"*Edinburgh, 23d August* 1872.—The Sheriff having considered this process, dismisses the appeal for the pursuer, adheres to the interlocutor appealed against, and decerns: Finds no expenses due from the date of the Sheriff-Substitute's interlocutor.

"*Note.*—It is with very considerable hesitation that the Sheriff has arrived at the above decision, and in doing so he has to state that he does not concur in all the reasons assigned by the Sheriff-Substitute for his judgment. In the first place, the Sheriff is of opinion that there was no fault on the part of the pursuer, who is proved to be a skillful, attentive, and sober workman; and, therefore, while adhering to the judgment appealed from, the Sheriff cannot concur in all his findings, nor in a great part of the note. In the next place, it is of no moment that the defender himself, who had been a cotton broker in Glasgow before he took up the trade of paper-making, was practically not acquainted with the trade. He was bound to give to his workman a reasonably safe machine, and not increase the risk and hazard by allowing any defect that could be remedied to exist. In the third place, the accident was caused by the removal of the brass guide-roll, which ought to have been in its place, and without which the machine could not be worked with safety.

"The question then comes to be, Who was in fault?—and upon the evidence this must be laid to the door of Stewart, the mechanic. Of course every paper machine will get out of order now and then, and all that can be expected from an employer of labour is that he employ a mechanic or other person to do the necessary repairs. The defender in this case did employ Stewart, and it was his business to put the brass guide-roll into its place, which he did in the course of half-an-hour after the accident. He ought to have done it during the course of the previous week. But for this omission to perform his duty on the part of Stewart, the defender cannot be made liable in damages to a fellow-workman."

The pursuer appealed to the Court of Session.

Cases cited—*Falconer*, 1 L. R. Q. B. p. 33; *Allsopp* v. *Yeats*, Jan. 18, 1858; 27, L. J. Exchequer, 156; *Wallace*, 1 Macph. 748.

At advising—

Lord Justice-Clerk—I am for adhering. Two questions arise—(1) Is there any reason for saying that the pursuer went into the danger? (2) Is the master liable? I am clear there is no ground for saying the pursuer went into the danger with his eyes open. I cannot say he contributed to the accident by going on with his ordinary business. Is the master then to be held responsible for the defective state of the machine? I think personally he did nothing to make him responsible. There was no neglect or fault on his part. Is he responsible then for the gross neglect of Stewart and the manager—although I do not think the evidence amounts to disqualify Stewart for his place. The case turns on the fault of a fellow-workman, for which the defender cannot be made liable.

Lord Cowan—I concur. I am clear no blame attaches to the pursuer. I cannot go along with the Sheriff in the first part of his note, where he says it is of no moment that the defender was practically not acquainted with the trade. I think it is of moment when the question is of fault in not observing a defect in the machinery.

Lord Neaves—I concur. The fact of the defender being about the premises constantly gave the servant an opportunity of complaining, and not doing so his master might well believe there was no great defect.

Lord Benholme—I concur generally.

The Court pronounced the following interlocutor:—

"Find it proved that the injuries sustained by the pursuer were occasioned by the machine in question having become defective and dangerous in respect of the absence of the brass guide-roll: Find that this state of the machine was occasioned by the fault or negligence of the manager, Baillie, and of the mechanic Stewart: Find that the defender was not personally guilty of any fault or negligence in the matter: Find that he is not liable for the fault or negligence of those who were employed by him, seeing he took reasonable care to employ competent workmen: Find that the manager, Baillie, and the mechanic, Stewart, were fellow workmen with the pursuer in a common employment. Therefore dismiss the appeal; affirm the judgment appealed against, and decern: Find no expenses due in this Court."

Counsel for Pursuer—Mair. Agent—T. Lawson, S.S.C.

Counsel for Defender—

I. clerk.

Thursday, May 29.

SECOND DIVISION.

[Lord Ormidale.

RUSSELL AND BROUN (SMITH'S TRUSTEES).

Settlement—Vesting—Construction.

Terms of settlement under which *held* (1) that vesting of the fee of the residue was postponed until the death of the liferentrix; and (2) that no power was conferred upon A, one of the beneficiaries, to test upon her share prior to the period of vesting.

This was a competition with regard to the residue of the moveable means and estate left by the late Dr Peter Smith of Dunesk. Dr Smith died on 7th July 1833, leaving a trust-disposition and settlement, dated 20th May 1822, and various codicils. The 6th purpose of the trust was as follows:—"Sixthly, I hereby direct my said trustees to pay to my said wife, in case she shall survive me, during all the days of her lifetime, the residue of the free yearly interest or return arising from any monies or other moveable means and estate I may die possessed of, and that half-yearly, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas that shall happen next after my decease, and so forth during all the days of her lifetime." The last purpose of the trust was as follows:—"And lastly, with regard to the fee and free residue of my moveable means and estate, as my said dear wife has declined to accept of a provision thereof which I had resolved to make in her favour, I hereby direct my said trustees to make over the same to and in favour of my said sisters Miss Jane Smith and the said

machine being the mechanic and manager. Finds, further, that said machine worked well, and made good paper with the wooden guide-roll. Finds, in law, that the said accident being caused by the pursuer's own carelessness and inattention, he cannot recover damages against the defender. That the mechanic and manager in the defender's employment being fellow-servants with the pursuer, the defender is not responsible to pursuer for their fault; and in so far as the accident is attributable to fault on their part, he cannot recover against defender. Therefore assoilzies the defender from the whole conclusions of the libel, and decerns. Finds defender entitled to expenses; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report.

"*Note.*—There is much in this case to enlist sympathy for the pursuer, a young man of great promise and of good character, thrown aside by a painful accident from the path of life in which his steadiness and abilities seemed to promise him an assured position. On the other hand, the defender is also a young man, who has apparently not been very successful in business, as these works, which were his venture in life, he has now been obliged to stop, and he has borne honourable testimony to the good character of pursuer. These considerations, which invest this case with a peculiar interest, must be disregarded. At the time of the accident the machine was being worked by the wooden guide-roll. It made good paper, and, in the opinion of the Sheriff-Substitute, was capable of being easily and safely wrought in that way. A good deal of the evidence against this view may be accounted for by the witnesses, James Ford, James Robb, and William Robertson, never having seen a machine with any other guide-roll than the one, and, of course, when that one was out, they could not realise the working of the machine with another in a different position. The Sheriff-Substitute had the advantage after the proof of seeing the machine, and he has no doubt of the correctness of Henry Arnott's opinion (p. 55 of Proof). If the pursuer had made his tail-end so as to project beyond the end of the cylinder, there could not have been the slightest danger. But he chose to save himself trouble, and pretends that there was difficulty in doing this with a 46-inch paper, which he was then leading. Peter Baillie, however, and James Crann, who wrought the same machine for fifteen months, say that there was no such difficulty, and that it would only have made a little more broke. It is no doubt true that with the wooden roller in position the machineman required to lead the paper on to the felt-roll, but even then his proper way was to drop the tail-end on to the felt-roll, and in the accident itself there is evidence of carelessness and inattention. Had the brass guide-roll been in position there would have been less likelihood of an accident occurring—(1) because the brass guide-roll is a foot higher than the felt-roll, the heights, according to Mason's plan, being 5 feet 4 and 4 feet 4 respectively; (2) because the brass guide-roll is not covered with felt, and the felt has a greater tendency to draw in the hand once it comes in contact with it; and (3) because the machineman would not necessarily have required to lead the paper after it passed the brass guide-roll, although he might have had to do so, and in that case the same accident as did occur might just as readily have happened as on the present occasion. A good many of the witnesses say that if a man's hand had been caught at the brass guide-roll it would not be crushed, as the brass guide-roll is placed in an open socket and would at once have sprung out. This is quite a mistake on the part of these witnesses. The opening in the socket is upwards, and the pressure of the hand supposed to be caught would have fixed the guide-roll in position and prevented it coming out.

"The Sheriff-Substitute has difficulty in finding that the accident is due to the machine having been wrought with the wooden guide-roll. It cannot be said absolutely that the machine was then out of order, for this machine differs from any other that seems to be known to the witnesses, in having two modes of working, and with both it made equally good paper. When, therefore, Stewart and Baillie found the machine working with the wooden roller in, it seems to the Sheriff-Substitute to be but a venial fault to have allowed that to continue. Care and attention on the part of the machineman might be expected. But even if the brass guide-roll ought to have been at once repaired and placed in position, it was the duty, in the first instance, of the mechanic to put it right, and in the second, of the manager to see that it was done. The defender has no practical knowledge of paper-making, and the whole charge of the work was with Baillie. It cannot be doubted that these men, Baillie and Stewart, are fellow-workmen with the pursuer. The case of *Wilson* v. *Merry & Cunningham* fixed that an under-ground manager, whose duty it was to see that there was proper ventilation in a mine, was a fellow-workman with the miners. In the present case there is but one machine at the defender's works, and the defender handed over the charge of that machine to three men, of whom one was called a manager, because, in addition to the charge of the machine, he superintended also the preparation of the pulp, and those workers who are engaged in the finishing and packing of the goods: another from his practical skill was called a mechanic; and the third was the machineman who worked the machine with the assistance of a boy. Surely it is a very simple case this of fellow-workers. The defender, to the best of his judgment, selected these men for their several positions. Though something was said in the proof about their not being strictly correct in their conduct, it came to nothing. The mechanic is just as much a fellow-worker with the machineman as the men who were employed to put up the platform in the mine were fellow-workers with the miners, and the Sheriff-Substitute cannot see that there is any difference between the relative position of Baillie and the pursuer and the relative position of the underground manager at Merry & Cunningham's and the miners. The one had to see that the ventilation was good, and he failed to do so; the other had to see that the machine was working properly, and while he saw that it worked fairly and well, the most that can be said is that he failed to see that provision was made for its being wrought in another way, which might have been a little safer. In both cases the managers had a superintending duty given to them: and whether they failed in that or not, the judgment in *Wilson* v. *Merry & Cunningham* conclusively fixes that the master is not liable in reparation."

The pursuer appealed to the Sheriff (FRASER) who pronounced the following interlocutor:—

Miss Anne Smith, and my said nephews Robert Graham, William Graham, and Peter Graham, and the heirs of their bodies, in such proportions as my said wife, in case she shall survive me, shall direct and appoint by any writing under her hand, and failing such appointment, then to my said sisters and nephews equally among them, share and share alike, it being hereby expressly declared that the children of any of my said nephews predeceasing me shall succeed to the share which would have fallen to their parent, to be divided among them equally, share and share alike; and the share of any of my said nephews dying without issue, or of my said sisters who shall die without settling the same, or shall predecease me, shall be divided among the survivors and their issue as above provided, equally share and share alike, and which shares, except in so far as liferented by my said sisters, shall be paid over to my said sisters and nephews, or their issue, at the first term of Whitsunday or Martinmas that shall happen next after the lapse of one year from my decease or my said wife's decease, whichever of these events shall first happen, or as soon thereafter as may be, with interest thereon from the first term of Whitsunday or Martinmas next after the death of me or my said wife, as the case may be; and the said sums so to be liferented by my said sisters shall, in like manner, at the first term of Whitsunday or Martinmas after the death of the said annuitants, be divided among my said residuary legatees as before provided; providing always that if my wife shall then be in life, the division shall be suspended till the first term after her death, she being always entitled to the liferent thereof, as before provided; and also that either of my said sisters shall be entitled to dispose by will of one-fifth part of the sum liferented by her." The truster's sisters and nephews above named all survived the truster, but predeceased the liferentrix, Mrs Smith. Miss Ann Smith died immediately after Dr Smith, intestate. Miss Jane Smith died in or about the year 1835, as before stated, leaving a disposition and settlement dated 5th November 1834, and recorded in the Sheriff-court Books of Dumfriesshire 13th February 1854, by which she assigned and disponed to her nephew, the now deceased Robert Graham (afterwards Robert Graham Smith), her whole moveable means and estate, and, in particular, "that portion or share of the means and estate to which she had right under the deeds of settlement executed by her said deceased brother Dr Peter Smith of Dunesk, or to which she might otherwise have right as one of the executors and successors of the said Peter Smith in his means and estate." Neither Miss Ann nor Miss Jane Smith was ever married, and both died without leaving issue. Robert Graham (afterwards Robert Graham Smith) died on 1st January 1853, without leaving issue, and he conveyed his whole estate and effects to trustees. William Graham died in or about 1850, leaving issue; and Peter Graham died abroad, between the years 1841 and 1852, also leaving issue, as hereafter mentioned.

By deed of apportionment dated 26th June 1866, and recorded in the Sheriff-court Books of Dumfriesshire 21st August 1871, the said Mrs Henrietta Erskine or Smith, in virtue of the powers conferred upon her by the foresaid trust-disposition and settlement of Dr Smith, and upon the narrative of the last purpose of said trust-disposition, above quoted, that the said Jane or Jean Smith, who had died previously, had executed the foresaid disposition and settlement of her share of the residue of the said Dr Peter Smith's estate in favour of the said Robert Graham (afterwards Robert Graham Smith); that the said Anne Smith had died without issue or leaving any settlement; that the said Robert Graham (afterwards Robert Graham Smith) had also died without leaving issue, his children having predeceased him: that it was a matter of doubt whether the shares of the said Jane Smith, Anne Smith, and Robert Graham Smith vested in them, seeing that they had died before the period appointed by the said Dr Peter Smith for the division of said moveable means and estate; as also considering that the said Robert Graham Smith acquired the fee of the lands of Dunesk, and whole other heritable estate which belonged to the said Dr Peter Smith under his said settlement, and that he likewise succeeded to the lands of Bilbow, of the liferent of which the said Mrs Henrietta Smith had been, as she considered, unjustly deprived, notwithstanding these lands were left to her in liferent by her husband, the said Dr Peter Smith: and that it appeared to be reasonable, on account of these and other considerations, that the fee and free residue of the said Dr Peter Smith's moveable means and estate should be divided in the proportions after-mentioned: Therefore she directed and appointed that the fee and free residue of the said Dr Peter Smith's moveable means and estate liferented by her should be paid and made over to the parties interested therein in the following proportions, viz.:—To the representatives of the said Jane Smith (if it should be found that her share of the estate vested in her), the sum of £20; to the representatives of the said Anne Smith (if it should be found that her share vested in her), the sum of £20 sterling; to the representatives of the said Robert Graham Smith (if it should be found that his share vested in him), the sum of £20; to the heirs or children of the body of the said Peter Graham, as representing their father, or in their own right, as the case might be, equally among them, share and share alike, the sum of £1000 sterling; and whatever balance might remain of said fee and free residue after payment of the several sums above-mentioned, Mrs Smith directed and appointed should be paid and made over to the said William Graham in case he should survive her, and in case of his predecease, to the heirs or children of his body, as representing him, or in their own right, as the case might be, equally among them, share and share alike; and in case it should be found that the shares of the said Jane Smith, Anne Smith, and Robert Graham Smith, or any of them did not vest in them, Mrs Smith directed and appointed the sums of £20 apportioned to them as aforesaid to be paid and made over to the said William Graham, or the heirs or children of his body, in manner foresaid. The truster's widow died on 8th July 1871.

Upon the death of Doctor Smith on 7th July 1833 the trustees appointed by him under his forsaid trust-disposition and settlement, and relative codicils, entered upon the possession and management of his estate. After payment of the debts and legacies specified in the said trust-disposition and codicils, the trustees held as the residue of the trust-estate £9000 consolidated stock, and £500 stock of the British Linen Company Bank, which, along with the testator's household furniture, were liferented by Mrs Henrietta Smith, the truster's

widow, until her death on 8th July 1871. After her death the said household furniture was sold, and the proceeds thereof, viz. £97, 18s. 11d., along with the foresaid £9000 consolidated stock and £500 stock of the British Linen Company Bank, held by the pursuers, and the interest and dividends thereon, formed the fund *in medio* in the present process.

The Lord Ordinary pronounced the following interlocutor:

"*Edinburgh, 26th November* 1872.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings: Finds that the competition in this case relates to the residue of the moveable means and estate left by the late Dr Peter Smith under his trust-disposition and settlement, and that it chiefly depends upon two questions, viz.—1st, Whether the fee or capital of said residue is to be held as having vested *a morte testatoris*, or not till the death of the testator's widow, to whom the liferent enjoyment of it is destined; and 2d, Whether the apportionment made by the testator's widow of the residue under a power contained in his deed of settlement is, or is not, to be held valid and effectual: Finds, in regard to the former of these questions, that the bequests by the testator of the fee or capital of said residue must be held to have vested, not at the death of the testator, but at the death of his widow, the liferentrix, being the date of its payment or distribution; and finds, in regard to the latter question, that said apportionment is to be held as valid and effectual. With these findings, and under a reservation of all questions of expenses, appoints the case to be enrolled in order to the case being further proceeded with.

"*Note.*—The sixth and last purposes of the testator's deed of settlement are the important ones to be kept in view in considering the questions which have now been determined by the Lord Ordinary.

"The testator, after some special bequests in the sixth purpose of his settlement, leaves the residue of his moveable means and estate to his wife in the event of her surviving him, in liferent, and then proceeds, in the last purpose of his deed, to dispose of the fee or capital of the residue so to be liferented. Notwithstanding the apparent complication, not to say confusion, arising from the manner in which the last purpose is expressed, the Lord Ordinary thinks it clear, 1st, That the liferent of the whole residue has been destined by the testator to his wife in the event of her survivance, an event which happened; 2d, That consequently no part of the capital of the residue could be paid or distributed till after the death of his wife, it being moreover expressly directed that the respective shares of the residuary legatees—sisters and nephews—should be paid over to them only after the death of the testator or liferentrix, whichever of these events should first happen; and 3rd, That the shares of the residue left to his nephews dying without issue, or of his sisters who should die without settling the same, or should predecease himself, must be divided among the survivors and their issue. There is thus both a liferent and survivorship in the present case, and accordingly the capital or fee of the residue cannot be beneficially possessed or enjoyed by, or be paid to, or distributed amongst, the parties named by the testator as his residuary legatees and their issue, or the survivors of them and their issue, till after the death of his widow the liferentrix.

"In this state of matters, and supposing there are no specialties to render it necessary to treat the present case as an exceptional one, a matter which will be afterwards adverted to, it falls, in the opinion of the Lord Ordinary, to be governed by that of *Young* v. *Robertson*, as decided in the House of Lords, in February 1862, (4 Macqueen's Appeal Cases, p. 314). There it was held, in the words of the Lord Chancellor (Westbury), to be a settled rule of construction equally in the law of Scotland as of England, 'that the words of survivorship in a settlement (that is, in a will), should be referred to the period appointed by that settlement for the payment or distribution of the subject matter of the gift.' And again, dealing with a case such as the present, the learned Lord says, 'If a testator gives a life estate in a sum of money, or in the residue of his estate, and at the expiration of that life estate directs the money to be paid or the residue to be divided among a number of objects, and then refers to the possibility of some one or more of these persons dying without specifying the time, and directs in that event the payment or distribution to be made among the survivors, it is understood by the law that he means the contingency to extend over the whole period of time that must elapse before the payment or distribution takes place. The result, therefore, is that in such a gift the survivors are to be ascertained in like manner by a reference to the period of distribution, namely, the expiration of the life estate.' There can be no doubt, therefore, that unless this principle of construction has been rendered inapplicable to the present case by some specialty or peculiarity, the Lord Ordinary is right in holding that the vesting of the fee or capital of the residue in question did not take place until after the death of the liferentrix, when it fell to be paid or distributed.

"The Lord Ordinary does not think that there is any such specialty or peculiarity in the present case. On the contrary, it appears to him that the peculiarities—such as they are—of the destination of the residue in the present case by the testator tend rather to support than otherwise the conclusion which has been arrived at. Thus, the destination by the testator of the capital or fee of the residue of his estate to his sisters and nephews, not as a class, but individually by name, is only in the proportions that may be directed and appointed by his wife in the event of her surviving him. Now, although this may not be conclusive of the point, it is at least strongly indicative of the period of vesting being postponed till after the death of the wife; for until then the precise amount which each of the residuary legatees may be entitled to cannot be known. The clause, again, to the effect that failing a direction and apportionment by the testator's widow, his sisters and nephews should succeed equally, tends to the same conclusion; for until the death of the testator's widow it cannot be known whether she has failed to direct and appoint what shares the residuary legatees are to have. Nor is it unimportant to observe that no part of the income of the residue goes to the residuary legatees, or any of them, till the period of the payment or distribution of the capital or fee, and that the assignees of the legatees are not mentioned in the destination at all. Neither can the Lord Ordinary find any sufficient reason for holding that the fee of that portion of the trust-estate out of which the annuities of the testator's sisters are to be paid must be held to vest *a morte testatoris*, for that portion of

the estate, on being set free by the death of the annuitants, falls into residue, to be treated just as the rest.

"On the principles therefore established in the House of Lords in the case of *Young* v. *Robertson*, and being of opinion that there is no specialty in the present case to exclude it from the operation of these principles, the Lord Ordinary thinks it must be held that the fee of the residue in question did not vest till the period of payment or distribution after the death of the testator's widow.

"In regard to the other question, viz., whether the apportionment by the testator's widow of the residue among the residuary legatees is a valid and effectual one, the Lord Ordinary has been unable to see sufficient ground for holding that it is not. The question however is not one which he can say is unattended with difficulty.

"It was maintained on the part of some of the claimants that the apportionment by the widow of £20 to legatees, whose share of the residue would otherwise be about £3,000, must be held to be illusory, and a fraudulent exercise of the power of apportionment committed by the testator to his widow. No case however was cited in which such a contention has been sustained by this Court. It was, on the contrary, conceded that in no case which has yet occurred in this Court has an apportionment been held to be void on the ground that the sums apportioned were illusory, and consequently that the exercise of the power was fraudulent. Cases, however, were cited in which the question was raised, the more important of these being *Watson* v. *Marjoribanks*, 17th February 1837, 13 Sh. 586, *Crawcour* v. *Graham*, 3d February 1844, 6 D. 580; and *Marder's Trs.* v. *Marder*, 30th March 1853, 15 D. 633. In the first of these cases there was no decision on the precise point, the deed of apportionment having been set aside on a ground which has no place here. Neither was there any decision of the question in the case of *Crawcour* v. *Graham*, although observations relating to it of more or less value are reported to have been made by some of the judges. In the remaining case of *Marder's Trs.* v. *Marder* it was held that an apportionment of £50 out of £2000 to one of two daughters, while the remaining £1950 were given to the other, could not be set aside as illusory.

"So standing the authorities, the Lord Ordinary does not see that he can derive much aid from them in deciding whether the apportionment of £20 to some of the residuary legatees in the present case is illusory or not. The last of the cases referred to is the nearest in point to the present, and so far as it goes the Lord Ordinary thinks it is calculated to support rather than otherwise the conclusion at which he has here arrived. It must be kept in view that the testator himself might undoubtedly have apportioned the residue of his estate just as his widow has done, and if so, why should the apportionment made by his widow not be equally good. The Lord Ordinary thinks it clear that the testator's object in regard to this matter was to substitute her into his own place; and he has certainly, neither expressly nor by implication, imposed any limits or conditions upon her discretionary exercise of the power he committed to her. The residuary legatees are not said, and do not appear, to have had any legal claim at all for a share of the residue in question. Not being children of the testator or his widow, they did not stand even in that favourable position. Keeping these considerations in view, the Lord Ordinary has been unable to see how he either ought, or could, on a satisfactory ground set aside the apportionment in question as illusory or fraudulent. He feels himself altogether unable to say that an apportionment of £20 in the circumstances which here occur must be held to be illusory. No rule or principle has been given or indicated by the testator or his widow for determining such a point. If, therefore, the Lord Ordinary were to disturb the apportionment which has been made, he would be interfering with the discretionary power committed to his widow by the testator, not on any principle that he could define, but simply because, if he had been in the widow's place, he would have divided the fund differently from what she has done. But surely no proceeding could be more arbitrary and haphazard than that; and none could partake less of a judicial character.

"Entertaining these views, it is unnecessary for the Lord Ordinary to determine the question which was raised by the parties, whether the statute 11 Geo. IV. and 1 William IV. cap. 46, which declares that all apportionments made under such a power as that in question should be valid and effectual, although only nominal and illusory, applies to Scotland or not. The Lord Ordinary may here remark, however, that this statute appears to have been noticed and treated in some of the cases above referred to as if it were applicable to England alone, and of course since the passing of that statute such a question as the present could not occur in England. But the report of the case of *Butcher* v. *Butcher* (9 Vesey's Chancery Reports, p 382), decided by Sir William Grant, as Master of the Rolls, in 1804, is very instructive on the subject. There, as here, an apportionment was challenged as illusory and fraudulent, but the Master of the Rolls, in an elaborate judgment, in which he reviewed the authorities in England, and entered into the inquiry whether there was or could be any sound principle on which a court could disturb the discretionary exercise of such a power by the party to whom it had been committed, held, as the Lord Ordinary has done here, that he was unable to discover any such principle.

"The Lord Ordinary understood at the debate that on the two questions which have now been determined being disposed of they would probably be able to adjust the necessary interlocutor of ranking so as to exhaust the case, but, of course, if any point should be found still to require discussion before the Lord Ordinary, the parties can have a further opportunity of being heard."

Against this decision a reclaiming-note was presented by several of the claimants.

Authorities cited—*Young* v. *Robertson*, 4 Macqueen's Appeal Cases, p. 314; *Watson*, 13 S. 586; *Crawcour*, 6 D. 580; *Marder's Trustees* v. *Marder*, 15 D. 633; *Butcher* v. *Butcher*, 9 Vesey, Chancery Reports, 382.

At advising—

LORD JUSTICE-CLERK—Two questions arise here—in the first place, When did the fee of the residue vest? and secondly, Was there a power given to Jane Smith to leave by will the share she would have had if she had survived the period of vesting? I agree with the Lord Ordinary that the fee did not vest until the death of the liferentrix. I think this case comes within the rule of *Young* v. *Robertson*, to which the Lord Ordinary refers. The term of payment is postponed, there is a right of survivorship, and a power of distribution. On the

second question, I think no such power was intended to be given to the sister. It was contended that there was a sufficient power given here, and that the will was a sufficient exercise of the power. The words which are said to give such a power are—"and the share of any of my said nephews dying without issue, or of my said sisters who shall die without settling the same, or shall predecease me." I think the words do not warrant such a construction; the grammatical reading of this plainly is in reference to a power already existing. Where the testator wished to give such a power he did it quite clearly—as further on, where he provides "that either of my said sisters shall be entitled to dispose by will of one-fifth part of the sum liferented by her." The words, "predeceasing me," really means after the death of the survivor and term of vesting. The real meaning I take to be—that if the sister survived the period of vesting, but died before payment, her share was to come under the settlement, and not to be left to disposition of law. On the question whether the apportionment made by the widow of the testator is illusory, I offer no opinion.

LORD COWAN—I concur. I think the vested interest did not take effect till the death of the liferentrix, and I am of opinion that the testator has not conferred upon the sister a power to give away her share as contended for. Such a power, if intended to be given, should be expressed in the clearest terms, and it is not given here in a habile manner to enable us to infer it. I offer no opinion on the question as to whether the apportionment may be held to be illusory.

LORD BENHOLME—I concur. The only question is, Was there a tripartite division, or was it bipartite? If it is only bipartite, there is no room for the question of illusory apportionment. In order to bring in that question it was attempted to be proved that there was a tripartite division of the residue. I am of opinion the division was a bipartite division, and that vesting took place at the death of the liferentrix. I think no power of appointment or faculty was given to the sister. What was intended was that if she took she could settle, but not otherwise. Such a power as that contended for is inconsistent with the deed and the views of all the parties. With regard to the question of illusory apportionment, the utmost length our law has gone is that there may be an illusory apportionment. There are traces of such a doctrine in the books, but I don't think the Court has ever applied it in any case, or that it would, as in England, merge into the other and separate question of "adequate."

LORD NEAVES—I concur. On the first point—that of vesting—the deed is obscure, but the preferable interpretation is that vesting took place at the death of the liferentrix. On the second point—the power of the sister to settle—the power is anomalous, and I do not think the implication sufficiently clear. I give no opinion on the question of whether the apportionment was illusory.

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Counsel for Real Raisers, and for Claimants Miss Bell and Others—J. M'Laren and Fraser. Agents—Jardine, Stodart, & Frasers, W.S.

Counsel for Robert Graham Smith's Trustees and for Captain Shortt and Others—Wilson. Agents—A. & A. Campbell, W.S.

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EDUCATION (SCOTLAND) ACT.

Thursday, May 15.

[Sheriff of Orkney.

WALKER *v.* MUIR.

Ballot papers—Marks by Returning Officer—Personal bar.

At a school board election a consecutive number was used by the Returning Officer as a private mark, and parties were represented by agents, who examined the ballot papers and acquiesced in the decision of the Returning Officer as to certain of them; *Held* (1) that the mark was not such as to identify the voter; (2) that by the acquiescence of his agent the petitioner was barred *personali exceptione.*

This appeal arose out of the election of a school board for the parish of Lerwick, Zetland, and the Sheriff-Substitute (MURE) being the Returning Officer, the objections had to be disposed of by the Sheriff. The record was closed on a minute of defence by the Returning Officer. The other respondent, the minister of the parish,—the lowest candidate elected—merely entered appearance to watch the proceedings. The Returning Officer's defence was—(1) That the petitioner had not the title and interest required by section 14 of the Education Act. (2) That the objections stated were irrelevant. (3) That, as the objections urged in the petition had been stated at the counting of the votes by duly authorised agents of the petitioner, who had then acquiesced in the decision given by the Returning Officer, the petitioner was barred *personali exceptione.* (4) A denial of the averments in the petition.

The respondent argued, that under section 14 of the Education Act a petitioner must be a person interested—that is to say, a person having a legal interest in raising such a question,—whereas this petitioner had no such position. He was not even designed as a resident of Zetland, but as residing in Marine Terrace, Aberdeen. No ground, such as being a ratepayer, was set forth, and consequently this was the case of an outsider who had been nominated by two ratepayers, and must be taken to have no other interest in the matter. If all parties truly interested were satisfied with the return made, such a petitioner could not have a real interest (1) to get the election declared *in toto* invalid, which must be the result of the objection to the Returning Officer's mark; or (2) to have Mr Saunders' election declared invalid, in which case the school board, as an undoubted quorum existed, would, under section 15, elect his successor.

The Returning Officer, it was alleged, used as a private mark a consecutive number on the ballot papers, which would enable the votes of the voters to be traced; but, *contra*, the Education Board's circular of 7th March 1873, authorised the use of a private mark, and the respondent contended that, in this case, where there was a constituency of 400,