January, which shows that £27, 0s. 11d. will fall due to you for commission, if the amount of sales £1160, 14s. 2d. is paid.' And in his letter to the defenders of 9th February 1871 (No. 82 of process), the pursuer expressly says that by the agreement he was to have 'one-third of the profits;' and it scarcely required to be admitted by him, although it was so in his examination as a witness, that there could be no profit on bad debts, or on anything but accounts payment of which had been actually received or recovered. Then again, in their letters to the pursuer of 12th June 1871, the statement in which was not repudiated or objected to by him in any way, they say, 'There is nothing due to you, as the loss on Roxburgh & Company's account will be larger,' that is, than any claim he could otherwise have had on other transactions. So far, indeed, from repudiating or objecting to the defenders' statement in the letter just referred to, the pursuer, on 5th June 1871 (No. 85 of process), wrote them for a state of accounts, and added 'I think you need not deduct all my portion of Roxburgh's bad debt off at once.' On 7th July 1871, the defenders did transmit to the pursuer, in a letter of that date (No. 517 of process), a tentative, or, as they term it, a *pro forma* account, showing, as they stated, 'that if £5726, 14s. is paid, £77, 3s. 8d. will be the amount of your commission to 30th June;' and in the same letter the pursuer added, 'You ought not to ask for money before it is due.' The Lord Ordinary does not see how it is possible to reconcile these letters, and the statements which they contain, with the interpretation of the agreement now attempted to be fixed upon it by the pursuer, or with any other interpretation of it than that contended for by the defenders, and if so, it is clear on the proof that no sum whatever is due to the pursuer.

"In the course of the debate it was suggested on the part of the pursuer that each transaction of sale of tea made by him should, in the matter of accounts, and in ascertaining whether any commission is or is not due to him, be looked at separately and independently. But in answer to this it is sufficient to say that the parties did not correspond or act under the agreement upon any such footing, and besides, that is not the footing on which the pursuer libels or maintains his action, as very plainly appears from his condescendence, and particularly the third article thereof.

"The Lord Ordinary has only further to explain, that the 'commission sheets' which the pursuer, towards the end of his evidence, says he was to send to his agent in order to be produced, have been produced, but after examination the Lord Ordinary cannot discover anything in them that can be held to affect favourably for the pursuer the views he has above expressed. They appear to the Lord Ordinary to be adverse to him rather than otherwise."

The pursuer reclaimed.

At advising—

Lord Justice-Clerk—I am clear it was not the meaning of the agreement that the traveller was to have a commission on all sales effected. The next question comes to be, Whether he was entitled to one-third of the profits on each transaction, or one-third of the ultimate profits on an indefinite series of transactions?

On the whole, I think the former is the true view. On the construction of the agreement, which was made out during the pursuer's employment by the defenders, I am clear (1) the pursuer was not a partner, because he had no control over the actings of the defenders, who retained the right of accepting or rejecting the orders. (2) He did not guarantee sales as a *del credere* commissioner; he was a traveller—a servant employed to sell tea, and he was to have one-third of the profits as remuneration, in respect of which he was to pay his whole travelling expenses. Now, was it aggregate profit on the whole transaction, or individual profit on each transaction? I think it was not the former, because (1) no period of settlement was fixed; and (2) one bad debt might have swept away all the profits of the pursuer, which cannot reasonably be supposed to have been the meaning of the parties. It is said the acting of parties show that the former was intended, and certain correspondence is referred to. Now, the defenders objected to inquiry as to communings between the pursuer's brother and them previous to the date of the agreement. It is difficult to construe the letters on the latter footing; but, on the whole, I do not think they should prevent the pursuer recurring to the real meaning of the agreement. He was unwilling to quarrel with his employers—this was the first bad debt—and the expression may mean that he was willing to bear part of the loss incurred. I think, on the whole matter, that the pursuer is entitled to one-third of the profit made on each transaction during the period of his employment.

Lord Cowan—If it was intended that no payment was to be made to the pursuer unless profit arose on the ultimate result of the accounts slumped *en masse*, it should have been clearly expressed. I think it is conclusive against that view that no term of payment is specified, and that the pursuer had no control over the open accounts, and was not even to collect the money.

Lord Benholme concurred.

Lord Neaves—I think the construction your Lordships propose is reasonable, and consistent with the position of parties and the terms of the agreement, which is the principal document. According to the defenders the pursuer never earned a shilling which might not have been swept away by a single bad debt. As to the letters, if the agreement bears this construction, and is to rule, I can find nothing in them so explicit as to alter the contract.

Counsel for Pursuer—Balfour. Agent—James Buchanan, W.S.

Counsel for Defender—Guthrie Smith and Blair. Agent—W. B. Hay, W.S.

Friday, February 21.

FIRST DIVISION.

SPECIAL CASE—DYMOCK'S TRUSTEES AND OTHERS.

Disposition—Vesting—Residue.

A testator directed his trustees to pay to A the yearly interest or produce of the sum of £6000, and, in the event of A predeceasing her husband B, to pay the yearly produce to him,

and on the death of the survivor of them to pay the capital sum to their child or children who might be then alive. The testator also gave directions as to the disposal of the whole residue of his estate. A and her husband had two sons, one of whom predeceased both parents, and the other survived A and predeceased her husband. *Held* (1) that the fee of the £6000 did not vest in the two sons, or either of them, and (2) that the said sum formed part of the residue of the testator's estate.

The facts of this case were as follows:—Andrew Storie, W.S., Edinburgh, died on 10th May 1862, leaving a trust-disposition dated 19th Nov. 1856, by which he disponed all his heritable and moveable property to trustees, for the purpose *inter alia* of paying it over to such person or persons as he should direct by any writing subscribed by him.

Mr Storie also left a deed of directions, dated 6th August 1861, with two additions thereto, dated respectively 6th and 14th August 1861, by which he gave directions to his trustees with reference to the disposal of the means and estate conveyed to them by the said trust-disposition.

By the fourth direction contained in the said deed of directions, Mr Storie directed his trustees to pay to Elizabeth Gray or Dymock, wife of Robert Lockhart Dymock, exclusive of her husband's *jus mariti* and power of administration, the yearly interest or produce of the sum of £6000 of his capital stock of the Bank of Scotland, and in the event of her predeceasing her husband, to pay the said yearly produce to him during his life, and on the death of the survivor of them, Mr Storie directed the capital of said stock to be paid or transferred to their child or children who might be then alive, in such shares, if more than one, as the parents might have appointed jointly during their life, and failing such appointment by them jointly, as the survivor of them should appoint, which also failing, among the said children equally.

By the tenth direction contained in the said deed of dirctions, Mr Storie directed the residue of his estate to be divided into four equal parts, two whereof were to be paid to Mrs Penelope Ogle or Swan, under certain restrictions; one-fourth to Alexander Hill Gray, and the other fourth to the said Elizabeth Gray or Dymock, and their respective heirs.

The said Mrs Elizabeth Gray or Dymock was a niece of Mrs Storie, the wife of the said Andrew Storie, and Mrs Swan was a niece of the said Andrew Storie. Mr Storie was survived by the said Mrs Elizabeth Gray or Dymock and Robert Lockhart Dymock, and their two sons, Robert Lockhart Dymock jun., who was born on 20th October 1842, and John Gray Dymock, who was born on 14th June 1844, and who both died without issue, and also by the said Mrs Penelope Ogle or Swan and James Swan and Alexander Hill Gray. The said John Gray Dymock survived his mother, the said Mrs Elizabeth Gray or Dymock, but predeceased his father, the said Robert Lockhart Dymock, and the said Robert Lockhart Dymock jun. predeceased both his father and mother. Mrs Elizabeth Gray or Dymock died on 21st April 1867, her husband, Robert Lockhart Dymock, died on 16th April 1872, and Alexander Hill Gray on 15th May 1866. In these circumstances, a question arose, whether the £6000 of capital stock of the Bank of Scotland had vested in Robert Lockhart Dymock jun. and John Gray Dymock, or either of them, or, in the event of its not having vested, whether the said fund went to the heir *in mobilibus*, or to the residuary legatees?

The parties to the case were (1) the trustees under the trust-disposition of the said Robert Lockhart Dymock; (2) the said Mrs Penelope Ogle or Swan, as heir-at-law and sole next of kin, and heir *in mobilibus* of the said Andrew Storie; and (3) Mrs Anne Crombie or Gray, relict of the deceased Alexander Hill Gray. The questions submitted to the Court were:—

"(1) Whether the said sum of £6000 of the capital stock of the Bank of Scotland, the interest or produce of which was directed to be paid to Mrs Dymock and her husband in liferent, and on the death of the survivor of them, the capital of which was directed to be paid or transferred to their child or children who might be then alive, vested in the said Robert Lockhart Dymock jun. and John Gray Dymock, or either of them, and is payable to the first parties as in their or his right? or whether the said bequest of the capital of said stock lapsed?

"(2) In the event of the Court being of opinion that the said bequest of the capital of said stock lapsed, whether the said sum of bank stock is payable to Mrs Penelope Ogle or Swan as the heir *in mobilibus* of Mr Storie, or the same forms part of the residue of Mr Storie's trust-estate, and is payable to the whole parties hereto as residuary legatees, or in right of residuary legatees, of Mr Storie?"

It was argued for the First Parties that the bequest of £6000 was an absolute gift of the fee thereof to the children of Mr and Mrs Dymock, and the fact that both the sons predeceased the liferenters (their parents) did not nullify the gift, but the fee must be held to have vested in the last surviving son. If the £6000 should be held not to have vested, then it must go to residue.—*Foreman* v. *Harrison*, 5 Vesey, 206: *Maitland's Trustees* v. *M'Dermaid*, March 15, 1861, 23 D. 732; *Foulis* v. *Foulis*, Feb. 3, 1857, 19 D. 362.

It was argued for the Second Party (1) that the fee of the £6000 never vested in the said sons of Mr and Mrs Dymock, for the gift was to them only in event of their being alive at the death of their parents; and (2) that the £6000 not having vested must go to the heir *in mobilibus* of Mr Storie.

It was argued for the Third Party (1) that the fee of the £6000 had not vested in the sons of Mr and Mrs Dymock, and (2) that that being so, it must go to the residuary legatees.

At advising—

Lord President—We have before us in this case two deeds—a trust-deed and a deed of directions; but the questions which we have to decide are entirely with reference to the deed of directions.

In regard to the first question submitted to us, the provision with which we have to deal is the settlement of £6000 upon the Dymock family. Mr Storie, the testator, had no children of his own, and his nearest relations were nieces and nephews, Mrs Swan was a niece of his own, and Mrs Dymock, wife of Robert Dymock, Procurator-Fiscal in Edinburgh, was a niece of his wife. Mr and Mrs Dymock had three children, but one predeceased Mr Storie, and died before the deed of settlement was executed. Thus at the date of the deed there were

only two children of the Dymocks alive, viz., Robert Lockhart, who was born in 1842, and John Gray, who was born in 1844. The deed was executed in 1862, and both these young Dymocks were then alive, but they died soon afterwards—one, Robert Lockhart, predeceased both parents, and the other, John Gray, survived his mother, but predeceased his father. So the question is, whether the fee of the £6000 settled on the Dymock family vested in these young men on the death of the testator, or whether, by their predeceasing their parents, it lapsed and went to the next of kin? The clause in the deed of directions directs the trustees to pay to "Elizabeth Gray or Dymock, wife of Robert Dymock, Esq., Procurator-Fiscal of the city of Edinburgh, exclusive of her husband's *jus mariti* and power of administration, the yearly interest or produce of the sum of £6000 of my capital stock of the Bank of Scotland, and in the event of her predeceasing her husband, to pay the said yearly produce to him during his life."

Now if the clause had stopped here the fee would have certainly been undisposed of. But the clause goes on to make a gift in favour of the children. "And on the death of the survivor of them, I direct the capital of said stock to be paid or transferred to their child or children who may be then alive, in such shares, if more than one, as the parents may have appointed jointly during their life, and failing such appointment by them jointly, as the survivor of them shall appoint, which also failing, among the said children equally."

Now it seems to me that this is a direction to pay the capital of the stock to the child or children who are alive at the death of the longest liver of the parents. It means that the person or persons then alive are to take, and nobody else. The gift is to the persons or person alive at a certain event, and therefore it is impossible to say that there was any vesting before that event happened.

Some other provisions of the deed were referred to in argument, but I think that they all bear as strongly on the one side as on the other. Take, for example, the provision to Mrs Swan. The direction is "to pay to Mrs Penelope Ogle or Swan, my niece, wife of James Swan, assessor of the shire of Renfrew, the interest of £12,000, to be invested by them in stock of the Banks of England or Scotland, or in landed security in Scotland, and that during her life, exclusive of the *jus mariti* and power of administration of her husband, and exclusive of his creditors, and after her death to pay the same to her said husband, if he survive her, during his life, and after his death to pay the capital sum to their children, in such shares as they, or failing their doing so, the survivor of them, shall direct in writing, or failing thereof, to the said children equally." Now, in reference to this clause it was argued that it was the intention of the testator to make the same kind of provision for the Dymocks as is here made for the Swans; but, unfortunately for the contention, the wording of the clauses stand in clear contrast to each other. So, as little light is thrown upon the matter by the other clauses of the deed, I think that we must take the clear meaning of the words of the clause. Taking the clause in this way, it is plain that nothing vested in any child who died before the last survivor of the parents. I am therefore of opinion that the first question must be answered against the first party.

The second question is, whether, supposing the bequest to have lapsed, the residuary legatees take? or whether there is intestacy as regards this fund? Now in the deed there is a proper residuary bequest, for the testator directs the residue of his estate to be divided into four equal parts, two whereof are to be paid to Mrs Swan, one to Mr Gray, and one to Mrs Dymock. The presumption is always against intestacy; and there is nothing here to prevent the residuary bequest from sweeping up everything which would otherwise have gone to the heir *in mobilibus*.

The other Judges concurred.

The Court held that the bequest of the capital of the £6000 stock of the Bank of Scotland had lapsed, and that the said sum formed part of the residue of Mr Storie's trust-estate.

Counsel for the First Party—Watson. Agents—J. & A. Hastie, S.S.C.

Counsel for the Second Party—Miller and Lancaster. Agents—Mackenzie & Kermack, W.S.

Counsel for the Third Party—Asher and J. A. Reid. Agents—Leburn, Henderson, & Wilson, S.S.C.

Saturday, February 22.

SECOND DIVISION.

[Lord Gifford, Ordinary.

LORD ADVOCATE (FOR BOARD OF TRADE) *v.* CLYDE STEAM NAVIGATION COMPANY.

Merchant Shipping Act, 1854 — *Registration of Tonnage—Permanent closed-in space.*

Certain alterations on a steam-ship necessitated a new registration, owing to increase of tonnage thereby. *Held*, that in computing the increase the space between a hurricane deck and the ordinary deck did not fall to be reckoned,—not being a "permanent closed-in space" in terms of the Act.

This case came up by reclaiming-note against the interlocutor of the Lord Ordinary (Gifford). The questions involved had reference to the steamship 'Bear,' the property of the Company, and to the mode in which the registered tonnage thereof should be calculated. The Board of Trade sought in their summons to have it found "that the proper registered tonnage of the steamship 'Bear' of Glasgow, belonging to the defenders, ascertained in accordance with the rules for the admeasurement of tonnage prescribed by 'The Merchant Shipping Act, 1854,' is not less than 585·46 tons, conform to certificate of survey and measurement by Martin Costelloe, the surveyor of shipping at Glasgow, appointed by the Commissioners of Customs to superintend the survey and admeasurement of ships under 'The Merchant Shipping Act of 1854,'" and, further, "that the tonnage of the said steamship, as registered in the 'Register Book' kept by the registrar of shipping at Glasgow, as described in the certificate of registry No. 99 in 1870, granted to the defenders in terms of said Act, was erroneously computed at 331·97 tons, and that said ship has been properly re-measured in terms of the certificate of survey and measurement foresaid, and that the said register book and certificate of registry should be corrected accordingly."