should be provided. I do not doubt that this is on the ground that the mode of working provides refuge at the necessary intervals without manholes.

In the case before us the pursuer, who had been leaving the mine with his companions, had gone back for some article he had forgotten, and was again on his way to the bottom of the shaft, when in the space between two roads running into the road upon which he was walking, a space of 47 yards in length, he saw a horse dragging hutches coming towards him. At first he attempted to run forward and get to the cross-road marked C upon the plan, but seeing he must fail to get there before the horse reached it he turned to go back. He had, however, got so far forward that the horse, seeing the light in his cap, and being excited by the shouting of the pursuer and of the driver of the hutches, got frightened and ran off. The pursuer turned and ran back, running in front of the horse, so as to reach the cross-road marked D as a place of refuge, but while he was running he also tried to stop the horse, with the result that he was thrown down, and the hutches ran over him, and he sustained the injuries of which he complains.

It was a very unfortunate accident, but I do not think that the pursuer has proved that any blame attaches to the owners of the mine for what has happened, and in my opinion that is sufficient for the decision of this case without any reference to the provisions of the Coal Mines Regulation Act. I do not say that any blame attaches to the unfortunate man at all. It was a pure accident resulting from his mistaken view that he could reach C before the horse came up.

Had he reached C in time it would have been a refuge such as the Act contemplates. And as there was only a distance of 47 yards between the cross-roads there was no necessity for a manhole.

Lord Young—I concur in the result, but I am not prepared to commit myself to the opinion that cross-roads are to be taken as manholes in the meaning of the Coal Mines Regulation Act.

My opinion rests on this entirely, that the accident to the pursuer has not been shown to be attributable to any want of care on the part of the owners of the pit. The pursuer, when he first heard the horse coming towards him was making for the cross-road marked C upon the plan, and if he had reached it it seems he would have found refuge there. It might have been otherwise; there might have been traffic upon that road also. I think, however, it is according to the evidence that when the pursuer saw the horse approaching he ought not to have run forward but ought to have turned back. The driver of the hutches says it was impossible for him to have reached the road C, because the horse was past it, and the Sheriff-Substitute says it is according to the custom of the mine that a man meeting a horse and hutches in the roadway ought to turn back to find a place of safety. Again, when he had reached the road D he might have found it obstructed by traffic also, and that might have been a clear case against the defenders, but it is plain that he never reached the cross-road, and so it could not be said that the accident happened because he could not find a place of refuge. I wish, however, to reserve my opinion as to whether cross-roads can be held to satisfy the requirements of the statute as to manholes.

Lord Rutherfurd Clark—I also think we should abstain from deciding any general question. I think it is not proved that the accident happened from want of manholes.

Lord Trayner—It appears to me that this accident cannot be attributed to any fault on the part of the defenders. I think it is proved that the accident resulted mainly because the horse bolted, but the defenders are not to blame for that. I also think that we should not decide any general question as to what may constitute a manhole in the meaning of the Act.

The Court pronounced this judgment—

"Find in fact in terms of the finding in fact in the interlocutor of the Sheriff-Substitute: Therefore dismiss the appeal: Affirm the judgments of the Sheriff and Sheriff-Substitute appealed against: Find the pursuer liable to the defenders in expenses in this Court," &c.

Counsel for Appellant—M'Clure. Agent—Charles T. Cox, W.S.

Counsel for Defenders—Dickson—Burnet. Agents—Winchester & Ferguson, W.S.

Thursday, February 4.

SECOND DIVISION.

[Sheriff of Aberdeen.

GRANT AND OTHERS (LOW'S EXECUTORS) *v.* WHITWORTH AND OTHERS.

(*Ante, Low's Executors and Others*, June 21, 1873, 11 Macph. 744.)

Succession — Vesting — Conditio si sine liberis — Division per Stirpes or per Capita.

A testator directed his trustees to pay the income of his whole estate to three annuitants—his two sisters and a sister-in-law—"the families of the annuitants to get the interest of their mother until the death of the last annuitant, when at the ensuing money term the residue of my estate is to be divided into two parts, the one for the families of my two sisters (excluding the *jus mariti* of their husbands), and the other half to the treasurer of" a church, equally.

At the death of the last annuitant the grandchildren of one of the testa-

tor's sisters, whose mother had predeceased the testator, claimed to represent their mother in her share, as being part of the family of the testator's sister, their grandmother.

Held that (1) the word "family" included only the children of the testator's sisters alive at the time of vesting; (2) that the division of the residue among the families must be *per stirpes* and not *per capita*.

Mr John Low, banker, Glasgow, died at Aberdeen on 26th July 1872. He was survived by two sisters—Mrs Margaret Low or Lawrie and Mrs Mary Low or Brebner—and by a sister-in-law—Mrs Low—all of whom at the time of his death had issue, but one daughter of Mrs Lawrie—Mrs Brown—had predeceased Mr Low, leaving children.

By a holograph testamentary writing dated 22nd May 1869 Mr Low disponed and conveyed his whole estate to trustees, whom he appointed his executors. He directed them to pay expenses, to realise investments, to pay certain legacies, and provided—"I desire the interest on the residue of my estate to be divided into three equal parts, and given to my two sisters Margaret Lawrie and Mary Brebner and my sister-in-law Mrs Low in half-yearly payments. The families of the annuitants to get the interest of their mothers until the death of the last annuitant, when at the ensuing money term the residue of my estate is to be divided into two parts—the one-half for the families of my two sisters (excluding the *jus mariti* of their husbands), and the other half to the treasurer of the Free Church for the Sustentation and College Funds equally."

Upon 22nd April 1872 he executed a second holograph testamentary deed, in which he provided annuities of £200 to each of his sisters and one of £100 to his sister-in-law, free of legacy-duty; "to my niece Eliza Lawrie or Brown" (who predeceased the testator on 9th June 1859), "for family equally, £1000;" sums of £1000 and £2000 to other nieces; £100 to each of five name-sons; and donations to charities, in all £7500. The deed then proceeded—

"Suppose my estate to realise .	£20,000
Take off	7,500
	12,500

Interest at 4 p. c. on £12,000 would pay the annuitants, but if short, take out of capital.

"Balance left for further disposal."

These deeds formed the subject of a special case, reported June 21, 1873, 11 Macph. 744. The Court held that both deeds were good testamentary writings and were to be read together, and that the residue of the estate had been competently disposed of by the first deed.

The executors realised the estate, paid the charges and legacies, and thereafter administered the estate for the payment of the annuities till the death on 15th January 1891 of the last annuitant, Mrs Brebner, the sister of the testator.

As the time had now come for the division of the residue, the trustees raised an action of multiplepoinding in the Sheriff Court at Aberdeen. They averred—"No question has arisen about the half of the residue that goes to the treasurer of the Free Church, but in regard to the division of the half of residue that was destined to the families of the testator's two sisters two questions have arisen, viz., first, whether the division is to be *per capita* or *per stirpes*, and second, whether the children of Mrs Eliza Lawrie or Brown, who predeceased the testator, represent their mother in her share as being part of the 'family' of the testator's sister Mrs Lawrie."

The claimants were—1st, Mrs Whitworth and others, six children of Mrs Lawrie, the testator's sister, who were alive at the testator's death, who claimed that the fund *in medio* should be divided among the children of the testator's two sisters who were alive at the death of the last annuitant, and that it should be divided *per stirpes;* 2nd, the son of Mrs Lawrie and his assignee, who claimed that the fund should be distributed *per capita*; 3rd, the husband of Mrs Brebner, one of the annuitants, and his assignee, who claimed his wife's share on a division of the fund *per stirpes;* 4th, William Lundie and another, children of a son of Mrs Brebner by her first husband. Their father had predeceased the last annuitant; 6th and 7th, James Brown and others, the children of Mrs Margaret Lawrie or Brown, the daughter of Mrs Margaret Lawrie or Brown, the daughter of Mrs Margaret Lawrie, sister of the testator, but who had predeceased him, and the assignee of one of the children.

The last three claimants claimed the portion of the fund which would have fallen to their parents' share had they survived the last annuitant.

Upon 29th September 1891 the Sheriff-Substitute (BROWN) pronounced this interlocutor:—"Finds on a sound construction of the testamentary writings of the deceased John Low, that the residue of his estate forming the fund *in medio*, falls to be divided among the families of his two sisters Margaret Lawrie and Mary Brebner, excepting the family of the deceased Eliza Lawrie or Brown, the eldest daughter of the said Margaret Lawrie, *per stirpes:* Finds that the said Eliza Lawrie or Brown having predeceased the date of the deed of settlement was not instituted under it, and therefore that the claimants who derive through her take no benefit under the deed: Finds further, that the family of the said Eliza Lawrie or Brown are excluded from participating in the residue of the deceased John Low, by the special bequest of £1000 made for them under the deceased's second testamentary writing: With reference to the foregoing findings in law, ranks and prefers the claimants, John Low Brebner and the North of Scotland Bank, Limited, to one-fourth of the fund *in medio:* Ranks and prefers the claimants William H. Lundie and Mary Altinee Lundie or Ledward each to one-eighth of the fund *in medio:* Ranks and prefers the claimants

Jane Lawrie or Whitworth, Sophie Lawrie or Clarke, Mary Lawrie or Pithie, Agnes Lawrie or Johnston, Henry Lawrie, Margaret Lawrie or Webster, and William Lawrie, each to one-fourteenth of the fund *in medio:* Refuses the claims lodged on behalf of the children of the said Eliza Lawrie or Brown, or their assignees and descendants: Finds the claimants John Low Brebner and the North of Scotland Bank, Limited, and William H. Lundie and Mary Altinee Lundie or Ledward entitled to expenses.

"*Note.*—The two questions involved in this case are concisely and clearly stated in the summons of multiplepoinding by which the several claimants have been brought into Court, and the facts out of which they arise are of quite simple character. One of these, taking the order in which they were presented in argument, is whether the Brown and the Smith family, being the children and grandchildren respectively of Eliza Lawrie or Brown, a niece of the testator, have any interest in the residue of the estate forming the fund *in medio?* I am of opinion they have not and that they are excluded on two grounds. The first of these is, that the parent of the claimants having predeceased the date of settlement, she was never instituted under it, and therefore there is no room for the operation of the *conditio si institutus sine liberis decesserit.* This doctrine was fully recognised in the two leading cases—*Sturrach* v. *Benny*, November 29, 1843, 6 D. 117, and *Rhind's Trustees* v. *Leith and Others*, December 5, 1866, 5 Macph. 104, and was referred to and adopted in *Blair's Executor* v. *Taylor*, January 18, 1876, 3 R. 362, and in the very recent special case *Hall* v. *Hall*, March 17, 1891, 18 R. 690. I assume that all the circumstances concur that would otherwise admit the condition, viz., that the testator stood *in loco parentis* and was making a family settlement, and that the legatees were not *nominatim* instituted, but it seems not doubtful, on the authorities above quoted, that the family of Eliza Lawrie or Brown have no claim to the residue as deriving right through her. The second ground on which I reject the claim of the Brown and Smith family is, that a special provision was made for Eliza Lawrie or Brown's family, in view undoubtedly of the fact that they did not otherwise take under the settlement. An argument indeed was maintained in favour of the claimants on the terms of this special provision, it being urged that Eliza is dealt with by the testament precisely as her sisters Sophia and Mary are, a further indication of the intention of the testator that her family should also share in the residue being that a legacy is left to the Rev. John Brown as nameson. I am unable to adopt this view, because, on the contrary, I think it is clear that in view of the predecease many years before of Eliza Lawrie or Brown, the codicil of 22nd April 1872 left the legacy of £1000 to her family, the testator simply emphasising by the terms of his bequest that he had not forgotten his dead sister. In the view I thus take of the case it is not necessary to consider the doctrine laid down in *Irvine* v. *Irvine*, July 9, 1873, 11 Macph. 892.

"The second question is, whether the division of the residue destined to the families of the testator's two sisters is to be *per capita* or *per stirpes?* This is a point undoubtedly of more difficulty, but after the best consideration I have been able to give it, I have come to be of opinion that the latter is the true rule of distribution. By the first writing the testator directed that the interest on the residue of his estate should be divided into three equal parts and given to the two sisters already mentioned and to his sister-in-law. By the second codicil these interests are converted into fixed annuities, but I apprehend that does not in any way affect the rule of division that now falls to be applied. What is important to note is how the testator in the first place deals with the interest of the residue. He gives that in three equal parts, and provides that the families of the annuitants are to get the interest of their mothers until the death of the last annuitant. The rule of construction is undoubted, that when a share of residue, whether original or lapsed, is given in liferent and fee to a person named and the children respectively, the division is *per stirpes.* There are here two liferents and the question practically is, whether that is ousted by throwing into the fee the liferent of a third person? But for the increment the division of the fee would certainly be *per stirpes*, and looking to the whole conception of the settlement and the manner in which the families of the testator's two sisters are dealt with in the first part of the deed, I think it would require words of a particularly distributive character to justify the division *per capita* for which the other claimants contend. The very contrary is the case for the testator continues to use the word 'families,' providing that the enlarged fee is to go to them equally. Both parties relied on the case of *Richardson* v. *M'Dougall*, March 26, 1868, 6 Macph. (H. of L.) 18, reported in the Court of Session in this branch of it (February 6, 1866, 4 Macph. 373).

"I cannot see, however, how the supporters of a *per capita* division make out that they take any advantage from this case, because the doctrine expounded by the Lord Justice-Clerk as to the division of the fee was undoubtedly upset in the House of Lords. The judgment is distinctly so rubricked, and the point is specially dealt with in the opinions of the Lord Chancellor and Lord Westbury. But the Lord Justice-Clerk as Lord President, in the case of *Home's Trustees* v. *Ramsay and Others*, December 11, 1884, 12 R. 314, makes it quite clear how he understood the judgment of the House of Lords when he says that under a destination of residue in liferent and fee to a person named, and to children respectively, the distribution as *per stirpes* is settled by the case of *Richardson* v. *Macdougall.* I quite recognise the specialty in *Home's Trustees* v. *Ramsay and Others*, quoted as an authority by the claimants

who have been preferred, that the share of a daughter dying without issue was given in liferent to her surviving sisters, and that it is necessary in the present case to go beyond the general principle which has been referred to, to the deed itself, to gather the testator's intention; but it seems to me, for the reason already assigned, that there is a clear indication of what that is, and that the general rule of law and the intention blend together. Reference was further made by the successful claimants to *Laing's Trustees*, November 18, 1879, 7 R. 244, and to the case of *Cumming*, January 13, 1891, 18 R. 380."

Mrs Whitworth and others appealed.

Cases cited:—1. Who were included in the families of the testator's sisters—*Low's Executors and Others*, June 21, 1873, 11 Macph. 744; *Irvine* v. *Irvine*, July 9, 1873, 11 Macph. 892; *Fyffe* v. *Fyffe*, July 13, 1841, 3 D. 1205; M'Laren on Wills, i. 726; *Gregory* v. *Smith*, May 4, 1852, 9 Hare's Chan. Rep. 708; *Pigg* v. *Clarke*, July 31, 1876, L.R., 3 C.D. 673. 2. Should division be per Capita or per Stirpes—*M'Courtie and Others* v. *Blackie's Children*, January 15, 1812, Hume's Decs. 270; *M'Kenzie* v. *Holte's Legatees*, February 2, 1781, M. 6602; *Grant* v. *Fyffe*, May 22, 1810, F.C.; *Bogie's Trustees* v. *Christie*, January 26, 1882, 9 R. 453; *Cunningham's Trustees* v. *Cunningham*, January 13, 1891, 18 R. 381; *Barnes* v. *Patch*, June 27, 1803, Vesey's Chan. Rep. 603; *Alexander* v. *Douglas*, June 29, 1782, Romilly's Notes of Cases; *Brett* v. *Hirten*, July 22, 1841, 4 Beavan's Reps. 239.

At advising—

LORD TRAYNER—The present appeal is taken against an interlocutor of the Sheriff-Substitute of Aberdeenshire pronounced is an action of multiplepoinding brought before him for the purpose of having determined who among certain competing claimants are entitled to the one-half of the residue of the estate of the deceased Mr John Low.

Mr Low died in July 1872 leaving a settlement dated 22nd May 1869 by which he directed his executors there nominated, *inter alia*, to divide the interest on the residue of his estate into three equal parts, and to give one of such parts to each of his sisters Mrs Lawrie and Mrs Brebner, and her sister-in-law Mrs Low, in half-yearly payments. He further directed—"The families of the annuitants to get the interest of their mother until the death of the last annuitant, when, at the usual money term, the residue of my estate is to be divided into two parts, the one-half for the families of my two sisters, and the other half to the Treasurer of the Free Church . . . equally." That is, the residue, on the death of the last surviving annuitant, was to be divided equally, one-half going to the Treasurer of the Free Church, and the other half to the "families of my two sisters." It is this half destined to the families of Mr Low's two sisters which forms the fund *in medio* in the present action. The claims now made on the fund *in medio* give rise to two questions—1st, Who are to be held as included in the "families of the two sisters; and 2nd, is the division of the fund among those entitled to share therein to be *per capita* or *per stirpes?*"

The first of these questions arises thus—Mrs Lawrie, one of the testator's sisters, had a daughter Eliza Lawrie or Brown, who died in 1859—that is, ten years before the date of the settlement now under consideration—leaving children and grandchildren. These children and grandchildren claim to share in the fund *in medio* as being of the "family" of Mrs Lawrie, the testator's sister, maintaining that the word "family" means not children only, but descendants generally. I think these claimants cannot succeed in their claim upon this ground. The word "family" when used as a term of designation is synonymous with children, a character which these claimants do not possess. It is quite true that in the case of *Irvine* it was said that the word "family" in the circumstances of that case would include all descendants. But in that case the destination which was being construed was one in favour of nephews and nieces, "and the families of such as may have predeceased," and the question was, whether under such a destination the grandchildren of a predeceasing nephew took equally with the child of that nephew. It was held that they did—not because they were included in the destination as of the nephew's family, but because they were entitled to their deceased parent's share on the principle of implied conditional institution. In cases where that principle is applicable it was said that the word "family" had a wider signification than "children." Here the destination is to the family of each sister of the testator without any provision for the succession of the issue of any member of such "family" to the predeceasing parent's share, and it seems to me that the destination here is in favour of the family—that is, the children of the two sisters who were alive at the date of vesting. Whether under that destination the children of any member of the family predeceasing would be entitled to succeed on the *conditio si sine liberis* need not here be considered, for in this case there is no room for the application of that principle. Mrs Brown, through whom these claimants claim, was never herself instituted, for she died, as I have said, ten years before the testator's settlement was executed.

The Sheriff-Substitute has rejected the claim of these claimants on another ground, namely, that they are the direct beneficiaries under the testator's codicil of a special legacy. I should rather regard that fact as showing that the testator made a special provision in favour of his grandnephews and nieces because they did not under his will take any share in the division of the residue. If I had read the provision as to the division of the residue otherwise than I have done, I would not have been disposed to hold that a special legacy in itself militated against the view that they were also to participate in the

residue. But this question need not enter into the decision of the case. It is enough to say that these claimants who claim through Mrs Brown neither take directly under the destination of the settlement nor on the ground of implied conditional institution.

The remaining question is, Is the division of the residue to be a division *per capita* or *per stirpes?* On that question I agree with the Sheriff-Substitute and with the reasons assigned by him for his judgment.

LORD RUTHERFURD CLARK, LORD YOUNG, and the LORD JUSTICE-CLERK concurred.

The Court pronounced this judgment:—

"Recal the third finding in the interlocutor of the Sheriff-Substitute of 29th September 1891; *quoad ultra* adhere to the said interlocutor, and dismiss the appeal: Further, and of consent of all parties, rank and prefer the claimants Jane Lawrie or Whitworth, Sophia Lawrie or Clark, Mary Lawrie or Pithie, Agnes Lawrie or Johnstone, Henry Lawrie, and Margaret Lawrie or Webster to one-sixth each of the sum of £59, 9s. 7d. contained in deposit-receipt, and forming part of the fund *in medio* specified in condescendence thereof, and decern: Find the appellants liable in expenses to the claimants John Low Brebner, the North of Scotland Bank, Limited, William H. Lundie, and Mary A. Lundie or Ledward; of which remit the account when lodged to the Auditor to tax and report, together with the expenses found due in the Inferior Court."

Counsel for Mrs Whitworth—The Lord Advocate—Kemp. Agents—Douglas & Miller, W.S.

Counsel for Alexander Brown and Others—H. Johnston—C. N. Johnston. Agents—Hagart & Burn Murdoch, W.S.

Counsel for Respondents—Asher, Q.C.—W. C. Smith. Agent—Alexander Morison, S.S.C.

Friday, February 5.

FIRST DIVISION.

Exchequer Cause—
Lord Wellwood, Ordinary.

THE LORD ADVOCATE *v.* MACFARLANE AND OTHERS (DUNLOP'S TRUSTEES).

Revenue — Legacy-Duty — Moveable Estate Directed to be Invested in Land—Entail—"Estate of Inheritance in Possession in the Real Estate"—Act 36 Geo. III. c. 52, secs. 12 and 19.

The Act 36 Geo. III. c. 52, sec. 12, provides—"That the duty payable on a legacy or residue or part of residue of any personal estate given to . . . different persons in succession, who shall be chargeable with the duties hereby imposed at one and the same rate, shall be charged upon and paid out of the legacy or residue or part of residue so given, as in the case of a legacy to one person; and where any legacy or residue or part of residue shall be given to . . . different persons in succession, some or one of whom shall be chargeable with no duty, or some of whom shall be chargeable with different rates of duty, so that one rate of duty cannot be immediately charged thereon, all persons who under or in consequence of any such bequest shall be entitled for life only, or any other temporary interest, shall be chargeable with the duty in respect of such bequest in the same manner as if the annual produce thereof had been given by way of annuity."

Section 19 provides—"That any sum of money or personal estate directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate, unless the same shall be so given as to be enjoyed by different persons in succession, and then each person entitled thereto in succession shall pay duty for the same in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually applied in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so applied: Provided, nevertheless, that in case before the same, or some part thereof, shall be actually so applied, any person or persons shall become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or with so much thereof as shall not have been applied in the purchase of real estate, the same duty which ought to be paid by such person or persons if absolutely entitled thereto as personal estate by virtue of any bequest thereof as such, shall be charged on such person or persons, and raised and paid out of the fund remaining to be applied in such purchase."

A testator directed his trustees during the six years succeeding his death to realise and invest his moveable estate in land, and to entail the same at the end of that period on W. H. D. and a certain series of heirs. The testator declared "that after the said period of six years have expired, the institute or the heir of entail in possession or entitled at the time to possess the lands and estates to be purchased as aforesaid under the destination hereinafter written, shall be entitled to demand and receive the interest and proceeds of the entire residue and reversion of my said estates, heritable and moveable, hereby conveyed, but under deduction always