession—Heritable and Moveable—Heir and Executor — Legacy—Residuary Legatee. A died, appointing B residuary legatee; B died intestate, without having obtained a conveyance from A's trustees, her *jus crediti* against A's estate being partly for heritable and partly for moveable subjects. Plea by B's executor that he was entitled to be relieved by B's heir of a rateable proportion of the debts and legacies due by A's estate, *repelled.*

Janet Martin died in 1847 leaving a trust-disposition and settlement whereby she disponed and conveyed to her trustees and executors her whole means and estate, empowering them to sell and dispose of the heritable subjects disponed to them, and of her whole other estate. The purposes of the trust were for payment of the truster's debts, and of certain legacies and annuities; and (6), for payment to John Martin of an additional or deferred legacy of £3000, and to Thomas Young an additional or deferred legacy of £5000, these legacies not to be payable till the death of the truster's niece Anne Gordon Martin, who was to liferent the capital of the legacies. (8) After payment of certain of the legacies and bequests, and upon setting apart a fund to meet the deferred legacies in article 6, the trustees were, on obtaining the consent of one of the annuitants, to "have it in their power to convey and make over and pay over to the said Anne Gordon Martin, whom I hereby appoint my residuary legatee, the whole residue and remainder of my means and estate, heritable and moveable, hereby conveyed," under burden of the annuities, and of all claims against the trust-funds, and thus to bring the trust to a close. Janet Martin left a considerable amount of property, consisting partly of heritable subjects, partly of heritable bonds, and partly of moveable property. The trustees entered on the administration of the trust, and paid the truster's debts and legacies. Anne Gordon Martin did not obtain a conveyance from Janet Martin's trustees. She died in 1862 intestate and unmarried. Two actions were raised—an action of multiplepoinding at the instance of Janet Martin's trustees, and an action of declarator at the instance of Thomas and James Young, executors *qua* nearest of kin of Anne Gordon Martin. It had already been held by the Court, in the conjoined actions, in a question between Thomas and James Young, claiming as Anne Martin's executors, and John Martin claiming as her heir-at-law, that the residuary estate of Janet Martin, to which Anne Martin had a *jus crediti* at the time of her death, had not been constructively converted, so as to become personal estate, descending to her executors, but that Anne Martin's right in the succession of her aunt, so far as heritable, went to her heir, and so far as moveable, to her executor.

The present question related to a plea maintained by Anne Martin's executors, to the effect that Janet Martin having charged her whole estate, heritable as well as moveable, with the payment of debts, legacies, and trust expenses, such debts, legacies, and trust expenses were chargeable upon the whole heritable and moveable estates rateably, according to their respective values.

The Lord Ordinary (JERVISWOODE) repelled this

plea, adding this note:—"The Lord Ordinary, in pronouncing the preceding interlocutor, has proceeded on the footing and principle that, as the trust-deed by Miss Martin contains a general direction to the trustees in the outset for payment of debts, it was the duty of the trustees to devote, in the first instance, the general estates of the truster towards the fulfilment of that direction, and that it was not within the power or right of the trustees to apply the subject of a special bequest to the payment of debts, so as to defeat the intention of the truster as respected each bequest.

"Applying this principle here, the Lord Ordinary assumes that the fact of the trustees having uplifted and applied the sums contained in the heritable bond to the payment of debts, cannot affect the question of succession to the truster's estate, in accordance with the terms of the deed of trust; and if it be the rule of law, as the Lord Ordinary holds, that bequests or legacies of sums of money are, apart from special direction, a direct burden upon the executry or moveable estate, he is at a loss to understand on what footing it can be successfully maintained for the claimants, the Messrs Young, that in this instance the £3000 and £5000 bequests are here to be charged as a burden primarily against the heritable estate. There is not an expression in the deed which will suffice to lead to that conclusion."

The executors reclaimed.

LORD-ADVOCATE (GORDON) and J. M'LAREN for them

ASHER (GIFFORD with him) in reply.

LORD CURRIEHILL—I concur with the Lord Ordinary, and on a very simple ground.

The question is one as to the succession of Miss Anne Martin, aunt of the beneficiaries, and that question must be determined on the state of matters as at the time of her death, for she died intestate, and at that time the whole of her property consisted of a claim on Miss Janet Martin's trust-estate. As I understand the matter, at that time all the debts of that trust-estate had been paid off, but these two burdens of £3000 and £5000; and, as I see from the record, these were paid off in a few weeks after her death, and they were so paid by funds which had been realised and were in the hands of the trustees, without encroaching on the heritable estate, or making it available for that purpose in any way. At the time of Miss Anne Martin's death, her claim on the trust-estate was for the residue which then remained, and which consisted, to a very considerable extent, of heritage, and, to some extent, of moveables. There was a debt owing to the legatees, but the right of the legatees was moveable, and not heritable, in their person. There were ample funds in the hands of the trustees to pay them. The right to the heritable estate, which she was entitled to get made over *in specie* at the time of her death, remained entire, subject to no burden. Though there was a personal debt, there were ample funds to meet it. The trustees might have paid off these debts before her death, for they were authorised to wind up the estate. The principle of the case seems to me to be this, that the claim on that estate consisted of subjects partly heritable and partly moveable. There was a burden of debt, but it was a moveable debt payable out of her moveable funds, and therefore at the date of her death, the *jus crediti* of the heir was unburdened. I think, therefore, that the Lord Ordinary is right.

The other Judges concurred.

Agent for Reclaimers—A. Stevenson, W.S.

Agents for Respondents—H. & H. Tod, W.S.

Thursday, February 6.

SECOND DIVISION.

OGILVIE *v.* BOATH.

Location—Admission—Quantum valeat. *Held* that when there is a contract of location admitted, but the price is either not fixed or cannot be ascertained, the *quantum valeat* must rule the rights of parties.

This was an advocation from the Sheriff-court of Dundee. The pursuer was the trustee on the sequestrated estate of the late George Galbraith, residing at Muirdrum; and the defender was John Ogilvie, farmer, Pitlivie; and the question was as to the sum which the defender was bound to pay to the pursuer for the grazing of 259 wethers in a grass park rented by the said George Galbraith, and by him let to the defender. The conclusions of the action were as follows:—

"Therefore the defender ought to be decerned to pay to the pursuer, as trustee aforesaid, the sum of £35, 12s. 6d., or such other sum as may be ascertained in the course of the process to follow hereon to be the value of a grazing in a park or parks at Panmure, occupied by the said George Galbraith, and let by him to the defender for 300 wethers for the period of one month, beginning on or about the 18th day of May last, which grazing was let to the defender, and used and possessed by him without the rent being specified, or, if specified, without any proper record of it having been preserved, with interest on the said sum from the 18th day of June last, when the same was due, at the rate of five per centum per annum, till payment, with expenses.

The pursuer maintained that there had been no bargain as to the rate, and that 6d. per head per week was a reasonable charge. The defender, on the other hand, alleged a bargain, to the effect that the rate was not to exceed 3d. per head per week.

The Sheriff-substitute (GUTHRIE SMITH), after a proof, found for the defender, holding the bargain alleged proved. He added the following note:—

"*Note.*—The bankrupt George Galbraith having absconded, the pursuer, who is the trustee on his sequestrated estate, has been obliged to come into Court without being able to say whether there was any or what bargain made with the defender as to the pasturing of these sheep. The summons concludes for the value of the grazing possessed by the defender, 'without the rent being specified, or, if specified, without any record of it having been preserved.' But the record of it has been preserved in the defender's memory, and the only question is, Whether he is to be believed? It appears to the Sheriff-substitute that he has not been contradicted in any material particular. The statement by Mr John Galbraith, the bankrupt's father, that Mr Ogilvie, the defender, once told him that he was to give his son nearly as much for the park as his whole six months' rent, is not confirmed, and at best can only be taken to have been some loose observation by the defender as to the excellent bargain which the bankrupt had made with the landlord. It may be unfortunate for the