being part of the piece of ground on which the said dwelling-house is situated. There is an alternative conclusion, in which he asks the Court to find and declare that the defender has no right to make any erections or buildings on said area of ground which will in any way interfere with or injure the pursuer's property or the pursuer's rights in the said area of ground.

I have come to be of opinion that both parties are in the wrong in the strong contentions they have maintained. I am of opinion that the pursuer Heron has no right of common property in the small portion of ground, but that the *solum* is the exclusive property of Dr Gray. But, on the other hand, the pursuer, as the proprietor of the shop and sunk storey, is entitled to a servitude of light over this small piece of ground to the south of the tenement. Originally the whole property consisted of a dwelling-house with a sunk flat, and also a front plot known as 1 Arniston Place. It had a small piece of ground at the end of and behind the house. The property came to belong to the Scottish National Property Company, and they altered its condition and turned the ground floor into a shop. They then sold the shop and the house to separate parties. First they sold the new shop, with a portion of the sunk flat, to Heron. Then they disponed the dwelling-house, except the cellar, to Dr Gray, and the question is, What right has the former over any portion of the ground south of the tenement—a right of property or a right of servitude? We must in order to answer this question look to the rights of parties at the time the first title was granted by the company. The first title was granted to Heron in 1878, and Dr Gray's title was granted in 1879. What did Heron get in his conveyance? He got the shop, together with the cellar underneath the shop, and together also with the two cellars or warerooms forming part of the said shop, together with, first, the *solum* of the ground on which the shop is built; second, a right of property in common with the proprietors of the dwelling-houses to the *solum* of the ground on which the cellars or warerooms are situated.

On the other hand, Gray in 1879 acquired the dwelling-house, "excepting always the front or westmost portion of the sunk storey of the said dwelling-house disponed to Heron," . . . . "together with a right of property along with the said James Heron to the *solum* of the piece of ground on which the said house is built, together with the piece of ground or green lying to the east and south of the said dwelling-house, as the same is now enclosed, with right to make use of it as absolute owner, it being hereby declared that there is no restriction against building on, or any right of servitude affecting, the said piece of ground." If Dr Gray had got this right first and recorded it, he would have had a strong case for saying—"I have this piece of ground absolutely, and you can claim neither property nor servitude over it." But the question must be determined as at the date of the first (Heron's) infeftment, and we must ask what at the date of his disposition, when he got not only the shop but a portion of the sunk storey, were the rights he acquired. Now, we are familiar with the law as to this kind of urban property. It is a common thing in Edinburgh to erect a property with a main-door and a sunk area and then separate flats above. It is not unusual in such cases to give the proprietor of the main-door house an exclusive right not only to the plot in front but to the green behind. Nothing is said about servitude. But there is an implied servitude in all such cases in favour of the proprietors of the upper flats, that the proprietor of the main-door house shall not erect buildings on that green which will obstruct the lights of the upper flat. We have had cases of the kind in the last few months. In *Boswell's* case the proprietor of the lower storey wished to build upon the green, and after remitting to the Dean of Guild to report whether the lights of the upper flat were interfered with, we stopped the operations on his reporting that the lights would be interfered with. That applies directly to this case. No doubt there are here given to Heron not the upper flat but portions of the sunk flat. But it is lighted by what were once small windows, but are now windows of three feet square, opening on to the piece of ground. It is plain Heron was intended to have those windows, and access to the light and air which they give. There is no right in Gray to block them up. On the other hand, the claim of Heron as put on record is untenable—the only proprietor of the ground is Dr Gray, and he may pave it or do what he likes with it, his only restriction being that he shall not interrupt the light and air that comes to those windows. He must have had this in view when he obtained a declaration in his titles that there was no servitude over the ground. That may give him a right of recourse against his author, but will make no difference in a question with Heron. The windows have existed more than forty years, though now somewhat enlarged. The proprietor of the shop is entitled to the benefit and use of them.

That leads to a modification of the Sheriff's judgment. He is right in not affirming common property. The true view of the case is that there is an implied servitude of light, and that Dr Gray, though proprietor of the *solum*, is not entitled to cut off that light.

Lord Justice-Clerk and Lord Young concurred.

The Court recalled the Sheriff's judgment and found in terms of the opinion of Lord Gifford.

Counsel for Pursuer (Appellant)—Keir—A. J. Young. Agents—W. Adam & Winchester, S.S.C.
Counsel for Defender (Respondent)—Kinnear—Darling. Agents—A. & G. V. Mann, S.S.C.

Saturday, November 27.

SECOND DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

YEATS *v.* BROWN AND OTHERS.

Succession—Vesting—Lapsing of Legacy.

A testator in his trust-disposition and settlement bequeathed to each of his two brothers a sum of £500, "to be paid at the first term of Whitsunday or Martinmas after the decease of" his wife, who was provided in an annuity out of the estate. In the residuary clause he appointed the residue of "my estate of every description, at the death of

my said spouse . . . . including any legacy that may have lapsed by the legatee's predeceasing her," to be divided among his nephews and nieces. *Held* that notwithstanding the words last quoted the legacies vested *a morte testatoris*, and did not lapse by the legatee's predecease of the widow.

Succession—Legacy—Condition.

A testator directed the residue of his estate to be divided among the children of his brothers and sisters, always excluding the eldest son of each family who should have succeeded to heritage from his father. *Held* that this was a provision for the benefit of younger children *intra familiam*, and did not exclude an only child of a nephew though he had succeeded to heritage of his father's.

James Brown, M.D., of Aberdeen, died in Aberdeen in 1823 leaving a last will and codicil by which he appointed his widow and one of his brothers and a Dr John Brown of Aberdeen to be his executors. After directing them to lend out such sums as would provide certain annuities to his widow and certain relatives, he directed them (fourth) to pay to each of his brothers Thomas and Alexander Brown, and to Dr John Brown above referred to, a sum of twenty guineas, payable at the first term of Whitsunday or Martinmas after his decease; (sixthly) . . . "to my brothers Thomas and Alexander Brown I bequeath the sum of £500 sterling each, payable at the first term of Whitsunday and Martinmas after the decease of my said spouse." The residuary clause of the testament was as follows:—"I appoint the residue and remainder of my estate of every description, at the death of my said spouse, and including the principal sum laid out for an annuity to her, and any legacy that may have lapsed by the legatees predeceasing her, to be equally divided among the children then alive of my brothers and sisters equally *per capita*, but always secluding the eldest son of each family who may have succeeded to any heritable property of his father's, and any of my said nephews who may have situations in India."

George Brown alone accepted the office of executor, and entered on the management of the estate. He died in 1838, and two other persons were decerned executors-dative in his room. They having also died, James Yeats, advocate in Aberdeen, was appointed judicial factor on the estate. The testator's widow died in May 1879. She was predeceased by all the other annuitants, and also by Thomas and Alexander Brown. By her death the residue of the estate became divisible among the nephews and nieces of the testator alive at that date equally *per capita* in terms of the will. There was then alive four nephews and nieces of the testator. Several other nephews and nieces had predeceased the widow leaving children. Certain questions having arisen as to the distribution of the estate, Mr Yeats, the judicial factor, raised this multiplepoinding for the purpose of having them determined. The only questions debated in the Inner House were —*First*, Whether the legacies to the testator's brothers Thomas and Alexander Brown had vested *a morte testatoris*, or had lapsed by reason of their predecease of the widow, in virtue of the words in the will, "any legacy that may have lapsed by the legatee's predeceasing" the widow? And *Second*, Whether the children of George Brown, a nephew, who was an only child of one of the testator's brothers, and as such succeeded to heritage from his father's estate, were excluded from participating as in his right by virtue of the words in the will, "but always secluding the eldest son of each family who may have succeeded to any heritable property of his father's?"

On 16th July 1880 the Lord Ordinary pronounced this interlocutor:—"Finds that the legacies to Thomas and Alexander Brown lapsed by their having predeceased the widow of the testator: Finds that the residue is divisible in equal shares among the nephews and nieces of the testator who survived the testator's widow, and the children of such nephews and nieces as predeceased the testator's widow, such children taking their parents' shares, but subject to the qualification that the children of George Brown, nephew of the testator, are not entitled to any share, in respect that the said George Brown succeeded to heritage from his father." . . . .

He added this note:—"(1) The first question is, whether the legacies to Thomas and Alexander Brown vested *a morte testatoris?* If this were to be determined by the clause of bequest alone, it is not doubtful that they vested at that date, inasmuch as there is only a postponement of payment till the death of the widow; but a difficulty arises in consequence of the residuary clause. The testator directs that the residue, and 'any legacy which may have lapsed by the legatee's predeceasing' the widow, shall be disposed of in a certain way. These words can apply to no other legacies than those which the testator left to his brothers, and the Lord Ordinary is inclined to think that they show that the testator not only postponed payment but postponed vesting till the widow's death. . . . .

"(3) George Brown, a nephew of the truster, succeeded to heritable property from his father. He was therefore excluded from any share, and the conclusion, in the opinion of the Lord Ordinary, extends to his descendants, who merely come in his place. If he could not take, neither, it is thought, could they." . . . .

Mrs Sarah Thomas or Taylor, who claimed as executrix of both Thomas and Alexander Brown by a series of transmissions under English law, reclaimed. A reclaiming-note was also lodged for the Rev. James Hawes, committee of the person and estate of the Rev. Alexander Paton, one of the testator's nephews, who was insane.

Argued for Mrs Thomas or Taylor—The words "any legacy that may have lapsed by the legatee's predeceasing the widow" were quite general, and were intended to provide for the possibility that by the operation of law some legacy might be held to lapse. The testator did not wish any legacy to lapse by predecease of the widow, or he would have directed that such lapsing should take place. Vesting *a morte testatoris* was always presumed. It clearly took effect under the bequest in this case if read alone, and the gift thus made was not derogated from by mere general words in a residuary clause.

Argued for the other claimants—Effect must if possible be given to every word of a deed. There was no other legacy to which the words in question could apply, the other legacies being to be paid at the first term after the testator's death. The meaning attached to these words by the Lord

Ordinary must therefore be held to be the meaning of the deed.

On the other point the children of George Brown argued, that the words "eldest son" being a relative term implying the existence of several children, the words excluding an eldest son of a nephew or niece of the testator being heir in heritage were intended for the benefit of younger children, and had no application where there was an only child.

At advising—

Lord Justice-Clerk—We have here two reclaiming-notes in this multiplepoinding relative to the settlement of Dr Brown. The Lord Ordinary has decided two questions, and these are now under review. The first arises on the bequest of £500. The testator there says, "to my brothers Thomas and Alexander Brown I bequeath the sum of £500 sterling each, payable at the first term of Whitsunday or Martinmas after the decease of my said spouse." In a later part of the deed, when dealing with residue, he says—"I appoint the residue and remainder of my estate of every description at the death of my said spouse, and including the principal sum laid out for an annuity to her, and any legacy that may have lapsed by the legatee's predeceasing her, to be equally divided among the children then alive of my brothers and sisters, equally *per capita*." These two legatees of £500 predeceased the widow, and the question is whether the legacies have therefore lapsed. The Lord Ordinary has held that the words which I last read so control the provision in regard to the legacies as to prevent them from vesting *a morte testatoris*, and to postpone the vesting till the widow's death. I am not surprised at that, for the words used seem at first sight to have that result. But I have come to an opposite conclusion, for though at first the legacies may seem to have lapsed, that is not in my opinion the true legal construction of the words used by the testator. In the first place, a legacy vests where there is nothing to the contrary *a morte testatoris*, and that being the rule the provision in the operative part of this bequest is in accordance with it. The other provision which is said to suspend vesting occurs in a clause not dealing in any way with legacies, but with residue. There it is provided that the residue of the estate, including any legacy that may have lapsed, is to be divided equally among the children of the testator's brothers and sisters. There is no difficulty in giving effect to these words as they stand. The provision is not that the legacies shall lapse in a certain event, but only that if it so chance that any legacy may lapse by predecease in that case the legacy shall go into residue. It is quite possible that the testator had in his mind a doubt as to how that might be. He says—I have made my provisions, but if it shall happen that a legacy shall be held to lapse, in that case it shall be divided among my nephews and nieces. That, I think, is the true legal effect of the clause. In regard to the other question that arises under the words following those I have already read—"always secluding the eldest son of each family who may have succeeded to any heritable property of his father's"—one of the families consisted of only one child, a son. He succeeded to heritable property, and the question is whether that exclusion applies to him. I think that it does not. I think the testator manifestly means that *intra familiam* the eldest son is not to carry off a share of the fund to the prejudice of his younger brothers and sisters if he gets heritage from his father. It would not be equitable or just to carry that to the effect of cutting off one family altogether because it consisted of only one child. The real object of the testator was to prevent the heir in heritage from diminishing the share of a younger child, and that does not apply where there is only one child. I am therefore for altering the interlocutor of the Lord Ordinary on both points.

Lord Gifford—I am of the same opinion on both points. As to vesting, we are always if possible to avoid reading one clause as repugnant to another, and we always try if possible to reconcile clauses which seem to conflict. This testator is not fixing any period when provisions shall vest. He only says, "legacies which may have lapsed." There was a doubt in his mind, and he speaks of what may happen. On the second point I think the provision is plainly in favour of younger children, and that it was not intended to cut out a whole *stirps* because it consisted of only one son.

Lord Young—I am of the same opinion on both points. I think that on a true construction of the deed there is no destination-over with respect to the legacy to the testator's brothers. I cannot read the words of the residue clause as amounting to a destination-over. The words are peculiar. The testator is dealing with the residue at the widow's death. If these legacies were by that time paid, the amount of them would be no part of the residue at the widow's death. They might lapse by the legatee's predeceasing her, but not necessarily, for if they died before her leaving children the *conditio si sine liberis* would prevent lapsing. But there are other modes of preventing lapsing. These legatees left people to take in their room, and that prevented lapsing. The words used—"may have lapsed"—refer to a possibility which has not occurred.

On the second point also I concur and have no observations to make.

The Court pronounced the following interlocutor:—

> "Having heard counsel on the reclaiming note for Mrs Sarah Thomas or Taylor, Recal the said interlocutor in so far as it finds that the legacies to Thomas and Alexander Brown lapsed by their having predeceased the widow of the testator and find that the same vested *a morte testatoris*, and that the reclaimer Mrs Sarah Thomas or Taylor, as representing the said legatees, is entitled to the legacies: Further, recal the said interlocutor in so far as it finds that the children of George Brown, nephew of the testator, are not entitled to any share of the residue; and find that their father, the said George Brown, was not excluded in respect that he succeeded to heritage from his father, and that the said claimants are entitled to his share of the estate: *Quoad ultra* adhere to the said interlocutor," &c.

Counsel for Mrs Thomas or Taylor—Mackintosh —Low. Agent—John Cay, W.S.

Counsel for Children of George Brown—Shaw. Agents—Henry & Scott, S.S.C.

Counsel for the other Claimants—Darling—Baxter—Begg. Agents—J. Y. Guthrie, S.S.C., Henry & Scott, S.S.C., Baxter & Burnet, W.S.

Thursday, December 2.

SECOND DIVISION.

[Lord Lee, Ordinary.

EARL OF STAIR *v.* AUSTIN AND OTHERS.

Property—Foreshore—Interdict—Right to Levy Harbour Dues.

S., a proprietor who held on a barony title without express grant of foreshore, erected on the foreshore for the convenience of the fishermen of D. a quay or pier, for the maintenance of which he was in use to exact dues from coasting vessels. He raised an action against the Crown tacksmen of certain adjacent oyster-fishings, and the fishermen employed by them, to interdict them from using the said quay without paying harbour dues. The Court *refused* the interdict, on the ground that S. had not shown any right sufficient to entitle him to interfere with the public use of the shore.

The pursuer in this case was the Earl of Stair, proprietor of the barony of Kilhilt, comprehending, *inter alia*, the five merk land of Drumore, lying in the parish of Kirkmaiden and sheriffdom of Wigtown. The defenders were Harry George Austin of the Archbishop's Palace, Canterbury, and others, the lessees from the Crown of the oyster fishings in the Bay of Luce, in the shire of Wigtown, and William Biggam and others, certain fishermen who resided in Drumore.

The lands of Drumore are situated on the south-western side of the Bay of Luce, and a point projecting from the said lands in a north-easterly direction into the sea forms a smaller bay, which is called Drumore Bay.

In 1809 Alexander M'Douall, younger in Curghie, entered into an arrangement with the Earl of Stair of that time, as proprietor of the said lands and barony of Drumore, by which he undertook to construct a pier or quay and a gravel bank running out from the shore a little to the westward, which should form a tidal harbour and be of use for the safety and mooring of vessels, and for the discharge and trading of cargoes—there being an obligation on the Earl of Stair to grant him a tack of the same. In terms of this arrangement, the quay so having been constructed, a tack was granted, dated 19th March 1822, for ninety-nine years from 1811, by the Earl of Stair in M'Douall's favour, of the quay or harbour of Drumore, and ground and houses connected therewith, with power to the said Alexander M'Douall and his foresaids to levy anchorage and reasonable dues for such vessels as might take the benefit of his works for their safety or for discharging their cargoes. The stipulated rent was £5, the tenant being bound to maintain the works and houses and haill other buildings in proper condition; there was also a power of removal at any time on certain conditions. This tack having passed by successive assignations into various hands, came by assignation, dated 21st July 1842, into the hands of the Earl of Stair.

The present pursuer averred that he and his predecessors, since the original tack to M'Douall, had fixed and levied dues on vessels using the quay and harbour, and goods loaded or discharged there, according to rules and regulations published from time to time, and that the dues were necessary to meet the expenditure connected with the harbour and access thereto. He further averred that the defenders Harry Austin, Captain George Austin, and Thomas Gann, as joint lessees from the Crown of the oyster-fishings in the Bay of Luce, employed several decked vessels which used the quay and harbour, and that the defenders William Biggam, the owner of the "Vigilant," and others, fishermen engaged in the oyster-fishing, and residing at Drumore, also used the said quay and harbour, but all refused to pay the aforesaid dues. It was to enforce payment of them that he raised the present action, and the conclusions of his summons were (1) that it should be declared that the quay and adjacent shore of the lands of Drumore on both sides of the quay, and the access to the said quay and shore through the said lands, belong to and were the property of the pursuer, and that the defenders had no right or title to moor their vessels or boats by attaching them to the quay at Drumore, or to the stakes, buoys, anchors, or works thereon, or on the said shore now in connection with the said harbour, or to use the said quay, stakes, buoys, anchors, or other works, or the said access to the quay and adjacent shore, for the purpose of trading or discharging these vessels or boats, or otherwise as a landing-place in connection with the fishing in the Bay of Luce; and that the defenders should be interdicted and "discharged from mooring their vessels or boats at the said quay, or to the said stakes, buoys, anchors, or other works, and from using the said quay and access thereto, and to the adjacent shore, through the pursuer's lands, for the purpose of loading or discharging their vessels or boats, or otherwise as a landing-place in connection with the fishery in the Bay of Luce."

He pleaded that (1) being proprietor of the quay at Drumore and adjacent lands, he was entitled to decree of declarator as concluded for; and that (2) the defenders having no right or title, ought to be interdicted from using the said quay or access thereto.

The defenders, on the other hand, averred that prior to the time when the defenders leased the oyster fishings from the Crown, the local fishermen and others from a distance had for years carried on the oyster dredging in the Bay of Luce; that the pursuer's predecessors had not, and the pursuer had not, any royal or parliamentary grant of harbour or other title authorising the erection of a harbour or the levying of harbour dues. Further, that although dues on coasting vessels using said quay had been exacted for some years, no dues had been paid by the owners or users of fishing-boats, and no demand was ever made for payment of dues on such boats till recently. The defenders, like the other boat-owners, moored or anchored their oyster fishing-boats, which were only ten or fifteen tons burden,