situation which the pursuer had occupied as head gamekeeper at the family residence, with charge of the whole shootings, including the outlying shootings at Lochgair. In these circumstances, the offer 'to take care of Lochgair shootings,' which is what the jotting made at the time bears, was an offer of a very different position from that which the pursuer had for many years been accustomed to occupy, and it is plain to the Lord Ordinary, upon the evidence, that the pursuer refused it upon that account, and the Lord Ordinary cannot say that he thinks the pursuer was wrong. For although he was to get the same wages as before, the situation was evidently a subordinate one, with no charge of kennels, dogs, and gamekeeping establishment, but substantially that of an underkeeper or watcher, entrusted with the duty of looking after an outlying shooting. In this respect the case appears to the Lord Ordinary to fall within the principle of the rule laid down in the case of *Gunn*, June 3, 1801, (Hume p. 384), in which a party who had been engaged as housekeeper and cook, having been deprived of her charge as housekeeper, it was held that a party so treated was not bound to remain in service as cook alone.

"But while the Lord Ordinary does not consider this offer as sufficient to exclude the pursuer's claim for compensation, it is one which in his opinion tends to show that the defender had no objection, on the ground of character, to take the pursuer back into his employment, and is one, therefore, which may on that account be held to afford grounds for modifying the damages, which the Lord Ordinary has accordingly limited to the amount of wages and fixed perquisites in use to be paid by the defender to the pursuer. These, according to the pursuer's evidence, which is not contradicted, amounted to about £73, 6s., which were paid quarterly, and the Lord Ordinary has fixed the damages at £75—the difference being a sum allowed to cover the interest due upon the instalments between the date when they became payable and the date of this decree."

The defender reclaimed, and argued:—(1) The pursuer accepted and acquiesced in the notice given him; (2) The defender had offered to take him back into his service.

The pursuer was not called upon.

At advising—

Lord President—Admittedly there was insufficient notice given by the defender to the pursuer. The case must be regarded as one of dismissal without notice between terms. He is entitled to claim damages, and accordingly the Lord Ordinary has allowed him a sum of £75. The defender objects to the judgment of the Lord Ordinary on two grounds—(1) because the pursuer did not originally take objection to his dismissal and assert that it was illegal, and (2) because the defender offered to take him back to his service. I need not say much as to the first of these objections. There lay no obligation on the servant to intimate that he was going to claim damages. He was entitled simply to go away, and then claim. It might have been natural that he should declare his intention, but his failure to do so is surely not to forfeit his claim of damages. The notice given is of an extremely indefinite kind. It is contained in the defender's letter of 1st May, which was forwarded to the pursuer, and is in these terms:—"Be so good as to tell Ross that I am dissatisfied with him; that he should look out for another situation, as I am looking out for another keeper." The answer to that by the pursuer is the first letter of 6th May to the defender's factor:—"Dear Sir,—I am in receipt of your letter on 4th inst. Would you kindly state to me by return of post, Does Mr Pender wish me to leave his service on first Whitsunday term?" There is no acquiescence there. The next letter is of the same date to the defender himself, as follows:—"Sir,—I am in receipt of a notification from Mr Wright, stating that my services will not be further required, on the ground that you are dissatisfied with me. I would humbly request of your intimating to me the cause of your dissatisfaction, and before I leave, that you would kindly grant me the opportunity of making a full explanation to you of whatever grievance I have unknowingly committed." That letter is never answered. Accordingly the pursuer left. He could do nothing else. He was not entitled to resist dismissal, and that cannot be construed into acquiescence in any sense. On the day he left he addresses a letter to the factor, in which he states that he will look to Mr Pender for payment of his wages till he should succeed in getting suitable employment elsewhere. That is a very distinct intimation of the claim which has been sustained by the Lord Ordinary.

As to the offer to take him back, there is some discrepancy in the parole evidence as to what actually took place. But fortunately there is written evidence. On 29th June the factor writes to the pursuer as follows—(*reads letter*). That is not a very explicit offer to reinstate the pursuer. Farther, I am of opinion that no offer to reinstate the pursuer in the same position he formerly occupied was ever made. The pursuer was entitled to maintain the position assumed in his letter of 2d July, in which he says "I will have much pleasure in returning to Mr Pender's service as gamekeeper, but only on the distinct understanding that I occupy the same position as I did before dismissal." There is no ground for the averment that substantially the same position was offered him. It was a very different position. I don't proceed on the ground of his being, in the new position offered him, debarred from receiving the gratuities which would fall to him as head gamekeeper. I am not prepared to enquire as to whether or not that should be taken into account in the question of difference of position, for, apart from that, the position was entirely different.

Lord Deas, Lord Ardmillan, and Lord Jerviswoode concurred.

The Court accordingly adhered to the Lord Ordinary's interlocutor.

Counsel for Pursuer—Macdonald and M'Kechnie. Agents—M'Neill & Sime, W.S.

Counsel for Defender—Fraser and Asher. Agents—Lindsay, Paterson & Hall, W.S.

Thursday, January 8.

SECOND DIVISION.

WIGHTON OR SMITH AND SPOUSE *v.* TRUSTEES OF THE LATE WM. WIGHTON AND OTHERS.

Succession—Testament—Destination—Heritable and Moveable—Conversion.

Terms of a trust-deed and codicil *held* as containing no express or implied direction to sell, and consequently not to operate as a conversion of the testator's heritage.

Succession—Annuity—Heritable burden.

A trust-deed directed that the maintenence of the truster's widow was to be paid out of "the yearly income of my trust-estate." *Held* that this was a bequest from the annual proceeds of the whole trust-estate, and not a heritable debt of the truster.

Succession—Failure of purposes of Trust—Intestacy.

If the purposes of a trust fail, even express directions to sell will not convert the heritage, and it descends *ab intestato.*

Question, whether trustees of a father infeft *qua* trustees in the heritage, took such infeftment for behoof of the beneficiary, his only son, and whether, accordingly, such beneficiary's widow is entitled to claim terce from the estate in which her husband was constructively vested.

This was an action at the instance of Mrs Elizabeth Wighton or Smith, wife of Alexander Smith senior, wright, Dundee, and Alexander Smith senior for his own interest, *pursuers;* against Alexander Gilroy, merchant, Dundee, John Cross, manufacturer there, and Joseph Grimond, flax and jute spinner and manufacturer there, as surviving and acting original and assumed trustees of the now deceased William Wighton senior, grocer, Dundee, acting under his trust-disposition and settlement, to which Mrs Mary Taws or Wighton, his wife, was also a party, dated 6th May 1858, and codicil thereto by him, dated 6th January 1863, both recorded in the sheriff-court books of Forfarshire on 7th August 1866; and against the said Mrs Mary Taws or Wighton, presently residing in the Montrose Lunatic Asylum, Montrose, and her *curator bonis* or other guardian, and the said Alexander Gilroy and Joseph Grimond, as trustees acting under a trust conveyance granted by her in their favour, dated 12th April 1866, for the interest of the said Mrs Mary Taws or Wighton, if she any has; and against Mrs Elizabeth Clara Barnes or Wighton, presently residing at No. 62 Charlotte Street, Tottenham Street, Tottenham Court Road, London, widow of the late William Wighton junior, wine and spirit merchant, Dundee, who was the son of the said William Wighton senior; and William Grant, contractor in Kirriemuir, as trustee, acting under a trust-disposition *omnium bonorum* granted by the said Mrs Elizabeth Clara Barnes or Wighton in his favour, dated 3d September 1868, for their interest,—*defenders.* The conclusions of the summons were as follows:—"Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session—(1) That the said William Wighton senior died intestate, so far as regards the succession to the fee of the residue of his estate, in consequence of the lapsing of the directions contained in his said trust-disposition and settlement, and that the defenders, the trustees of the said William Wighton senior, now hold the trust-estate for behoof of the representatives *ab intestato,* in heritage and moveables respectively, of the said William Wighton senior, subject to the burden of an alimentary provision in favour of the said Mrs Taws or Wighton, made in said trust-disposition and settlement: And more particularly (2) it ought and should be found and declared, by decree foresaid, that the pursuer, the said Mrs Elizabeth Wighton or Smith, as nearest lawful heir, both of line and conquest, of the said William Wighton senior, her brother, and of her nephew William Wighton junior, has the sole good and undoubted right and title to the residue of the heritable estate of the said William Wighton senior, as the same existed at the time of his death, under burden of a proportional part of said alimentary provision to Mrs Mary Taws or Wighton: And (3) it also ought and should be found and declared, by decree foresaid, that the pursuer, the said Mrs Elizabeth Wighton or Smith, as next of kin to the said William Wighton junior, has good and undoubted right to two-sixth parts of the residue of the moveable estate of the said William Wighton senior, under burden of a proportional part of foresaid provision: And (4) it ought and should be found and declared that the defenders, the said trustees of William Wighton senior, hold what may be found to be the whole of the residue of the heritable estate, or the sums representing it, if converted into money, and two sixth parts of the residue of the moveable estate of the said William Wighton senior, for behoof of the said pursuer, Mrs Elizabeth Wighton or Smith, until the death of the said Mrs Mary Taws or Wighton: And further, (5) the defenders, the said trustees of the said William Wighton senior, ought and should be decerned and ordained, by decree foresaid, to exhibit and produce before our said Lords a full and particular account of their whole intromissions with the trust-estate of the said William Wighton senior, in order that the interest therein of the pursuer, the said Mrs Elizabeth Wighton or Smith, may be ascertained, and may be declared and decerned for by our said Lords, as herein concluded for: And further, (6) the defenders, the said trustees of the said William Wighton senior, ought and should be decerned and ordained, by decree foresaid, to make immediate payment to the pursuer, the said Mrs Elizabeth Wighton or Smith, of the whole accumulations of free income which have arisen on what shall be found and declared to be her share of the residue of the heritable and moveable estate of the said William Wighton senior, which shall be found to have accumulated since the death of the said William Wighton senior, after satisfying the said alimentary provision of the said Mrs Mary Taws or Wighton: And (7) the defenders, the said trustees of the said William Wighton senior, ought and should be decerned and ordained, by decree foresaid, to make annual payment to the pursuer, the said Mrs Elizabeth Wighton or Smith, during the lifetime of the said Mrs Mary Taws or Wighton, of the whole free yearly income of what shall be found and declared to be the pursuer's share of the residue of the estate, heritable and moveable, of the said William Wighton senior, subject to deduction of a proportional part of the said alimentary provision to the said Mrs Mary Taws or Wighton."

The facts of the case were as follows:—The pursuer, Mrs Elizabeth Wighton or Smith, is the only surviving sister and nearest lawful heir and next of kin to the deceased William Wighton senior, and also to his son, William Wighton junior. Mrs Mary Taws or Wighton is the widow of William Wighton senior, and is presently an inmate of Montrose Lunatic Asylum. She has no *curator bonis,* but in 1866, prior to her becoming insane,

she executed a trust conveyance of all her property, and of all her rights and interests, in favour of Alexander Gilroy and Joseph Grimond. Mrs Elizabeth Clara Barnes or Wighton is the widow of William Wighton junior. In September 1868, being bankrupt, she executed a trust-disposition *omnium bonorum* in favour of William Grant, for behoof of her other creditors. The trust-disposition and settlement *mortis causa* executed by William Wighton senior, to which his wife was a party, disponed in favour of William Wighton junior, Alexander Gilroy, and John Cross, as trustees, his whole means and estate, heritable and moveable, which should belong to him at the time of his death, and specially the heritable subjects therein described, and he appointed his trustees to be his only executors; but declaring always that the deed was granted by him in trust for the purposes, and with and under the provisions, conditions, and declarations therein mentioned. By the third purpose of the trust-disposition and settlement, the truster directed and appointed his trustees to lay out such portions of the yearly income of his trust-estate as they might think fit, and not less than £36 sterling yearly, for the purpose of alimenting and providing Mrs Mary Taws or Wighton, his spouse, in a comfortable and becoming manner during her life; and for this purpose he directed his trustees to arrange for her board and lodging in some respectable family, and to lay out and expend the foresaid sum yearly, with such addition as they might consider proper in paying her board, maintenance, lodging, and clothing, with what other aid or support his trustees might in their discretion consider necessary; these provisions in favour of Mrs Mary Taws or Wighton were declared to be purely alimentary, and were not to be diverted from the purposes intended on any account whatever. The provision thus made Mrs Mary Taws or Wighton accepted of in full of all terce of lands, half or third of moveables, and every other claim whatever which she could by law demand in case of her survivance. By the seventh purpose of the trust-disposition and settlement the truster gave the following directions as to the residue of his estate, viz.:—"Upon the death of the said Mary Taws or Wighton, and upon the youngest of my children attaining the age of twenty-one years complete, whichever of these events shall last happen, I direct and appoint my said trustees to make a fair and equal division of the residue and remainder of my trust-estate among my whole children, share and share alike; and declaring that, in the event of the death of any of my said children before the period of division, leaving lawful issue, such issue shall inherit the share which would have fallen to their deceased parent equally among them; and in the event of the death of any of my said children before the period of division, without leaving lawful issue, then, and in that case, their shares shall form part of my trust-estate, and shall be divided among the survivors of my said children and the issue of any of them who may have predeceased, in the terms above directed." William Wighton senior died on 18th September 1865 and the trustees named accepted office, and entered upon the possession and management of the trust-estate, which was partly heritable and partly moveable. He was survived by Mrs Mary Taws or Wighton, his widow, and by one child, William Wighton junior, his other children, James and Robert, having predeceased him without issue. On 19th February 1866 William Wighton junior died without leaving lawful issue, and without obtaining service as heir to his father. The widow still survives. The pursuer is nearest and lawful heir of line and of conquest of both father and son. As next of kin of William Wighton junior, she was duly decerned and confirmed executrix-dative to him. With the exception of the residue of the moveable estate of William Wighton senior, the whole moveable estate of William Wighton junior has been realised and divided among those having right thereto. The annual payments made by the trustees of William Wighton for behoof of his widow since his death have not exhausted the yearly income of the residue of the trust-estate, and the surplus income has accumulated, and now amounts to a considerable sum. The pursuers averred that the income of the whole trust-estate amounted to about £280 per annum, and that about £120 only had been found by the trustees to be required for the proper maintenance of Mrs Mary Taws or Wighton. The whole other purposes of the trust have been fulfilled. The trustees now hold the residue to enable them to meet the provision during Mrs Wighton's lifetime, and the pursuers maintained that, subject to this provision, the whole of the residue, so far as it consists of what was heritable estate of William Wighton senior at the time of his death, and two sixth parts of the residue, so far as it consists of what was moveable estate of the deceased at the time of his death, belonged to the pursuer; three sixth parts, or one-half, of the moveable estate falling to the defender Mrs Elizabeth Clara Barnes or Wighton as *jus relictæ*, and one third of the remainder, or one sixth of the whole estate, falling to the defender Mrs Mary Taws or Wighton as mother of William Wighton junior, in terms of the Intestate Moveable Succession (Scotland) Act, 1855. The pursuers required the trustees to make payment to them of the accumulations of income, so far as effeiring to the female pursuer's share of the trust-estate, which were not required to meet the provision to the truster's widow, and also to make payment for the future of the free surplus of the annual income of the estate so far as effeiring to the female pursuer, after satisfying a proportional part of the provision to Mrs Mary Taws or Wighton; but the trustees declined to do this without judicial authority.

The pursuers pleaded—(1) The directions of the said William Wighton senior contained in his said trust-disposition and settlement as to the disposal of the residue of his estate having lapsed, the said William Wighton senior died intestate *quoad* the succession to the said residue, and his trustees now hold the same subject to the foresaid provision to his widow for behoof of his legal representatives in heritage and moveables respectively, according to the nature of the estate composing the said residue as at the time of his death. (2) The pursuer, the said Mrs Elizabeth Wighton or Smith, being the nearest and lawful heir of line and of conquest of the said William Wighton senior, is entitled, subject to the burden of a proportional part of the foresaid provision to his widow, to the fee of the whole of the residue in so far as it consists of heritage, or represents heritage, left by the said William Wighton at the time of his death. (3) The pursuer, as sole next of kin of the said William Wighton junior, is likewise entitled, subject to the foresaid provision, to two sixth parts of

the residue of the moveable estate of the said William Wighton senior. (4) The pursuer is entitled to immediate payment of the accumulations of income in the hands of the said William Wighton senior's trustees, so far as these have arisen from the heritable estate, and from two sixth parts of the moveable estate of the said William Wighton senior. (5) The pursuer is further entitled to payment during the lifetime of the said Mrs Mary Taws or Wighton of that part of the said surplus income corresponding to the pursuer's interest in the said residue, after satisfying the provision to Mrs Wighton. (6) The defenders, the trustees of William Wighton senior, are bound to produce and exhibit a full and particular state of their intromissions with his estate, in order that the rights and interests therein of the pursuer may be ascertained. (7) The trustees are bound to hold the residue of the whole heritable estate, or what represents the heritable estate of William Wighton senior, and two sixth parts of the residue of his moveable estate, for behoof of the pursuer Mrs Elizabeth Wighton or Smith, until the death of Mrs Mary Taws or Wighton. (8) Generally, the pursuers are entitled to decree as concluded for, with expenses.

The defenders, William Wighton's trustees, pleaded: The defenders having no authority under the trust-deed to make the payments demanded by the pursuers, they are not bound to make such payments except under judicial authority.

The defenders, William Grant (Wighton's trustee) and Mrs Wighton, pleaded: (1) The main object of the truster being to benefit his children, his estate must be held to have vested in them as a class, and William Wighton junior being the last survivor of said class, was in right of the whole estate. (2) The widow of the deceased William Wighton junior is entitled *jure relictæ* to one-half of the residue of the trust-estate of William Wighton senior, in respect that on a sound construction of the trust-deed—first, the fee of the whole of the said residue vested at the death of the testator in his only surviving son, the said William Wighton; and second, that that right was moveable in his person. (3) Even if the first plea in law for the pursuer should be sustained, the annuity provided to the truster's widow being heritable in its nature falls to be charged against his heritable, and not against his moveable, succession.

The Lord Ordinary pronounced the following interlocutors:—

"*Edinburgh, 15th July* 1873.—The Lord Ordinary having heard parties' procurators, and having considered the closed record as amended, writs produced, and whole process, finds that the trust-disposition and settlement of the late William Wighton senior, of which No. 26 of process is a copy, did not by its terms or in law operate as a conversion of the heritable property and estate of the said William Wighton into moveable property or estate, and finds that the questions between the pursuers and defenders in the present action must be determined on the footing that the heritable estate which belonged to the said deceased William Wighton at his death is still heritable, and that the moveable estate which belonged to him at his death is still moveable, each being liable for the debts or bequests chargeable thereon, according to law: finds that in consequence of the deaths of the whole children of the said deceased William Wighton and spouse, without leaving issue, the whole residue of the trust-estate of the said deceased William Wighton falls either to the heirs-at-law and next of kin of the said deceased William Wighton senior, or to the heirs-at-law and next of kin respectively of the deceased William Wighton junior, his son, and with these findings, and before farther answer, supersedes farther consideration of this cause till the first sederunt day in October next, in order that the pursuer, Mrs Elizabeth Wighton or Smith, may expede, procure, and produce decree or decrees of service in her favour as heir-at-law of the said deceased William Wighton senior, and also as heir-at-law of the said deceased William Wighton junior; and reserves, meanwhile, all questions of expenses.

"*Note.*—The object of the present action is to declare the right of the pursuer Mrs Smith to the whole residue of the trust-estate of the late William Wighton senior, on the ground that by the failure of the whole of the children of the testator without issue, and before the period of vesting, the whole residue falls to the heirs-at-law and next of kin of the testator, or alternatively to the heirs-at-law and next of kin of the last surviving child.

"Although Mrs Smith sues in the character of heir-at-law, and although she maintained that the succession was, at least to a very large extent, heritable, she has produced no service in her favour as heir, either of William Wighton the father or of William Wighton the son. She explained her delay in expeding service by stating that before doing so she wished to have the question determined whether by the terms of Mr Wighton's trust-deed his heritable estate was in law converted into moveable, by means of a direction express or implied to sell and convert the same,—for, said the pursuer, if the estate were to be held converted, service would be unnecessary.

"The Lord Ordinary does not think that this is a good reason for the pursuer delaying or abstaining from expeding service, or of running the risks which such delay implies, but as the question of conversion was fully argued, the Lord Ordinary has decided this question by a finding, and as he has decided that the estate is not converted, service is indispensable. He thinks it better to decide nothing further at present, and to sist or supersede process till a service or services be expede and produced. The remaining points of the case will then be finally determined.

"On the question of conversion the Lord Ordinary has not found much difficulty. He thinks the trust-deed and codicil did not *per se* operate as a conversion of the testator's heritage. There is no express direction to sell, and although there is very ample power of sale, it is quite fixed that a mere power of sale, however ample, does not imply conversion. Still farther, there is not even an implied direction to sell; on the contrary, the ultimate direction is 'to make a fair and equal division of the residue and remainder of my trust-estate among my whole children, share and share alike.' The expression seems carefully framed to meet the case of a division in specie instead of a sale and a division of the price. Again, there was no necessity for sale, and that necessity might never arise The testator was survived only by one child, who, if he had lived, would have been sole residuary legatee, and to whom it would have been the duty of the trustees, at the period of vesting or winding up, to make over and convey the whole estate

tantum et tale as it stood in the testator, in so far as not required for the other purposes of the trust. The leading case is *Buchanan* v. *Angus*, in the House of Lords, 15th May 1862, 4 Macqueen, 374. Buchanan's case was a much stronger case for conversion than the present, for not only was there a special power to convert the whole into money, but the residue was directed to be 'paid' to the testator's brother and sister equally, and there was other specialties which do not occur here. The result of the decision is, that where no absolute duty is imposed on the trustees—where discretion is left to any extent in the trustees—and where sale is not 'indispensable to the execution of the trust,' then, and in any of these cases, there is no conversion. See cases quoted in *Buchanan*, and the doctrine has repeatedly been applied in subsequent cases.

"There is a further specialty in the present case, that if the purposes of the trust-deed fail, intestacy arises, and there is authority for holding that even express directions to sell for the purposes of a trust will not convert the estate if the purposes of the trust fail, and it decends *ab intestato*, —see *Collans* v. *Wakeman*, 2 Vesey Jr., 683; *Cogan* v. *Stevens*, 1 Beven, 482, 5 Law Journal. Chancr., 717: *Taylor* v. *Taylor*, 22 Law Jr., Chancr. 742, in which case see Lord Cranworth's dictum. No doubt the contrary was found in Scotland, in the well-known case of *Dick* v. *Gillies*, 4th July 1828, 6 S. 1065, but the case has already been overruled in one of its branches by *Lord* v. *Colvin*, 7th December 1860, 23 D. 111; see also *Neilson* v. *Stewart*, 3d February 1860, 22 D. 646, in particular Lord Colonsay's opinion, p. 656.

"It is true this last point may not arise in the present case, for it may possibly be held that though William Wighton junior did not survive the fixed period of vesting, yet being the sole surviving child, the succession vested in him notwithstanding. But this would be just an additional reason for holding that any implied direction to convert, could only be in the event of there being more children than one, among whom a division was required.

"In order to avoid risk, the pursuer should expede service as heir at law, not only of William Wighton senior, but also of William Wighton junior, and so in one or other capacity she will take the succession, subject to the rights and claims of the defenders."

Edinburgh, 4th November 1873.—The Lord Ordinary having heard parties' procurators, and having resumed consideration of the closed record, and whole process, with the decrees of service now produced by the pursuer, finds and declares that the whole heritable estate which belonged to the deceased William Wighton senior at the date of his death, and which is now in the hands of his trustees, and the prices or surrogata for such part of said heritable estate (if any) as has been sold or realised by the trustees, subject to the burdens of the trust, now belongs to, and is vested in, the pursuer, Mrs Elizabeth Wighton or Smith, as the heir-at-law, both of the said deceased William Wighton senior, and as the heir-at-law of the also deceased William Wighton junior, his son, and that in virtue of the decrees of general service now expede and produced by the pursuer; but finds that the said heritable estate or proceeds thereof, or surrogata therefor, are subject to the purposes of the trust created by the said William Wighton senior so far as yet unexecuted, and to this effect finds, decerns and declares under the declaratory conclusions of the summons; finds that the whole residue of the moveable estate of the said deceased William Wighton senior, subject to the purposes of his trust, vested under his trust-deed in his son, the said William Wighton junior, and that the same now falls to be divided thus,—one-half of the whole moveable estate to the defender Mrs Elizabeth Clara Barnes or Wighton, widow of the said deceased William Wighton junior, or to the defender William Grant, as now in her right; one-sixth of the whole to the defender Mrs Mary Taws or Wighton (who has not appeared in the present action), but who, as the mother of the said deceased William Wighton junior, has right thereto under the Intestacy Act, 18 Vict., cap. 23, and the remaining two-sixths thereof to the pursuer of the present action; and to this effect also finds, decerns and declares under the declaratory conclusions of the summons; finds that the annual payment necessary to be made by the trustees of the said deceased William Wighton senior for the support and maintenance of the truster's widow falls to be made from the whole annual income of the trust-estate, both heritable and moveable, and falls to be defrayed rateably and proportionally from the proceeds of the heritable, and from the proceeds of the moveable estate; and with these findings, appoints the case to be enrolled for further procedure, reserving meantime all questions of expenses.

"*Note.*—In the preceding interlocutor the Lord Ordinary has endeavoured to exhaust the whole questions at issue between the parties, leaving nothing but the details of accounting to be carried out in accordance with the principles now fixed.

"If the views adopted by the Lord Ordinary in this and in the former interlocutor of 15th July last are affirmed and acquiesced in, there should be no difficulty in adjusting the accounting without farther litigation. There will remain only the question of expenses, which stands reserved, and which was not adverted to at the debate. The preponderance of success hitherto has been with the pursuers.

"By the interlocutor of 15th July last the Lord Ordinary found that the trust-deed of Mr Wighton senior did not operate as a conversion of his heritable estate. Acting upon this judgment, the pursuer has since expede services which transmit the heritable right, and she seems now entitled to decree of declarator to the effect that the said heritable estate is now vested in her. The Lord Ordinary has given decree accordingly.

"As to the moveable estate, there was not much dispute between the parties, and the Lord Ordinary has found that it divides in certain proportions between the pursuer Mrs Smith, the defender Mrs Wighton junior, and another defender, Mrs Wighton senior, who has not appeared (she is a lunatic), but whose interest must not be overlooked.

"The only farther contest between the parties related to the incidence of the annual sums necessary for the support and maintenance of Mrs Wighton senior, and which is to be paid or disbursed by the trustees for her behoof. The defender Mrs Wighton junior, and her trustee, maintained that this was a heritable burden, which must be paid wholly from the rents of the heritable estate. They even contended, though perhaps not

very strongly, that if the rents fell short, the deficiency should be charged on the capital of the heritable estate.

"The Lord Ordinary does not think that the defenders' view as to the incidence of this burden is well founded. He thinks the question is one depending upon the intention of the truster, for the maintenance of Mrs Wighton senior is one of the unexhausted purposes of the trust. The direction of the trust-deed is that his widow's maintenance be paid out and from 'the yearly income of my trust estate'—that is, from the income of his whole trust-estate, both heritable and moveable. It is a bequest from annual proceeds, and not an heritable debt of the truster. The supervening intestacy which has occurred makes it necessary now to distinguish the estate into heritable and moveable, and equity requires, in order to do justice as between heir and executor, that the catholic burdens be rateably divided between the two.

"The same result is reached by viewing the provision made to Mrs Wighton senior as coming in place of her legal rights of terce and *jus relictæ*. Her terce would have been a burden on the heritage, her *jus relictæ* on the moveables. The surrogate provision must in equity be laid rateably both on the heritable and on the moveable estate.

"The trustees of Mr Wighton senior very properly took no part in the discussion. Their only object is to obtain exoneration by paying or denuding under the order of Court, and although the present action is not in form a multiplepoinding, it falls to be disposed of on similar principles.

"In strictness, the trust cannot be wound up during the life of Mrs Wighton senior, but perhaps parties might arrange to reserve a fund sufficient for her maintenance, so as to permit of the trustees being relieved of the rest of the estate. Probably, however, this is rather a matter for extrajudicial arrangement."

The defenders relaimed, and it was further urged by them that the trustees of the said William Wighton senior having been infeft *qua* trustees in his heritable estate took such infeftment for behoof of and as representing William Wighton junior, the party beneficially interested in said estate, and that accordingly his widow is entitled to claim terce from said estate in which her husband was constructively vested. (*Rose* v. *Fraser*. Ross' L.C.)

This question not having been raised on record or before the Lord Ordinary, the Court adjourned the case to hear parties upon it. When the case was called, the Solicitor-General, for the defenders, stated that on inquiry he had found that no infeftment had been taken by the trustees until after the death of William Wighton junior, who only survived his father seven months, and that accordingly it was unnecessary to discuss the question.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming-note for Mrs Elizabeth C. Barns or Wighton, and William Grant, her trustee, against Lord Gifford's interlocutor of 4th November 1873, refuse said note, and adhere to the interlocutor complained of: Find the reclaimers liable in expenses from the date of the Lord Ordinary's interlocutor, and remit to the Auditor to tax the same and to report: and remit to the Lord Ordinary to proceed with the cause, with power to decern for the expenses now found due; and decern."

Counsel for Pursuers (Respondents)—Solicitor-General (Clark), Q.C., and Jameson. Agents—W. & J. Cook, W.S.

Counsel for Trustees—J. H. A. Macdonald. Agents—Lindsay, Paterson & Hall, W.S.

Counsel for Defenders (Reclaimers)—Guthrie. Agent—W. S. Stuart, S.S.C.

Saturday, January 10.

FIRST DIVISION.

[Sheriff of Midlothian and Haddington.

BEGG AND OTHERS (TRUSTEES FOR DEACONS' COURT OF NEWINGTON FREE CHURCH) *v.* JACK.

Process—Interdict and Removing—Summary Application—Mutual Wall.

The respondent in this case erected a gable wall partly on the site of a mutual wall between his property and that of the complainers. The latter, though repeatedly, in the course of a correspondence, objecting to his interfering with the height of said mutual wall, took no legal steps to prevent the gable being proceeded with, but allowed the respondent to continue his operations until said gable had reached the height of four storeys. The complainers having then presented a petition to have the wall removed, *Held* that, in these circumstances, the present case was not one suited for a summary application—the Court being of opinion that it was quite unreasonable to delay until a building had been all but completed, and then apply summarily to have it pulled down.

Counsel for Complainers — Solicitor - General (Clark) and Jameson. Agent—John Auld, W.S.

Counsel for Respondent—Lord Advocate (Young) and Campbell Smith. Agent—J. B. W. Lee, S.S.C.

Tuesday, January 13.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

GREIG *v.* BARCLAY AND OTHERS.

Contract—Reduction—Error—Facility and Fraud.

Circumstances in which *held* that there were no relevant grounds of action.

This was an action at the instance of Peter Greig, residing in Crail, only surviving son and heir-at-law of the deceased Andrew Greig, shipowner and hotel-keeper, Newhaven, against Clementina Barclay, wife of Richard Cockerton, 82 Cornwall Gardens, South Kensington, London, and Richard Cockerton for his interest, Margaret A. P. Barclay, wife of Thomas Watson, writer, 56 W. Regent Street, Glasgow, and Thomas Watson for his interest, Mary Stewart Barclay, wife of D. L. Foggo, broker, Glasgow, and D. L. Foggo for his interest, as heirs *in mobilibus* of the late Thomas Barclay, auctioneer, Glasgow,