the valuation-roll is the rule. The question is, whether the heritors were entitled to ascertain real value by the actual value on the valuation-roll, or were bound to ascertain it by the old valuation. There is not, and there never was, any statutory injunction to use the old valuation of Charles the Second's time as the mode of ascertaining the value of lands and heritages. It was a rule of convenience, there being no other authorised standard of value, and so a certain customary sanction grew up. But the *Peterhead* case decided that the fact to be ascertained was still the real value, and that where the old valuation from any cause was grossly and palpably inaccurate, however inconvenient, the fact must be ascertained. Here the old valuation is deficient by a third, and I think that a sufficient disparity to justify an abandonment of the old valuation.

Agents for the Pursuers—H. & A. Inglis, W.S.
Agents for the Defenders—Tods, Murray & Jamieson, W.S.

Thursday, June 16.

FIRST DIVISION.

SPECIAL CASE—WALKER'S TRUSTEES.

Succession—Construction—Devolution—Lapsed Share—Vesting—Expenses. B executed a trust-deed in 1846, which provided, *inter alia*, that if survived by his son and daughter, then one and four years old, his son's share should be retained till he was twenty-five, and his daughter's share be payable on her majority or marriage to her and her heirs and assignees; but the trustees were directed, if she married, to settle it on herself in liferent and her family in fee, exclusive of her husband's *jus mariti* and right of administration. In the middle of one of the purposes of the trust-deed it was provided that a share lapsing by the death of one child should devolve on the surviving "children," under the same conditions as they were to receive their shares. The daughter was married in 1866, and by her marriage-contract conveyed all *acquirenda* to the marriage-contract trustees, with a direction that failing issue the estate should go to the survivor of herself and husband. Her father was a party to the contract, and a few days after executed a codicil in implement of his obligations under it. His son survived him, but died, unmarried, before he was twenty-five, leaving a trust-conveyance. *Held* (1) the son's share had not vested in him, and could not pass to his trustees; (2) "children" must be read as "child," and the clause containing the word be held generally applicable, and not confined in its scope to the purpose containing it; (3) the lapsed share must go to the daughter under the same conditions as her own share; and (4) that it had been carried by the marriage-contract to the marriage-contract trustees.

The expense of the case was only ordained to come out of the fund in dispute after all the parties to the case had signed a minute requesting the Court so to decern.

The late George Walker, M.D., had only two children, viz., Mary Scott Walker, now Gavin, born on 15th January 1842, and George Murray Walker, now deceased, born on 3d April 1845. Dr Walker died on 28th September 1866, survived by his children, and leaving a trust-disposition and settlement of his whole estate, heritable and moveable, dated 24th February 1846, and four codicils thereto. Miss Walker was, on 14th January 1866, married to Mr John Gavin. An antenuptial contract of marriage, dated 8th and 10th January 1866, was entered into between them, with the special advice and consent of Dr Walker. The trustees thereby appointed were parties to the case. Only one child has been born of the marriage. The means and estate of which Dr George Walker died possessed consisted almost exclusively of house property in Edinburgh. His moveable property consisted, with some trifling exceptions, of his household furniture, plate, books, and pictures, which were, by a holograph testament, dated 20th June 1866, specially bequeathed to his son George Murray Walker, subject to his mother's liferent. Dr Walker's liabilities consisted of—(1) a debt of £600, secured over one of the houses; (2) debts to the amount of £600 due by personal bonds; (3) the sum of £5000 provided by him to his daughter in her marriage-contract; and (4) his ordinary personal and household accounts. When the trustees proceeded to divide the trust-estate in terms of the directions in Dr Walker's trust-deed, it appeared that the sum of £5000 provided to Mrs Gavin by her marriage-contract considerably exceeded one-third of the value of the house property provided to her by her father's trust-deed; and it was arranged, with the consent of all parties, that Mrs Gavin's provision should be paid by the trustees granting a bond and disposition in security over the whole trust-estate for the said sum of £5000 in favour of Mr and Mrs Gavin's marriage-contract trustees, to be held by them for the purposes of the marriage-contract. This was accordingly done, and, subject to the above bond, the trust-estate remained vested in the trustees for the purposes of the trust, except the provision thus dealt with. George Murray Walker attained the age of twenty-one, and survived his father; but died on 21st December 1869 without having attained the age of twenty-five years. He left a trust-disposition and settlement, dated 1st November 1866, in favour of trustees, by which he conveyed to them his whole estate, heritable and moveable, and particularly his whole right and interest in the means and estate of his deceased father, the late Dr George Walker. The purposes of it were, however, unconnected with the Special Case. The provisions of the other deeds referred to will be found quoted in the Lord President's opinion. The trustees under George Murray Walker's settlement maintained that the share of the trust-estate set apart for George Murray Walker after his father's death, and thereafter held for his behoof, had vested in the said George Murray Walker at his death, and been carried to them by his trust-settlement. The trustees under the marriage-contract of Mr and Mrs Gavin, and Mr Gavin for his interest, maintained that the share of George Murray Walker in his father's estate lapsed by his having died without having attained the age of twenty-five years, and that the same, as undisposed of residue, now belonged to Mrs Gavin, as her father's heir, and that the same fell under her general conveyance of *acquirenda* in her marriage-contract. Mrs Gavin maintained that upon the death of her brother his share, in terms of her father's trust-deed, devolved upon her as the sole surviving child of her father, and did not fall under the conveyance in her marriage-contract, but must now, in terms of her father's trust-

deed, be secured against the *jus mariti* and right of administration of her husband, and against being affected by his debts or deeds, and must be settled upon herself in liferent only, and her children born and to be born in fee. As the interests of Mr and Mrs Gavin were opposed to each other, a curator *ad hanc litem* was appointed to her. The opinion and judgment of the Court were requested upon these questions:—

"1. Whether the share of Dr George Walker's estate, destined by his trust-settlement to George Murray Walker, his son, vested in the said George Walker at and prior to his decease, and has been validly conveyed by the trust-settlement of the said George Murray Walker to his trustees?

"2. Whether the said share of Dr Walker's trust-estate did not vest in the said George Murray Walker at and prior to his decease, and whether by the death of the said George Murray Walker the same has devolved upon Mrs Gavin under her father's trust-settlement?

"In the event of the *first* of these questions being answered in the negative, and the *second* in the affirmative, the opinion and judgment of the Court is further requested upon the following questions:—

"3. Whether the trustees of Dr George Walker are bound to settle the said share upon Mrs Gavin in liferent only, and her children in fee, and to secure the same against her husband's *jus mariti* and right of administration, and against being affected by his debts or deeds?

"4. Whether Mrs Gavin has now right to the fee of the said share, either under the trust-deed of her father or as his heir-at-law, and whether in such event she is bound to convey the same to her marriage-contract trustees in terms of her marriage-contract: or whether the right to the said share has been already conveyed to Mrs Gavin's marriage-contract trustees under the said contract of marriage?"

Watson and Marshall for trustees of Dr Walker and his son.

Crichton and Asher for Mr and Mrs Gavin's marriage-contract trustees.

Solicitor-General for curator to Mrs Gavin.

At advising—

Lord President said that in answering the first question the history of the parties must be kept in view. Dr Walker's settlement was executed in February 1846, at which time he had only two children, a son one year old and a daughter four, and these two children were the same as those he left at his death in 1866. The plan of the settlement was, after providing for the widow, and payment of various legacies, he gave directions to the trustees what they were to do in the event of his leaving the son and daughter he then had, or one son and daughter surviving him. The directions were to be found in the sixth and seventh purposes, which were in the following terms:—"In the event of my dying leaving only my said son and daughter, or only one daughter and one son, I hereby direct and appoint my said trustees, at the first term of Whitsunday or Martinmas after my daughter shall attain the age of twenty-one years, or be lawfully married (provided her marriage shall meet with the full approbation and consent of a majority of my trustees at the time), or so soon after as they shall find convenient, and in the event of no division having been previously made, to have my whole property, heritable and moveable, as it shall then stand, valued in such manner as my said trustees may fix upon (and which my said children are hereby enjoined to acquiesce in, and prohibited from quarrelling or impugning in any manner of way), and after obtaining such valuation, to divide my said property into three equal parts or shares, and to set aside one-third part thereof as the portion of my said daughter Mary Scott Walker, or any other daughter I may have, and to convey, assign, and dispone the same to her and her heirs or assignees *omni habili modo;* but as it is my wish that in the event of my daughter's marriage her property should be secured against the *jus mariti* or right of administration of any husband she may marry, and against being affected by his debts or deeds, and should be settled on herself during life, and her family after her death, I request my said trustees to see this wish carried into effect so far as in their power to do so: In the event foresaid of my leaving only one son and one daughter, and of a division being made by my daughter reaching the age of twenty-one years, or being married as aforesaid, then I hereby direct and appoint my said trustees, after the said division is made, to apply so much as they may consider necessary of the annual produce of the other two third parts or shares of my said estate, heritable and moveable, for the maintenance, clothing, and education, and forwarding in business of my said son George Murray Walker, or of any other lawful son, aye and until he reach the age of twenty-five years complete, and at the first term of Whitsunday or Martinmas after he shall attain the said age of twenty-five years, then to pay over, assign, and convey the said remaining two parts or shares of my said estate, and any accumulation thereof that may have been made since the period of division in manner before mentioned, to and in favour of my said son George Murray Walker, or any other son, and his heirs or assignees whomsoever; and in the event of my son reaching the age of twenty-five years before my daughter shall reach the age of twenty-one years, or be lawfully married as before mentioned, then and in that case the foresaid valuation shall be made at the time of my son reaching the age of twenty-five years, and my property shall then be conveyed in the proportions before mentioned to my said son and daughter, and their heirs and assignees."

There were thus two cases contemplated, one of which had occurred,—the truster had left the two children he then had, and in that case the division fell to be made on the daughter's marriage. Then followed the eighth, the second last purpose, which did not apply to the case that had occurred. But at the end of it there were certain declaratory clauses about which there was some difficulty. It was said that they were part of the eighth purpose, and that it did not apply to the case that had occurred, and therefore that these clauses were to be disregarded. The first of these clauses was as follows:—"Declaring that if any of my children shall predecease me, or die before their provisions shall become payable, without leaving lawful issue, then the whole of my estate shall, without division, be conveyed over to my surviving children, and the heirs of such as may die leaving issue, at the same periods and in the same terms as are pointed out in regard to their own separate provisions." This clause, it was said, plainly could not apply, for it spoke of payment to children if one died, and this

would imply more than two children previous to the one child's death. The contention, therefore, was that, both from its position and from the language used, this clause did not apply generally, and therefore to the event that had occurred, but only to the eighth purpose.

Now, in the first place, it was to be observed that this clause was followed by another in these terms:—"Declaring hereby, that in making a valuation of my said property in manner before mentioned, provision must be made for the annuity due to my said wife, and any other annuity or annuities I may leave, by setting a sum aside for meeting the same, or by purchasing an annuity from some well established insurance company, which sum so set apart, as well as the furniture, plate, and others liferented by my widow, when freed from the said annuity or annuities, shall then be divided in the same proportions as the rest of my estate, and applied to increase the provisions to my child or children, or the descendants of such as may have died accordingly." Now, this latter clause was a part of the eighth purpose, yet unquestionably it was of general application, and applied to other cases than that contemplated by the eighth purpose. Then it was also to be observed the eighth purpose concluded with those words:—"with power to my said trustees, if they shall see proper, to advance to my said son George Murray Walker, or any son, out of his capital, what sum or sums may be required as apprentice-fee, or for the purpose of setting him or them up in business." Now these words were plainly of general application. There was therefore nothing in the position of the first mentioned clause in this eighth purpose to prevent its being intended to be of general application, seeing that it was in company with clauses of general application.

In the second place, if the clause in question was not of general application, there would be no provision at all for the predecease of children. This would be an odd result. The clause therefore was to be read generally; "children" must be read as "child"; and thus there was a provision if a child died without issue before his provision was payable that the whole estate was to go to the survivor. Now, by the seventh purpose the son's provision was not to be payable till he reached twenty-five. Till then it was to be held for his use. As George therefore had predeceased this period without issue, his provision had not vested. This was the position of matters under the settlement, and not much light was thrown on it by the other deeds, which were long subsequent to it. This answered the first two questions, the first in the negative, and the second in the affirmative.

The third question was, whether the estate thus falling to Mrs Gavin was to be settled in terms of her father's settlement, or under the general conveyance by her in her marriage-contract? That contract was executed on 8th January 1866. Her father was a consenting party to it, and it contained the following clauses:—"For which causes, and on the other part, the said Mary Scott Walker hereby assigns, dispones, and makes over to the said trustees all and sundry lands and heritages, goods, gear, debts, and sums of money, and generally the whole property, heritable and moveable, now belonging or resting and owing to her, or that shall pertain and be owing to her during the subsistence of the said marriage (excepting always her provisions before specified, and also the sum or sums to which she may derive right under and in virtue of the obligation by the said Dr George Walker, her father, hereinafter written), with all action and execution competent to her thereanent; but in trust for the purposes following, *videlicet*, to pay the rents, interests, dividends, and annual proceeds of the said means and estate to the said Mary Scott Walker during all the days of her life, and after her death, in the event of her being survived by the said John Gavin, to pay the same to him during all the days of his life and survivance, and on the death of the said spouses to pay or deliver over the fee or capital of the said means and estate to the child or children of the marriage, subject to the power in favour of the said intended spouses after written of appointment and division among the children and their issue, and of substituting an annuity; but failing children, then to the survivor of the said John Gavin and Mary Scott Walker, and his or her heirs, executors, and representatives whomsoever: And the said George Walker hereby binds and obliges himself, his heirs, executors, and representatives whomsoever (but excepting always the proportional share of liability, along with the other funds of the said George Walker, for paying the annuity of £125 to his wife in the event of her surviving him), to make payment to the said trustees, and that at the first term of Whitsunday or Martinmas occurring after the death of him, the said George Walker, the sum of £5000 sterling, with a fifth part more of the said sum of liquidate penalty in case of failure, and the interest of the said sum at the rate of £5 per centum per annum from the said term until paid; but in trust always for the ends, uses, and purposes following, *videlicet*, to pay the interest or produce of the said sum to the said Mary Scott Walker during all the days of her life, and after her death, in the event of her being survived by the said John Gavin, to pay the said interest or produce to him during all the days of his life and survivance; and on the death of the survivor of the said spouses, the said trustees are hereby directed to pay over one-half of the capital of the said sum to the child or children of the said marriage, subject to the power in favour of the said intended spouses after written of appointment and division among the said children and their issue, and of substituting an annuity; and failing children, to pay over the said one-half of the before mentioned sum of £5000 to whomsoever the said Mary Scott Walker may appoint, by any writing under her hand, to take effect after her death, and failing such appointment, to her legal representatives whomsoever, and to pay over the other half of the capital of the said sum of £5000, on the death of the survivor of the said spouses, to whomsoever the said Mary Scott Walker may appoint, by any writing under her hand to take effect after her death, and failing such appointment, to her legal representatives."

This sum of £5000 had been provided to Mrs Gavin by a codicil by her father to his settlement on 18th January following. He, on the narrative of his daughter's marriage-contract and his obligation to pay the £5000 therein mentioned, directed his trustees to do so, and then gave the following directions:—"and having regard to the provisions in favour of my said daughter expressed in the before-written trust-disposition and settlement, as it is not my intention that the said sum contained in the before-mentioned obligation by me should be in addition to the said provisions, I hereby direct and appoint my said trustees to deduct the

said sum from the said Mary Scott Walker's share of my means and estate in a division thereof, and reckon and impute the same as a payment to her on account of her said share: considering also that the sum before-mentioned may in terms of the said contract of marriage be laid out and invested on heritable or other security, and as the bulk of my means and estate consists of house-property, it is my wish, and I recommend my trustees to arrange with the trustees under the said contract of marriage, on a valuation of my estate being obtained, to transfer a share thereof equivalent to the said sum of £5000 to the trustees under the said contract of marriage, to be held by them in trust for the purposes thereof."

By the marriage-contract the fee of the estate brought by Mrs Gavin was, failing children, to go to the survivors. The question therefore presented itself, whether in consequence any balance or lapsed share would pass under this clause, or whether there was anything in Dr Walker's settlement to prevent it? In answering this question, it was important to observe he was a party to the marriage-contract. He made a codicil subsequent to the execution of the contract, but the codicil was silent on the point. In the clause devolving George's share on his sister, her share was to be payable at the same periods and in the same terms as are pointed in regard to her own provision. Therefore this share that had devolved on Mrs Gavin came to her on the same conditions as her own share. By the sixth purpose of her father's settlement the conveyance was "to her and her heirs and assignees *omni habili modo*." Now, when Dr Walker wrote this, his daughter was only four years old, and the period of her marriage distant. But he gave power to his trustees, in the event of her being married, to secure the provision against the *jus mariti* of her husband, and settle it on herself in liferent, and her family thereafter. But in his own lifetime occurred the very event contemplated, viz., her marriage, and therefore it was for him to have done what, had he been dead, he had directed his trustees to do. The Court might therefore feel sure that Dr Walker had his views carried into effect as he thought best. Every thing therefore ought to go to Mrs Gavin as stipulated in her marriage-contract, and therefore every thing she took fell under the general conveyance to her marriage-contract trustees.

The other Judges concurred.

MARSHALL asked that the expense of the case should be paid out of the fund.

Counsel for the other parties concurred.

The Court declined to make any finding to that effect till a joint minute should be put in by all the parties consenting to the expense coming out of the fund, and asking the Court to find in terms of the minute.

Agents for Trustees of Dr Walker and his Son—Tawse & Bonar, W.S.

Agents for Mr and Mrs Gavin's marriage-contract Trustees—Morton, Whitehead & Greig, W.S.

Agent for Mrs Gavin's Curator—Party.

Friday, June 17.

SPECIAL CASE—RANKEN *v.* BEVERIDGE.

Succession—Destination—Children—Grandchildren—Heirs whatsoever. Under a trust-disposition a house was destined to B in liferent allenarly and her children equally in fee; whom failing to C in liferent and her children equally in fee; whom failing to the truster's own nearest heirs whatsoever. In 1838 the trustees conveyed the house as directed by the truster, but none of the disponees was ever infeft. B died without issue in 1855; C in 1865. C had one child D, who died in 1864, leaving a son and a daughter. *Held* (1) on the death of B, C became fiar; (2) the destination to C's children included her grandchildren; (3) as the destination was not exhausted, the heirs whatsoever of the truster were excluded; (4) the direction to divide equally amongst C's children did not apply to her grandchildren; and (5) as thus D was entitled to the whole, her son, as her heir-at-law, was entitled to the house.

By a trust-disposition and settlement in 1837 the now deceased John Ranken, glass manufacturer, Leith Walk, gave, granted, assigned, and disponed to and in favour of certain trustees, for the ends, uses, and purposes therein referred to, all and whole a lodging or dwelling-house in Fyfe Place, Leith Walk, with an area or piece of garden behind the same, as also his whole other heritable and moveable estate. The second purpose of the trust was in the following terms:—"I hereby direct and appoint my said trustees to dispone and assign my foresaid lodging or dwelling-house, area and pertinents in Fyfe Place, with all the furniture, bed and table linen, silver plate, and every other article in said house, to the foresaid Susan Ranken, my eldest sister, in liferent for her liferent use allenarly, excluding the liferent of any husband she may marry, and to her children in fee equally among them; whom failing to my youngest sister, Mrs Margaret Ranken or Gibson, wife of the foresaid Mitchell Gibson, also in liferent, excluding the *jus mariti* of her husband, and to her children in fee equally among them: whom all failing, to my own nearest heirs whatsoever."

The truster died on 10th September 1837. He was survived by his two sisters, Susan Ranken and Mrs Margaret Ranken or Gibson, and by his only brother, Francis Ranken. Susan Ranken died unmarried and intestate in 1855. Mrs Margaret Ranken or Gibson was married to Mr Mitchell Gibson in 1835, and died on the 4th of September 1865. There was only one child born of their marriage, named Margaret Gibson, who was in 1862 married to Mr Alexander Beveridge. Mrs Beveridge died in October 1864, leaving two children, who are still alive, viz., a son named Alexander Gibson Beveridge, and a daughter named Margaret Ranken Beveridge. In implement of the second purpose above mentioned, contained in Mr Ranken's trust-disposition and settlement, his trustees executed a disposition and assignation in favour of Susan Ranken, dated 25th April 1838, whereby they disponed and assigned to her in liferent for her liferent use allenarly, excluding the liferent of any husband she might marry, and to her children in fee equally among them; whom failing to her youngest sister, the said Mrs Margaret Ranken or Gibson, also in liferent, excluding the *jus mariti* of her husband, and to her children equally in fee among them; whom all failing to the said John Ranken's own nearest heir whatsoever, all and whole the foresaid lodging or dwelling-house in Fyfe Place, with the area or garden ground behind the same, and pertinents therein described.

In 1841 a charter of resignation and confirma-