At advising—

Lord President—I agree with the Auditor in regard to this matter, and do not think that we are precluded by the finding in our interlocutor of 18th July 1885 from giving effect to that view.

The party who presents a petition of this kind is bound to pay expenses, and that on this obvious ground, that it is because of his fault in causing the collision that the application is rendered necessary. But the expenses involved would not amount to more than the expense of stating the claims if those claims were unobjectionable, and the proceedings would come to a conclusion without any reference to an average adjuster.

The limitation of the petitioners' liability has the effect generally, and certainly has the effect here, of limiting the amount of the fund available for payment of the claims. In fact, it converts the process, after the amount of the fund has been ascertained, into a process of competition as in bankruptcy. The claimants in claiming a sum which in the aggregate exceeds the amount of this fund are in competition with each other when they come before the average adjuster.

I think the just rule is, that whatever expenses have been incurred by the claimants in the competition *inter se* should not be borne by the petitioner.

Lord Mure—It is evident the petitioners are liable in some part of these expenses, and what I wanted to know was whether these expenses before Mr Richards were incurred in consequence of something that the Carron Company had done. It was explained that this was not so, and I think therefore it would be unfair that they should pay the expense of what was a competition between the parties. I agree with what your Lordship observed in the course of the argument, that this process is just like a multiplepoinding, in which the petitioner takes no part in the dispute.

Lords Shand and Adam concurred.

The Court approved of the Auditor's reports, and found the claimants not entitled as against the petitioners to the expenses incurred in discussing their claims before the average adjuster.

Counsel for Petitioners—Dickson. Agents—John Clerk Brodie & Sons, W.S.

Counsel for Claimants—H. Johnston—Jameson. Agents—Hagart & Burn Murdoch, W.S., and J. & J. Ross, W.S.

Tuesday, November 3.

SECOND DIVISION.

WATSON AND OTHERS *v.* BEST'S TRUSTEES AND OTHERS.

Faculty and Powers—Marriage-Contract—Power of Appointment — Invalid Appointment — Residuary Appointment.

A wife who had under her marriage-contract power to appoint her own share of the marriage-contract property among the children of the marriage, who were to have equal shares in the event of her making no appointment, appointed part of that property in certain proportions among the children of the marriage, omitting one child to whom she made no appointment, but who would have taken a share under the provisions of the marriage-contract. The deed contained also an invalid appointment of certain legacies to persons who were strangers to the power, and a residuary clause appointing the residue equally among the children to whom she had already made particular appointments. *Held* (*dub.* Lord Craighill) that the sums appointed to strangers to the power fell under the residuary clause of the deed of appointment.

Thomas Best and Mrs Dunlop or Best were married in 1831. An antenuptial contract was entered into whereby Mrs Best conveyed to the marriage-contract trustees the whole property belonging to her for certain trust purposes; among these were, that the trustees should hold her property for behoof of herself and her husband and the survivor in liferent, and after the death of the survivor of the spouses pay over the fee to the children procreated of the marriage in such proportions as should be appointed by a writing executed jointly by the spouses, or by Mrs Best if she survived her husband, and failing any appointment then to pay to the children in equal shares.

On 7th December 1859 Mr and Mrs Best executed a joint deed of appointment, by which they appointed the estate above mentioned among the children of the marriage then alive, in certain proportions. This deed contained a power either to the spouses jointly or to Mrs Best, if she survived Mr Best, to alter or revoke the same, and the division thereby made, but under the declaration that in so far as not altered the same should be held as a valid deed of appointment and division.

There were five children of the marriage.

Thomas Best predeceased his wife.

In July 1875, after Mr Best's death, Mrs Best executed a deed of appointment and division by which she revoked the deed of 1859 and made a new appointment of her estate in certain proportions. In particular, she, with his own consent, directed that only one-half of the amount apportioned to her son William James Best should be payable to him, and that the other half should be divided equally between his two children, he having the liferent of that half. By this deed she gave a sum of £100 to John Paton Watson, husband of one of her daughters.

In 1880 Mrs Best executed another deed of appointment and division, which bore to revoke the joint deed of 1859 but did not bear to revoke the deed of 1875.

By this deed she appointed and divided her estate as follows, viz.—(1) £3000 equally between her grandchildren Thomas Alexander Vans Best and Louisa Vans Best, the children of her deceased son Alexander Vans Best; (2) £1000 equally between the two children of William James Best, the income being payable to him during his life; (3) £200 equally between Eric Grant Matheson and Ailsie Matheson, children of Mrs Louisa Cecilia Caroline Matheson or Best, widow of Alexander Vans Best; £100 to William Pirrie, M.D.; £50 to Jane Duncan, an

old servant; and £50 to each of three charitable institutions.

The clause disposing of the residue was in these terms:—"After fulfilling or providing for the fulfilment of the above direction, the whole remainder of the trust funds and property shall be divided equally among or between the said Margaret Best, William James Best, and Andrew Vans Dunlop Best, my said children."

No share was appointed by this deed to one of Mrs Best's daughters, Annie Best or Watson, wife of John Paton Watson.

After Mrs Best's death the present Special Case was adjusted to determine whether there was any valid and subsisting appointment by Mrs Best, and as to the construction and effect of the deeds above narrated. Mrs Best was survived by four children, namely, her daughters Mrs Watson, Margaret (Mrs Reid), and two sons William James Best and Andrew Vans Dunlop Best. The deceased son Alexander Vans Best was represented by his two children Thomas Alexander Vans Best and Louisa Vans Best.

The parties of the first part were the marriage-contract trustees.

The parties of the second part were (*a*) Mrs Reid, William James Best, and Andrew Vans Dunlop Best, (*b*) the two children of William James Best, and the two children of the deceased Alexander Vans Best.

The parties of the third part were Mrs Watson and her husband.

The parties of the fourth part were Eric Grant Matheson, Ailsie Matheson, Jane Duncan, and the three charitable institutions to whom legacies were provided in the deed of 1880. Dr Pirrie had predeceased Mrs Best.

The second parties maintained that the deed of 1880 was the ruling appointment; that its first and second heads validly appointed £4000 of the funds at Mrs Best's disposal; that its third, fourth, fifth, and sixth heads were in themselves invalid as appointments to, in all, a further £500 of said funds, the appointees being strangers to the power; but that the said sum so invalidly appointed fell into residue, and became divisible among the residuary appointees under the seventh head; that it was the intention of the residuary appointees, in the event of it being found that their construction of the deeds was correct, at their own hands to carry out the wishes of Mrs Best by making over the sums so added to residue to the persons and charities in whose favour the invalid appointments had been made; that in the event of the deed of 1880 being held to be invalid, the second parties maintained that the deed of 1875 was the ruling deed.

It was also narrated that the third parties maintained that there was no effectual appointment by any one of the said three deeds, in respect that the deeds of 1859 and 1875 were revoked, expressly or by implication, and that the deed of 1880 contained no appointment in favour of Mrs Watson, one of the objects of the power. Alternatively, they maintained that if the deed of 1880 was a valid and subsisting deed of appointment *quoad* its first, second, and seventh heads, it was invalid and ineffectual *quoad* its third, fourth, fifth, and sixth heads, and that the sum of £500 thereby attempted to be appointed to strangers to the power did not fall to be distributed as residue under the seventh head, but that there was a failure to appoint thereto, and consequently that the said sum of £500 fell to be distributed in terms of the marriage-contract equally among the objects of the power.

The fourth parties admitted that the appointments in their favour under the deed of 1880 were invalid.

A number of questions were submitted for the opinion of the Court, but counsel for the third parties having stated in the course of the debate that he gave up the contention that the deed of 1880 was not the ruling deed, the only questions which remained for decision were the following:—(I.) Whether any, and if so which, of the following deeds, viz., (1) the said joint-deed of appointment executed by Mr and Mrs Best on 7th December 1859; (2) the said deed of appointment executed by Mrs Best on 3d July 1875; and (3) the said deed of appointment executed by Mrs Best on 30th April 1880, constitutes a valid, subsisting, and the regulating appointment in whole or in part to the funds and estate of Mrs Best, held by the first parties under her marriage-contract? (II.) Assuming the third deed mentioned in question 1 [that of 1880] to be the regulating deed of appointment, and it being admitted by the fourth parties that the appointments thereby made in favour of the fourth parties and Dr Pirrie are not valid appointments, do the sums so invalidly appointed fall to be divided as residue under the seventh head of the said last-mentioned deed, or do they fall to be divided in terms of Mr and Mrs Best's marriage-contract?

Argued for the parties of the second part—The only question which remained for argument was, whether the legacies in the names of those who were strangers to the power in the deed of 1880, which amounted to £500, fell into the residuary appointment of that deed or fell into intestacy *quoad* Mrs Best, and were to be regulated by the marriage-contract. The question was a new one, for there was no reported case of a residuary clause occurring in a deed of appointment. It was, however, an inference from *Mackie* v. *Gloag's Trustees*, July 4, 1885, 12 R. 1230, that such an appointment did not fail in respect of such a clause, and must embrace the whole estate. The appointment, so far as taken to the objects of the power, must stand for the whole fund. The position of this sum was analogous to that of a lapsed legacy, which never fell into intestacy but always went to residue.

Other authorities — *Watson* v. *Marjoribanks*, February 17, 1837, 15 S. 586; *Campbell* v. *Campbell*, June 19, 1878, 5 R. 961.

Argued for the parties of the third part—A lapsed appointment was in a different position from a lapsed legacy, for it was a failure to exercise a power on the part of the maker of the deed, whereas the lapse of a legacy arose from circumstances not in the power of the testator. It was a question of intention, and as there was nothing to show an intention on the part of the appointer here that the sum invalidly appointed was to go to the residuary legatees, the only resource was to leave it to be dealt with by the provisions of the marriage-contract. The question had been determined in England in that way—*Gage* v. *Leapingwell*, 1812, 18 Vesey, 463; *Easum* v. *Appleford*, 1839, 5 Mylne & Craig, 56; *Jeaffreson's Trustees*, 1856, L.R., 2 Eq. 276; *Lakin* v. *Lakin*, 1865, 34 Beav. 443.

At advising—

Lord Young—I think this is rather a neat question, whether the clause directing that "after fulfilling or providing for the fulfilment of the above directions the whole remainder of the trust-funds and property shall be divided equally among or between" the truster's children, applies to the sum of £500 with respect to which these directions cannot deal. Parties have presented the question to us in the most candid and becoming manner, and argued it quite clearly. My own opinion is that the clause is sufficient to carry the fund in question. The "above direction" applies to it. Had that direction been capable of fulfilment the residue would be smaller, in my view, than it is now by £500. But it is not capable of fulfilment—that is to say, the law strikes it out of the deed, just as it strikes out of a will any legacy which for any reason whatever is not to be given effect to. I think if the deed professed to deal with the whole of the testator's property, or the whole of any specified fund, that a failure of a particular part, contrary to the desire of the maker of the deed, would not lead to intestacy, or take that sum out of the deed altogether which professed to deal with the whole. There is no doubt that this direction as to the £500 has to be taken out of the deed, because the law will not give effect to it, but it does not follow that the fund with which the deed deals has to be diminished by £500. Now, it is essential to the contention of Mr Johnston, or the parties interested whom he represents, and whose case he stated so distinctly, that the property dealt with by this deed is to be diminished by £500, which accordingly is to be disposed of irrespective of the deed altogether. Now, I cannot take that view. It deals with the whole of the maker's estate. The whole of her estate was by her marriage-contract vested in the marriage-contract trustees. This deed deals with every farthing of that estate, and directs distribution of it in a certain manner, the £500 being a part as to which a precise direction is given. It deals with the whole fund. The maker of the deed says—"If there is anything which I have not appointed, or not well appointed, then I mean that to go to so and so. There is no part of that fund to be taken out of the deed—that is to say, the fund which I announce the deed is to deal with, and the whole of which it is to deal with, is not to be diminished by £500." Now, I do not give that opinion with any confidence. It is admittedly a new question. I think it is really a question of intention upon each particular deed, although that question of intention upon this particular deed is of a somewhat novel character. On that simple ground, that while the particular direction fails, the property dealt with by the deed is not to be diminished, I propose that we should answer the question put to us in this way, that the £500 not well appointed goes to the residuary appointees.

Lord Craighill—Although not very confident in my opinion, I entertain a different view from that expressed by Lord Young. The case is a peculiar one, and in this case I think the intention must be derived from the special words which are employed. The question which I put to myself is this, What was the extent of the benefit intended to be conferred on those three members of the family who are the beneficiaries under the last, or as it was called, the residuary clause? It appears to me that the clause is in no degree affected by the possibility that some of those who had received benefits under the earlier clauses of the deed might fail, and that in this way there might be money left to be disposed of either in this residuary clause or by the marriage-contract, which provided for that contingency. This is, I think, nothing else than a bequest of amounts that might remain after all those sums which the earlier clauses of the deed had appointed had been paid and delivered to the respective beneficiaries, for the words virtually are, that "after fulfilling the above direction the whole remainder of the trust-funds and property shall be divided equally amongst" those persons immediately afterwards named. It is that remainder—and that remainder only—which is to be given to those persons. I do not see any indication whatever in any part of the deed that those three were to receive more than the balance which would remain after the respective sums had been paid except in the one case which is provided for, namely, that if there should be a failure of those entitled to the £3000, then the £3000 thus left free should fall into the money which was to be bequeathed or appointed to be paid to those three persons. That a lapse is provided for in one case and not in any of the others seems to me to suggest this, that the appointer did not intend that any money set free in consequence of the lapse should be dealt with as falling under the last clause of the deed excepting in the one case for which she has made provision. Taking her intention from that, it is equally right to infer her intention from the specific words of the clause, "after fulfilling all other purposes"—that is to say, after paying the £3000, the £1000, the £200, and several sums devoted to charities—the balance, and the balance only, is to be paid to the three beneficiaries on whom this benefit is to be conferred. There are many cases no doubt where a residuary bequest is so framed, and occurs in a deed in such circumstances, that even where there is no express provision as to the way in which lapsed legacies are to be disposed of, the lapse will accrue to the benefit of the residuary fund. But not only is that not provided for, except as regards one contingency, but the whole structure, as I think, of this particular clause leads to an opposite conclusion. As I have said, after hearing Lord Young's opinion, I do not profess to have a very confident opinion as to the soundness of my conclusion, but I have thought it right to express the views I entertain.

Lord Rutherfurd Clark—I agree with Lord Young.

Lord Justice-Clerk—I concur. I do not feel any confidence in the opposite view which I had at first felt inclined to entertain, and I agree so far with Lord Young that I do not need to enter any dissent from his views. I would only say that it is clear to my mind that this is not a case of a lapsed legacy in any sense whatever. The question here arises not from outward circumstances or contingent circumstances rendering the bounty of the testator unavailing, but from want of power on the part of the appointer her-

self. Now, that is quite a different matter, and therefore any agreement on the assumption of the appointer having power does not apply. A deed which failed from want of power in regard to an essential particular presents a different problem from the ordinary case of a lapsed legacy. At the same time the two run so close together that I am not prepared to dissent from Lord Young's views, and the question will be answered in that sense.

The Court pronounced this interlocutor:—

"The Lords . . . are of opinion and find that the deed of appointment executed by Mrs Best on 30th August 1880 constitutes a valid, subsisting, and the regulating appointment of the whole funds and estate held by the first parties under her marriage-contract, and answer the first question accordingly; answer the first alternative of the second question in the affirmative, and the second alternative thereof in the negative: Find it unnecessary to answer the remaining questions," &c.

Counsel for First, Second, and Fourth Parties—Pearson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Third Parties—Mackay—H. Johnston. Agents—Henderson & Clark, W.S.

Tuesday, November 3.

FIRST DIVISION.

[Lord Trayner, Ordinary.

LORD BLANTYRE AND ANOTHER *v.* DICKSON AND OTHERS.

Road – General Turnpike Act 1831 (*1 and 2 Will. IV. cap.* 43), *sec.* 70—*Haddingtonshire Roads Act* 1863—*Public Footpath – Justices—Jurisdiction.*

Held that the Justices of Peace of Haddingtonshire had no jurisdiction either under section 70 of the General Turnpike Act 1831, or under the powers contained in the Haddingtonshire Roads Act 1863, to shut up a public footpath upon which no public money had been expended, and which had not been under the management of the road trustees.

Proof—Minutes of Meeting—Subscription.

Quære—Whether unsigned minutes of a meeting of justices ordering that a public footpath should be shut up were valid?

By the 70th section of the General Turnpike Act 1831 (1 and 2 Will. IV. cap. 43), it is provided "that where any new turnpike road shall be made in lieu of an old road, or where any bye road shall be used for the purpose of evading the toll duties imposed by any local Act, or where any old road or any bye road shall have become useless or of no importance to the public, it shall be lawful for the justices at any stated meeting, on the application of the trustees of such road, to give orders for shutting up such old road or bye road." . . .

By the Haddingtonshire Roads Act 1863 it was enacted by sec. 3 that "the words 'the roads' shall mean and include all turnpike and labour roads, highways, and bridges within the county of Haddington, and generally all public roads and bridges within the said county whereon the public have at the passing of this Act a right of passage, or whereon any public traffic is carried on, and which are not herein specially excepted."

By section 4 of the said Act the provisions of the General Turnpike Act, "in so far as the same are not inconsistent herewith, shall be, and the same are hereby incorporated with this Act, and the same shall extend and apply not only to the turnpike roads but also to all the roads hereinafter described." . . .

On 13th July 1880 a petition was presented by Lord Blantyre, the proprietor of the lands of Lennoxlove, and J. D. Lawrie, proprietor of the lands of Monkrigg, both in the county of Haddington, to the Road Board of Haddingtonshire, praying that the board should take measures for shutting up an old public road lying between the public road leading from Haddington to Coalston on the west, and the public road leading from Haddington to Gifford on the east, running through a portion of the pursuer's respective properties of Lennoxlove and Monkrigg, and for assigning the ground of the road to the petitioners for their respective rights and interests as the owners of properties adjoining the road, all in terms of the General Turnpike Act 1831.

Upon this application the board on 3d August 1880 pronounced an order directing an application to be prepared by their clerk and presented to a stated meeting of Justices of the Peace for an order to shut up the said road.

At a meeting of Justices for the county of Haddington, held on 26th October 1880, the application of the Road Board to shut up the said road was entertained, and a resolution passed that it should be shut up.

At a meeting of the said Road Board on 17th March 1882, the road was ordered to be shut up, and was thereafter closed as a public highway. Immediately after this last-mentioned order was pronounced by the board, the petitioners entered into an arrangment for settling their respective interests in the *solum* of the road.

This was an action at the instance of Lord Blantyre and J. D. Lawrie against Alexander Dickson and others, inhabitants of Haddington, who claimed a right to use the ground as a road, to have it found and declared that the pursuers had a good and undoubted right and title to the exclusive possession and occupation of the ground occupied by the said road, and for interdict against the defenders entering upon or using the ground, and from destroying or interfering with the fences on the ground.

The pursuers narrated the proceedings above set forth, and founded on the resolution of the Justices of date 26th October 1880.

The defenders pleaded—"(4) The road in question not having been within the jurisdiction or under the administration of said Road Trustees, Road Board, and Justices, the proceedings founded on were *ultra vires* of said bodies."

They further stated that the resolution of 26th October 1880 was unsigned, and therefore pleaded that it was inept and invalid.

From the record as amended in the Inner House, together with a minute of admissions lodged by the pursuers, the following appeared to be the nature of the road in question:—The