the proportion of the assessment is to be recovered "so soon as but not before some building is erected on a land or heritage adjoining such road or street." In the interpretation clause, section 4, it is declared that "land or heritage in the singular number shall mean one of such lands and heritages separately valued or entered in the valuation roll as separately occupied." Therefore the pursuers are entitled at the most to levy an assessment on the defenders in respect of the frontage of the farmhouse and steading (about 70 yards or thereby); because as the rest of the farm, which is a separate "land or heritage" in the sense of the definition, has no building upon it, nothing is yet due in respect of it.

I therefore dissent from the judgment proposed.

On 5th March 1901, the Court, in conformity with the opinions of the majority of the whole Judges present at the hearing, refused the reclaiming-note, and adhered to the interlocutor reclaimed against.

Counsel for the Pursuers and Respondents —Lees—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Counsel for the Defender and Reclaimer —H. Johnston, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Tuesday, March 5.

FIRST DIVISION.

[Lord Low, Ordinary.

YOUNG'S TRUSTEES *v.* YOUNG.

Succession—Liferent and Fee—Gift one of Liferent or Fee—Lapsed Share—Intestacy.

A testator, after providing for the payment of certain annuities to his wife and his elder son, directed his trustees to hold and apply the whole residue of his estate for the use and behoof of his younger children, equally among said children, share and share alike, under the burdens and conditions following. He directed that the share falling to his elder daughter Mrs M. should be held by his trustees for her behoof in liferent, and should belong to her issue in fee, equally among such issue *per stirpes;* that the share falling to his younger daughter should be held by his trustees for her in liferent, and should belong absolutely to her issue equally *per stirpes* in fee, but subject to a provision that the annual proceeds of this share should be paid to his widow during her viduity; and that the share falling to his younger son should be held by the trustees for the liferent use of the testator's widow during her viduity, and on her decease or re-marriage should become a vested interest in the younger son payable on his attaining twenty-five. He directed his trustees "in the event of the death of any of my younger children leaving lawful issue, and having at the time of such decease a share or interest in my estate, to pay . . . such share or interest to" the children "of such deceasing child who shall attain the age of twenty-one years," equally if more than one, and "failing such issue attaining the said age of twenty-one years," he appointed "that the share and interest of such of my younger children deceasing shall form part of my estate and shall belong to my other younger children or their issue attaining said age, equally among them *per stirpes.*" The liferent rights of daughters were declared to be an alimentary provision for their own personal use and behoof. The testator died in 1864, and was survived by his widow and the four children mentioned in the settlement. The elder son died in 1876, the younger son in pupilarity in 1866, the widow in 1869, the younger daughter in minority and unmarried in 1870, and the elder daughter Mrs M., without issue, in 1899. After the death of the younger daughter it was decided in a special case (*Moodie* v. *Young, ante*, vol. vii., 482) that her share and the share of the younger son fell into residue "to be administered . . . by the trustees . . . for behoof of Mrs M. in liferent . . . and her children in fee."

Held (1) that under the above provisions no right of fee had been conferred upon Mrs M.; and (2) that in the event, which happened, of her death without issue, the fee of the residue was not disposed of by the settlement, and fell to be dealt with as intestate succession of the testator.

Succession—Construction of Testamentary Writings—Falsa Demonstratio.

A truster, after narrating the terms of his father's trust-disposition and settlement, and what had followed thereon, proceeded as follows—"Considering that in the event of the said J (his sister) deceasing without leaving issue, the whole purposes of the said trust-disposition and codicil will have been implemented, and the residue of the said estate will fall or belong to me or to my children as undisposed-of intestate succession of my father. . . . Therefore in order to provide for the management and disposal of the said residue in the event of my succeeding thereto . . . I do hereby assign, dispone," &c., to certain trustees "the whole residue of the said estate, heritable and moveable, to which I shall succeed in the event of my being predeceased by the said J without issue." The event in which the fee of the residue in fact fell into intestacy was the death of J without issue, whether before or after the death of the present truster. J survived him and died without issue. The estate consisted of heritage, and the present truster, as heir of his father at the date of his father's death, was consequently entitled to the fee of the residue which was undisposed of.

Held that the estate to which the present truster was so entitled was carried by his trust-disposition, the reference to the predecease of J. being merely a misdescription of the event in which it fell into intestacy.

Mr James Young *primus* died in 1864, leaving a trust-disposition and settlement, dated 12th September 1861, and relative codicil dated 13th April 1864. By the second and third purposes of his trust he provided annuities of £100 and £50 to his wife and to his eldest son James Young *secundus* respectively. By the fifth purpose he directed "That my trustees shall from time to time realise and convert into money my whole estates and effects, heritable and moveable, not hereby specially disposed of, and after providing for the annuities before written, shall hold and apply the prices and produce thereof, and whole residue and remainder of my estate, for the use and behoof of my younger children, the said Janet Edmonstone Young, Margaret Primrose Young, and John Primrose Young, and such other child or children as may be procreated of my body, equally among said children, share and share alike, under the burdens and conditions following, *videlicet:*—The share falling to the said Janet Edmonstone Young, my eldest daughter, shall be held by my trustees, or invested by them in their names for behoof of the said Janet Edmonstone Young in liferent during all the days and years of her life, and shall belong to her issue in fee, equally among such issue *per stirpes* to the extent and on the condition after provided in the case of the shares of my whole younger children. . . . The share falling to the said Margaret Primrose Young, and to any other daughter or daughters to be procreated of my body, shall be held by my trustees, or invested by them in their names, for the use of such daughter or daughters in liferent, and shall belong absolutely and be paid or conveyed to the issue of such daughter or daughters equally among such issue *per stirpes* in fee, but that only as after provided in the case of the shares of my whole younger children: Declaring that the free interest or annual proceeds of the share or shares falling to the said Margaret Primrose Young, and to any other daughter or daughters to be procreated of my body, or to others through the decease of any of said daughters, shall be paid over half-yearly at the terms of Whitsunday and Martinmas to the said Margaret Marshall Primrose Young, my wife. . . . And the share or shares falling to the said John Primrose Young, and to any other son or sons to be procreated of my body, shall be held or invested by my trustees in their names, for the liferent use of the said Margaret Marshall Primrose or Young, so long as she survive me and remain unmarried; and on her decease or second marriage the said share or shares shall become vested interests in my said son or sons, and shall be payable to him or them on his or their respectively attaining the age of twenty-five years, till which time or times the free interest or annual proceeds thereof shall be administered for his or their behoof by my trustees. . . . And I direct my trustees, in the event of the death of any of my younger children leaving lawful issue, and having at the time of such decease a share or interest in my estate, to pay or assign and convey such share or interest to and in favour of all the lawful children of such deceasing child who shall attain the age of twenty-one years, equally between or amongst them, share and share alike, if there be more than one; . . . it being hereby expressly declared that the share of any of my younger children so dying leaving lawful issue shall be divided equally among his or her issue attaining said age of twenty-one years, and failing such issue attaining the said age of twenty-one years, I direct and appoint that the share and interest of such of my younger children deceasing shall form part of my estate, and shall belong to my other younger children or their issue attaining said age, equally among them *per stirpes;* declaring also that the liferent right of each of my daughters shall be exclusive of the *jus mariti* of any husband she may marry, and shall not be assignable or affectable by her or his deeds or debts, or by the diligence of her or his creditors, but shall be an alimentary provision for her own personal use and behoof." . . .

James Young *primus* was survived by his widow and by the four children mentioned in his settlement. Of the children, James Young *secundus* died in 1876 survived by his widow Mrs Margaret Young or Wyper and three children, viz., James Young *tertius*, Mrs Helen Young or Halliday, and Mrs Marion Young or Tudhope. John Primrose Young, the truster's younger son died in pupilarity on 29th October 1866. Margaret Primrose Young died on 22nd January 1870 in minority and unmarried. Mrs Janet Edmonstone Young or Moodie, the truster's other daughter, died without issue in 1899. Mrs Young, his widow, died in 1869.

After the death of Margaret Primrose Young a special case was submitted to the Court for the purpose of determining the question of the disposal of the shares of residue bequeathed to her and to John Young, and on 19th May 1870 the First Division found and declared that "The shares of the residue of the trust estate of the deceased James Young provided to his son John and his daughter Margaret have, by reason of the death of John in pupilarity and the death of Margaret without issue, fallen into and become part of the residue of the trust estate to be administered and disposed of by the trustees in the manner provided with respect to Mrs Moodie's original share, for behoof of Mrs Moodie in liferent, exclusive of her husband's *jus mariti*, and of her children in fee."

The case is reported *ante*, vol. vii, p. 482.

By trust-disposition dated 27th February 1872, James Young *secundus*, on a narrative of the terms of the trust-disposition of James Young *primus*, and of the deaths of John Young in pupilarity and

of Margaret Young in minority and unmarried, and further, on the narrative that the interest of Janet Edmonstone Young in the residue of the estate of James Young *primus* was limited to the free income thereof, which was an alimentary provision for her own behoof, "and that in the event of the said Janet Edmonstone Young deceasing without leaving issue the whole purposes of the said trust-disposition and codicil will have been implemented and the residue of the said estate will fall and belong to me or to my children as undisposed of and intestate succession of my father the said deceased James Young, subject always to the payment of the liferent annuity provided in my favour and before refered to," disponed to trustees "the whole residue of said estate, heritable and moveable, to which I shall succeed in the event of my being predeceased by the said Janet Edmonstone Young without issue." The purposes of the trust were to pay over the income to the truster for his liferent use allenarly; to pay to his wife in the event of his predeceasing her the whole free income for her liferent use allenarly; and on the decease of the survivor of himself and his wife to administer the income for behoof of the surviving children until the youngest should attain the age of 25, when the whole of the residue was to be equally divided among the children. Mrs Moodie did not predecease James Young *secundus*, and enjoyed the liferent of the whole residue of the estate till her death in 1899. She left a trust-disposition and settlement whereby she bequeathed the residue of her estate to James Young *tertius*, his two sisters Mrs Halliday and Mrs Tudhope, and to Mrs Jane Moodie or Jackson.

Mr David Guthrie, C.A., Glasgow, was appointed judicial factor on Mrs Moodie's estate.

Questions having arisen as to the disposal of the residue of the estate of James Young *primus*, an action of multiplepoinding was raised in name of his trustees as nominal raisers. Claims were lodged (1) by James Young, eldest son and heir-at-law of James Young *secundus*, (2) by David Guthrie the judicial factor on Mrs Moodie's estate, and (3) by Mrs Margaret Lamont Young now Wyper, widow of James Young *secundus*, sole surviving trustee under his trust-disposition, with consent and concurrence of (1) herself as an individual, (2) Mrs Halliday and her husband, and (3) Mrs Tudhope and her husband.

The claimant James Young maintained (4) That upon the death of Mrs Moodie without issue the whole estate liferented by her fell into intestacy, and that the same, in so far as it consisted of heritage at the date of the death of James Young *primus*, now belonged to him as heir-at-law of the said James Young *primus*. The claimant maintained that in respect Mrs Moodie did not predecease James Young *secundus* the settlement of the said James Young *secundus* did not effectually dispose of any part of said estate. (5) Alternatively, and if it should be held that the said estate was effectually disposed of by the settlement of the said James Young *secundus*, the claimant maintained that he was entitled to ride on any claim that might be made, either for the trustees under that settlement, or for Mrs Wyper as liferentrix under the same, to the extent of one-third of the amount claimed, whether the same be of fee or of income.

The claimant David Guthrie maintained (2) That in terms of the will of the late James Young of Scarlethall, Mrs Moodie became upon the death of John Primrose Young and Margaret Primrose Young entitled to the fee of the whole estate, her right, however, being in the nature of a protected succession, and subject to defeasance in the event of her having children, or alternatively, that she was entitled to one-third of said estate, together with one-half of the share liferented by John Primrose Young, and the whole of the share liferented by Margaret Primrose Young. If it was held that in the events which had happened the estate in the hands of the nominal raisers fell to be dealt with as intestate succession of the late James Young of Scarlethall, then he maintained that it had to be treated as moveable estate, and that Mrs Moodie was entitled to one-fourth thereof. He further maintained that any right which vested in Mrs Moodie was carried by her settlement. He claimed to be ranked and preferred to the whole fund *in medio*, or alternatively to five-sixths, or alternatively to one-fourth.

The claimant Mrs Wyper maintained—"(4) The estate of the said James Young *primus* at the date of his death consisted (with the exception of his household furniture bequeathed absolutely to his widow) entirely of heritage, and the said James Young *secundus*, as his eldest son and heir-at-law, was exclusively entitled thereto, subject to the burden of the trust created by the said James Young *primus*, and the purposes of the said trust having now been fulfilled, the residue of the said estate, now forming the fund *in medio*, falls into intestacy and is to be treated as heritable estate to which the said James Young *secundus* acquired right as at the date of his father's death." She claimed to be ranked and preferred to the whole fund *in medio*.

The Lord Ordinary (Low) on 28th June 1900 pronounced the following interlocutor—"Finds (1) that upon a sound construction of the trust-disposition and settlement of the deceased James Young of Scarlethall, the fee of the trust-estate held by the pursuers and nominal raisers as trustees acting under said trust-disposition and settlement for behoof of Mrs Janet Edmonstone Young or Moodie in liferent was not disposed of in the event which happened of the death of the said Mrs Janet Edmonstone Young or Moodie without issue, and falls to be dealt with as intestate succession of the said James Young; (2) that the said succession falls to be regulated according to the character of the estate, whether heritable or moveable, at the date of the death of the

truster; (3) that James Young *secundus* was the eldest son and heir-at-law of the truster, and became entitled to the said estate in so far as the same was heritable at the date of the truster's death; and (4) that the said estate to which the said James Young *secundus* became entitled as aforesaid was carried to his testamentary trustees by the trust-disposition and settlement left by him: With these findings, appoints the cause to be enrolled for further procedure: Reserves all questions of expenses, and grants leave to reclaim."

Opinion.—"The first question in this case is, Whether the late Mrs Moodie, in the event which happened of her dying without issue, was entitled to the estate held by the testamentary trustees of her father in fee?

"The question depends upon the construction of the fifth purpose of the trust-disposition and settlement of the late James Young of Scarlethall, Mrs Moodie's father—[*his Lordship narrated the terms of the settlement*].

"The truster died in 1864, leaving no younger children except the three mentioned in the settlement. John Primrose Young died in pupilarity in 1866, and Margaret Primrose Young died unmarried and in minority in 1870. John predeceased his mother, but Margaret survived her.

"A special case was then presented to the Court in regard to the shares of the estate held by the trustees for Margaret and John, and the Court found and declared that their share had 'fallen into and become part of the residue of the trust estate to be administered and disposed of by the trustees in the manner provided with respect to Mrs Moodie's original share, for behoof of Mrs Moodie in liferent, exclusive of her husband's *jus mariti*, and of her children in fee.'

"Mrs Moodie died in 1899, and the claimant David Guthrie is judicial factor upon her trust estate. He argued that upon a sound construction of the fifth purpose of Mr Young's settlement a right of fee was given to Mrs Moodie, and that the sole object of the truster in restricting her enjoyment of her share during her life to a liferent was to protect and secure the succession of her children, if she had children.

"There are several cases in which where a daughter died without issue she was held to have taken a fee in a share of the estate, her enjoyment of which during her life was limited to a liferent. The leading cases are *Lindsay's Trustees*, 8 R. 281; *Dalgleish's Trustees*, 16 R. 559; and *Logan's Trustees*, 17 R. 425. In all these cases, however, there had either been a direct gift to the daughter or a direction to the trustees to pay to her. In this case no direct gift was given to Mrs Moodie, nor were the trustees directed to pay or convey to her any part of the capital of the trust estate. The trustees were merely directed 'to hold and apply' the residue of the estate 'for the use and behoof of my younger children . . . under the burdens and conditions following,' and the conditions following gave no right whatever to Mrs Moodie except a liferent.

"Mr Hunter founded on the word 'burdens'—'under the burdens and conditions following'—and argued that the use of that word showed that the right given to her children was only a burden upon Mrs Moodie's right. I cannot accept that view. I think that the word 'burdens' referred to the fact that the shares given to sons and to younger daughters other than Mrs Moodie were burdened with a liferent to the truster's widow.

"Mr Hunter also founded upon the declaration in the clause dealing with the event of the death of a child that the share of the deceaser shall 'form part of my estate, and shall belong to my other younger children or their issue.'

"I do not think that that declaration aids the view that Mrs Moodie took a fee. The clause in which it occurs applies to the whole children, whether sons or daughters, and must be read with reference to the rights which had been already conferred upon sons and daughters respectively. The declaration therefore appears to me to amount to no more than this, that in the event contemplated the share of the deceasing child shall fall back into residue, and shall be held for or paid to the surviving children or their issue upon the same terms as the original shares given to them. And that appears to me to have been the construction of the settlement adopted by the First Division in the special case. Upon the death of Margaret Young and John Young the very event contemplated in the clause with which I am dealing arose, and the First Division held that the shares of these children fell into residue, to be 'administered and disposed of by the trustees in the manner provided with respect to Mrs Moodie's original share for behoof of Mrs Moodie in liferent and her children in fee.'

"I am not sure that that was not a direct decision of the question raised in this case, because Mrs Moodie was a party to the special case, and claimed in fee the shares which had been set free. I assume, however, that at the time when the special case was presented it was possible that Mrs Moodie might still have children, and if that were so, probably the judgment of the Court cannot be regarded as deciding the rights of the parties in the event, which has happened, of Mrs Moodie dying without issue. It was decided, however, that the residue fell to be disposed of in the manner provided with respect to Mrs Moodie's original share, and for the reasons which I have given I am unable to find anything in the settlement which would justify the view that any other or higher right was given to Mrs Moodie with respect to her original share than a liferent.

"The result is that the residue of the estate in the hands of the trustees has not, in the events which have happened, been disposed of, and falls to be dealt with as intestate succession of the truster. The next question therefore is, who in these circumstances is entitled to the residue?

"I understand that the truster's estate may for the purposes of this case be re-

garded as having consisted at his death entirely of heritable property, and notwithstanding the direction to the trustees with which the fifth purpose of the settlement begins, 'to realise and convert into money my whole means and effects,' I think that his succession must be regulated by the character of the estate at the time of his death—*Cowan*, 14 R. 670.

"Now, besides the three younger children mentioned in the fifth purpose Mr Young had an elder son, James Young, for whom in his settlement he had provided an annuity. James Young was his father's heir in heritage, and he died in 1876, survived by a widow and by a son and two daughters. The widow Mrs Wyper is a claimant as now sole trustee acting under her husband's trust-disposition and settlement, and the son James Young is a claimant as heir-at-law of his father.

"James Young maintains that the heritable estate of the truster was not carried by the settlement of his (the claimant's) father, (1) because the latter predeceased Mrs Moodie, and the succession did not open to him until that lady's death, and (2) because the terms of the settlement are not habile to carry the said heritable estate.

"I am of opinion that the first of these grounds cannot be sustained. If the view which I have taken is sound, the truster, in the events which have happened, in no way disposed of his heritable estate, the succession to which therefore falls to be regulated by the law of intestate succession. Now, the law of intestate succession looks only to the date of death. It is then, and then only, that the heir falls to be ascertained, and James Young (*secundus*), the truster's eldest son and the claimant's father, was the truster's heir in heritage. No doubt, owing to the terms of the truster's settlement the right of James Young (*secundus*) was subject to the contingency of Mrs Moodie leaving children. But when Mrs Moodie died without children the contingency was at an end, and it appeared that the beneficial right to the estate had been in James from the date of his father's death, and that the trustees had truly been holding the fee for him.

"The second ground is founded upon a very strict construction of the words of the trust-disposition and settlement left by James Young (*secundus*). He there narrates the terms of his father's settlement and what had followed thereon, and he then proceeds—'Considering that in the event of the said' Mrs Moodie 'deceasing without leaving issue, the whole purposes of the said trust-disposition and codicil will have been implemented, and the residue of the said estate will fall and belong to me or to my children as undisposed of and intestate succession of my father. . . . Therefore in order to provide for the management and disposal of the said residue in the event of my succeeding thereto,' he disponed and assigned to trustees 'the whole residue of said estate, heritable and moveable, to which I shall succeed in the event of my being predeceased by the said' Mrs Moodie 'without issue.'

"The argument was rested mainly upon these last words, It was contended that as James Young (*secundus*) died before Mrs Moodie, nothing could be carried by a conveyance of estate to which he should succeed if he was predeceased by her.

"I do not think that that is a reasonable construction of the settlement. It is plain that what James Young (*secundus*) was dealing with, and what he intended to convey to his trustees, was any right which he might have as heir *ab intestato* to his father in the event of Mrs Moodie dying without children. The only mistake which there is in the wording of the settlement is that it suggests that the right of James (*secundus*) depended upon his being predeceased by Mrs Moodie, whereas it only depended upon Mrs Moodie dying without issue. The mistake, however, appears to me to be of the nature of a mere misdescription, which will not be allowed to defeat the plain intention of the testator.

"I am therefore of opinion that, in so far as the succession consists of heritage, the claims for David Guthrie and James Young fall to be repelled, and the claim for Mrs Wyper sustained."

The claimants James Young *tertius* and David Guthrie reclaimed.

The following cases were cited by the parties in support of their respective contentions:—

By the reclaimer David Guthrie—*Downie's Trustees* v. *Cullen*, March 16, 1882, 9 R. 749; *Mackay's Trustees* v. *Mackay's Trustees*, June 8, 1897, 24 R. 904, at 907; *White* v. *Gow*, July 11, 1900, 2 F. 1170; *Dunlop's Trustees* v. *Sprot's Executor*, March 9, 1899, 1 F. 722; *Lindsay's Trustees* v. *Lindsay*, December 14, 1880, 8 R. 281; *Dalglish's Trustees* v. *Bannerman's Executors*, March 6, 1889, 16 R. 559; *Logan's Trustees* v. *Ellis*, February 7, 1890, 17 R. 425; *Maitland's Trustees* v. *M'Dermaid*, March 15, 1861, 23 D. 732.

By the reclaimer James Young *tertius*—*Muir's Trustees* v. *Muir's Trustees*, March 19, 1895, 22 R. 553; *Stewart's Trustees* v. *Stewart*, January 22, 1896, 23 R. 416; *Campbell's Trustees* v. *Campbell*, June 30, 1891, 18 R. 992.

By the respondent Mrs Wyper—*Rait* v. *Arbuthnott*, March 18, 1892, 19 R. 687; *Forbes' Trustees* v. *Forbes*, January 13, 1893, 20 R. 248; *Bruce's Trustees* v. *Bruce*, June 7, 1875, 2 R. 775; *Orr* v. *Mitchell*, March 20, 1893, 20 R. (H.L.) 27.

At advising—

LORD PRESIDENT—The leading questions in this case are—(1) Did the fee of the residue of the trust-estate of James Young *primus* pass to his elder daughter Mrs Moodie by virtue of his testamentary settlement, or did he, in the event, which occurred, of Mrs Moodie deceasing without issue, die intestate as regards that residue? (2) If James Young *primus* died intestate as regards the residue, did it (consisting as it did practically of heritage) pass to his eldest son James Young *secundus*, as possessing the character of

his heir-at-law at the time of his death? and (3) If it passed to James Young *secundus* as intestate heritable succession, did James Young *secundus* die intestate as regards it in the event, which occurred, of his predeceasing Mrs Moodie, or was it carried by his testamentary settlement?

James Young *primus*, the truster, died on 8th September 1864, survived by his second wife and by four children, viz., James Young *secundus* and Mrs Moodie, who were children of his first marriage, and Margaret Primrose Young and John Primrose Young, who were children of his second marriage.

James Young *primus* left a trust-disposition and settlement dated 12th September 1861, and relative codicil dated 13th April 1864. By the third purpose of the settlement he provided a liferent annuity of £50 to his eldest son James Young *secundus*, and by the fifth purpose he directed his trustees to hold and apply the trust-estate for the use and behoof of his younger children, Mrs Moodie, Margaret Primrose Young, and John Primrose Young, and any other children whom he might have, equally among such children, share and share alike, under the burdens and conditions thereinafter mentioned; and he declared that the share falling to Mrs Moodie should be held by his trustees, or invested by them in their name, for behoof of her in liferent during all the days and years of her life, and should belong to her issue in fee, equally among such issue *per stirpes*. He gave similar directions in regard to the shares provided to Margaret Primrose Young and any other daughters he might have, declaring, however, that his widow should have an interest in these shares during her life or until she married. With respect to the shares falling to John Primrose Young and other sons, if there should be any, he directed that as long as his widow remained alive and unmarried the income thereof should be paid to her, and that upon her death or marriage the said share or shares should become vested interests in his said son or sons, and should be payable to him or them on his or their respectively attaining the age of twenty-five years. He further directed his trustees, in the event of the death of any of his younger children leaving lawful issue, and having at the time of such decease a share or interest in his estate, to pay, assign, or convey such share or interest to the children of such child who should attain twenty-one years of age, and failing such issue attaining that age he directed and appointed that the share and interest of such of his younger children deceasing should form part of his estate, and should belong to his other younger children or their issue attaining that age, equally among them *per stirpes*.

James Young *primus* died in 1864, survived by his widow and his four children—all of whom however are now dead. His widow died in 1869. His eldest son James Young *secundus* died in 1876, survived by his widow, the claimant Mrs Wyper; Mrs Moodie died in 1899, and is represented in this case by the claimant David Guthrie, the judicial factor on her trust estate. John Primrose Young died in pupilarity in 1866; and Margaret Primrose Young died unmarried and in minority in 1870.

The first question is, whether under the testamentary settlement of James Young *primus* a right of fee was conferred upon Mrs Moodie, and I concur with the Lord Ordinary in thinking that this question should be answered in the negative. The direction to the trustees is "to hold and apply" the residue of the estate for behoof of the younger children, but no gift of the fee was made to Mrs Moodie either directly or indirectly. The trustees were not directed or empowered to make over any part of the capital to her in any event, nor were they to hold it subject to her disposal, but for her liferent enjoyment only. The case therefore does not, in my judgment, fall within the class of those in which there is a gift made to a daughter, either directly or in the form of a direction to pay or convey to her upon the fulfilment of some condition or upon some event, or in which the trustees are directed to hold for her an interest in fee subject to some condition which does not occur, so that the right of fee becomes absolute in her person and may be disposed of by her or pass to her heirs *ab intestato*. But in the present case there is nothing of this kind.

This is not the first occasion on which the construction and effect of the testamentary settlement of James Young *primus* have been considered in this Division of the Court, a special case (*Moodie* v. *Young*, May 19, 1870, 7 S.L.R. 482) having been submitted for the purpose of obtaining a judgment as to the disposal of the shares of the two younger children who died without issue. The third question put in that case was, "3. Whether, upon a sound construction of the said trust-disposition and codicil, the said shares fall into and become part of the residue of the trust estate, to be administered and disposed of by the trustees in the manner provided with respect to Mrs Moodie's original share, and therefore to be invested by them in their own names for behoof of Mrs Moodie in liferent, exclusive of her husband's *jus mariti*, and of her children in fee,"—and the Court answered this question in the affirmative. This answer seems to me to involve a decision upon the construction of the truster's settlement which supports the conclusion at which the Lord Ordinary has arrived.

If I am right in thinking that the residue of the trust estate was not disposed of in the event, which occurred, of Mrs Moodie not having children, but is intestate succession of James Young *primus*, the next question is, who is now entitled to it. It appears that the estate consisted almost exclusively of heritage, and the quality of the estate as heritable or moveable must, for the purposes of this question, be taken to be that which it had at the date of the truster's death, and the person possessing the character of his heir *ab intestato* must be ascertained as at that date—*Cowan*,

14 R. 670; and *Lord* v. *Colvin*, 23 D. 111, and 3 M. 1083. If this be so, it follows that the right to the heritable residue passed to the truster's eldest son James Young *secundus* as his father's heir in heritage. James Young *secundus* died, as already stated, in 1876, and he was survived by a widow, who claims as sole acting trustee under his testamentary settlement, and by a son James Young *tertius*, who claims as his father's heir-at-law. The legal advisers of James Young *secundus* had foreseen that the residue of his father's estate might not improbably come to him as intestate succession, and it was accordingly declared in his testamentary settlement that in the event of Mrs Moodie deceasing without leaving issue the residue of the estate would fall and belong to him or to his children as undisposed-of intestate succession of his father; and to provide for the management and disposal of that residue in the event of his succeeding to it he disponed to trustees "the whole residue of the said estate, heritable and moveable, to which I shall succeed in the event of my being predeceased by the said Mrs Moodie without issue." It was maintained by James Young *tertius*, the heir-at-law of James Young *secundus*, that his father's testamentary settlement did not take effect upon the residue in question, because he was not predeceased by Mrs Moodie, and that consequently the residue should fall to James Young *tertius* as intestate succession of his father. I concur, however, with the Lord Ordinary in thinking that this is not a reasonable construction of the settlement. It appears to me that James Young *secundus* intended to dispose, and did effectually dispose, of the residue if it should come to him whether he did or did not survive Mrs Moodie. The only event which could defeat his right to take the residue *ab intestato* was Mrs Moodie having and being survived by children, but so long as the estate was not disposed of by the truster's settlement in consequence of this condition not having been fulfilled, and so long as it became intestate succession, it was wholly immaterial whether James Young *secundus* did or did not survive Mrs Moodie. Under these circumstances I think that such a mistake in the description of the event upon which the testamentary settlement of James Young *secundus* was to take effect should be disregarded, and upon the whole case I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM—James Young died in 1864, survived by his widow and four children—two sons and two daughters. His widow has died. James the eldest son died, also leaving a widow and children. His younger son John died in 1866, in pupilarity and unmarried; and Margaret, his younger daughter, died in 1870, also unmarried and in minority. Janet, Mrs Moodie, his other daughter, died also without issue in 1899. That is the position of the family to which we have now to apply the provisions of Mr Young's trust-deed. Mr Young left estate to trustees, and after the usual direction for payment of debts, he directed them to pay an annuity of £100 to his widow and another annuity of £50 to his elder son James. After bequeathing certain articles to his younger children, he desired the trustees to realise and convert into money his whole estate from time to time—that is, the estates not thereby specially disponed. He directed his trustees to hold the residue for the use and behoof of his younger children—Janet, Margaret, and John—equally, share and share alike. Then he goes on to provide that the share falling to Mrs Moodie should be held by his trustees, or invested by them in their names for her behoof in liferent during all the days and years of her life, and should belong to her issue in fee. That is the provision as regards Janet, and the share of Margaret was dealt with in identical terms. Then he goes on to provide for his son John, and what he says is this, that the share of John should be held or invested by his trustees in their names for the liferent use of Margaret Marshall Primrose or Young, so long as she should remain unmarried, and on her decease or second marriage the share should become vested interests in his son or sons, and should be payable to him or them on his or their respectively attaining the age of twenty-five years, till which time the free interest should be administered for his behoof or their behoof by his trustees. As regards the shares of the younger sons, there is in the event which has happened no further direction, and it is equally clear that as John died in pupilarity and unmarried he took no vested interest. There is another clause in the deed to which I may refer, because it was founded on by the factor on the estate of Mrs Moodie, and is construed by the Lord Ordinary—that is, the passage at the foot of the page where he directs the trustees "in the event of the death of any of my younger children leaving lawful issue" to pay the share to such issue who attain twenty-one years of age, and then there are provisions as to taking *per stirpes*.

Then he goes on to the clause founded on by the factor for Mrs Moodie, which is in these terms—"It being hereby expressly declared that the share of any of my younger children so dying leaving lawful issue shall be divided equally among his or her issue attaining the age of twenty-one years, and failing such issue attaining the said age of twenty-one years, I direct and appoint that the share and interest of such of my younger children deceasing shall form part of my estate belonging to my other younger children or their issue attaining said age, equally among them *per stirpes*." That is the clause on which the argument was founded wherein it was said that in the event there mentioned the share of the predeceasing child should belong to the other children. It was founded upon as if it had been a declaration to the effect that the share of any of the younger children dying should belong to the other children. But that is

not the proper construction of the sentence, because the share of "such of my younger children deceasing" means the share of "such of my younger children deceasing leaving lawful issue." John and Margaret being both dead without issue in 1870, a special case was brought before this Court to determine what was to be done with their shares. In John's case he never attained the age of twenty-five years; his share was held by the trustees and never was otherwise than part of the residue, because the contingency on which they were to pay the residue to John never arose, and accordingly it being a gift to John and there being no further destination it necessarily remained part of the residue. Margaret's share is different, because it is identical with the claim now made for Janet's share. If Mrs Moodie ever had a share of the fee of this estate, so had Margaret. Accordingly, it appears to me that the decision of the Court in the special case regarding Margaret's share is exactly applicable to Janet's share which is now before us. Now, the decision is in these terms—It was found and declared "that the shares of the residue of the trust estate of the deceased James Young provided to his son John and his daughter Margaret have by reason of the death of John in pupilarity and the death of Margaret without issue fallen into and become part of the residue of the trust-estate to be administered and disposed of by the trustees in the manner provided with respect to Mrs Moodie's original share." I see the Court have answered the question in the words that were put to them. If I had been selecting words I should not have said that the share had fallen into and become part of the residue by reason of the death of John and Margaret. My view is that it remained and was held by the trustees as residue all along, and that it was only payable by the trustees in the event, which never occurred, namely, that the share of John vested in him and became payable, or that Margaret had children and the fee became payable to them. Until these events occurred the whole residue remained in the hands of the trustees. But however that may be, the result is exactly the same, and we have now to deal with the whole of the residue of the estate—with John's, Margaret's, and Janet's shares; and the question is what is to be done with them. Now, the first thing I would point out is that we cannot sustain the claim of the factor on Mrs Moodie's estate to the whole of the residue except on the ground that the decision was right in the special case, while his own argument proves that it was wrong, and that he is only entitled to one-half, that is, Janet's own share and one-half of John's, while if we only gave him a half I do not know what would become of Margaret's share, which it is decided her disponee had no right to. I agree with your Lordship that the difficulties which have been mentioned do not occur, because I am perfectly clear with your Lordship that no fee whatever was given to Janet or Margaret of this residue. I have never been able to understand why such a claim was made, because the words of the fifth section are clear. The trustees are told to hold and apply the residue of the estate falling to Janet. They are not to pay it to her, but it is to be held by them for behoof of Janet in liferent during all the days of her life, and then it is to belong to her issue in fee. Now, how it can be held that a fee which the testator says shall belong to her issue shall belong to her I cannot understand. There is no contradiction of that in the cases referred to where it is said that a direct gift of a fee was given under conditions. Here we have no direction to pay the share to Janet, or any part of it—she only got a liferent. I think these cases are not applicable. The result is that this is a case of intestacy, and we have to go back to the date of the death of the testator to see who was his heir, and upon that there is no doubt James, his elder son, was his heir-at-law, and the intestate estate vested in him *a morte*.

The second question in the case is, whether that residue estate which vested in him is to go to his heir-at-law the claimant James Young, or to his disponee the claimant Mrs Wyper, under a disposition executed by him in favour of trustees. In a question between the heir and the disponee the heir must give way to the disponee if the disposition is valid, and the question is whether or no James the elder son's disposition in favour of trustees did carry the estate to his trustees. It is said that it did not carry it to the trustees because it contains this clause—After disponing to trustees it says—"the whole residue of said estate, heritable and moveable, to which I shall succeed in the event of my being predeceased by the said Janet Edmonstone Young without issue." It is said that the estate which was carried by this disposition was the estate to which he should succeed in the event of his being predeceased by Janet Young. It is said that he was not predeceased by her, and that the event did not occur. But that is a mere misdescription of the event in which he should take the estate. In the narrative of the deed, after correctly narrating the past history of his father's trust, he says—"And that in the event of the said Janet Edmonstone Young deceasing without leaving issue the whole purposes of the said trust-disposition and codicil will have been implemented, and the residue of the said estate will fall and belong to me or to my children as undisposed-of and intestate succession of my father. . . . Therefore in order to provide for the management and disposal of the said residue in the event of my succeeding thereto, for the benefit and behoof of myself and my wife and children, I do hereby assign, dispone, and convey to and in favour of myself," &c. Could anything be clearer as the truster's intention than that. It is in the event which has occurred, and in that event he dispones to trustees for behoof of himself and his wife and children. Can it be doubted in the face of that, that the words to which I have referred are merely words

of description? I do not say if it had run in other terms—if it had said "the whole residue in the event of my being predeceased"—there might have been some strong argument raised. But that is not what it says. He states as a matter of fact—"The whole residue of said estate, heritable and movable, to which I shall succeed in the event of my being predeceased" by Janet. He does not make it a condition—in that event—and I am of opinion that the residue of that estate was vested in him and should go to his trustee, and the claim of his widow, the sole surviving trustee, be sustained.

LORD M'LAREN and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Claimant James Young—Sol.-Gen. Dickson, K.C.—Clyde. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Claimant David Guthrie—A. S. D. Thomson—Hunter. Agent—Henry Robertson, S.S.C.

Counsel for the Claimant Mrs Wyper—J. Wilson, K.C.—W. Harvey. Agent—W. Kinniburgh Morton, S.S.C.

Thursday, March 7.

FIRST DIVISION.

DUNLOP PNEUMATIC TYRE COMPANY, LIMITED *v.* ROSE.

Process—Petition and Complaint—Breach of Interdict — Amendment — Clerical Error.

In a petition and complaint for breach of interdict against infringing a patent, it was stated that the sale complained of as constituting the breach had taken place on 1st December 1899, a date prior to the granting of the interdict. The petitioners presented a note in which they stated that the sale complained of had been *per incuriam* described as having taken place on 1st December 1899 instead of 1st December 1900, the date on which it actually took place, and craved leave to amend the petition by substituting "1900" for "1899." The Court, in respect that the error was so patent as to amount practically to a clerical error, and that no prejudice was alleged by the respondent, *allowed* the amendment on condition of the petitioner paying any expenses caused to the respondent by the error.

On 13th February 1901 the Dunlop Pneumatic Tyre Company presented a petition and complaint for breach of interdict against M. G. Rose, cycle agent, West Nicolson Street, Edinburgh, praying the Court to find that the respondent had been guilty of contempt of Court and breach of interdict.

The petitioners stated that on 31st October 1900 Lord Kyllachy had granted decree interdicting the respondent from infringing their patent for the invention of improvements in rubber tyres and metal rims or felloes of wheels for cycles and other light vehicles; that on 27th October 1900 the respondent was sequestrated, and Mr R. A. Craig was appointed trustee; that since the date of her sequestration the respondent had, notwithstanding the interdict, illegally and in breach of the interdict, infringed the petitioners' patent, and that in particular "respondent sold, or knowingly allowed to be sold, within her premises at 37 West Nicolson Street foresaid on 1st December 1899, to one Edward Thomas Cheer, tyre dealer, of 160 Clerkenwell Road, London, E.C., one pair of outer covers 'reconstructed,' said pair of outer covers, either singly or in combination, not having been supplied by petitioners to respondent, nor sold under any consent, licence, or agreement from them to respondent, and being an infringement of said letters-patent, against the infringing of which by respondent the petitioners had obtained the said decree."

Answers were lodged by the respondent, in which she denied that she had at any time infringed the interdict granted against her. She further averred as follows—"In particular, the respondent denies that she sold or knowingly allowed to be sold, at 37 West Nicolson Street aforesaid, on 1st December 1899, to the party named in the complaint or to any other person, a pair of outer covers such as are described in the complaint. Such records of her business as were kept by the respondent were taken possession of by the trustee and are not now available, but she is certain that no such transaction took place at or about the date libelled, or at any other time subsequent to the interdict proceedings and prior to the realisation of the business."

A note was presented to the President of the Court by the petitioners, in which they stated that the particular sale complained of, "which of course was subsequent to the date on which interdict had been granted, was *per incuriam* described as having taken place on 1st December 1899 instead of 1st December 1900, the date when it actually took place," and therefore respectfully craved his Lordship "to move the Court to allow petitioners to delete the figures '1899' occurring in line three at the top of page 5 of the said petition and complaint, and to substitute therefore the figures '1900.'"

The respondent objected to the prayer of the note being granted, on the ground that her answers had been framed on the footing that the sale complained of took place on the date stated in the petition and complaint.

LORD PRESIDENT—There is no doubt that this proceeding is of a quasi-criminal nature, and if the mistake could have misled the respondent in any way, there would have been a difficulty in not applying the