They might all be perfectly well taken on shore, though the chronometer peculiarly requires to be so, but it would need a very strong proof of usage to exclude the chronometer on that ground from the rule which applies to the rest. I agree with your Lordship that the alleged proof is of the weakest possible description, and not at all sufficient to overcome the presumption arising on the face of the document. Added to all that, there are two things to be observed—(1) That the owner thought it necessary to direct Mr Wilkie specially to except the chronometer. Why did he do that if he knew that it did not pass with the rest of the things? (2) This was a sale which took place just before the vessel sailed, and it was not to be supposed that she would sail without a chronometer. I think every one of the circumstances is in favour of the purchaser.

Lord Ardmillan—In this case the Sheriffs have differed, and I cannot say I think it is an easy case. It is only after considerable hesitation that I have come to be of the same opinion as your Lordships. The view which I take is this—Where the words of a written bargain are clear, no proof of usage is competent. When the words of the written bargain are loose, such proof is competent, but it must be clear and full. I cannot say that I think the words of this contract are so clear as to make proof of usage incompetent, but when usage is proved it must amount to a rule of trade which both parties must be held to have known. The proof here shows that the chronometer was uniformly kept on board except when it was taken on shore for the specific purpose of rating, and it does not matter that at the time of this sale it happened to be on shore. Neither is it of importance that it was sent on board again, for it is admitted that the maker was ignorant of the sale of the vessel; but it is of importance, as Lord Deas says, that the ship was on the point of sailing, or in other words on the point of requiring her chronometer. She was in the position of a vessel sold by her *owners;* it is allowed that *builders* do not supply such things; the owners who buy from them select what things they want from an inventory; but here the chronometer had been on board during the previous voyage. I think that, so far as it goes, the proof is rather in favour of the seller, but even taking it at its best, it does not amount to settled usage. Therefore I think that enough has not been instructed by the defenders, on whom lay the *onus* of taking off the effect of the comprehensive words of the contract.

Lord Mure—I arrive at the same result as your Lordships. I think the terms of this contract are quite as strong as those in the English cases referred to; and I think it was quite sufficient to carry the chronometer, which was essential to the voyage as much as any of those other things which admittedly passed under it. I think the words in the contract are quite as strong as the word appurtenances; and as regards the question of usage, I hold the proof of it to be by no means sufficient.

The Court pronounced the following interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute and the Sheriff, dated respectively the 29th April 1874 and 21st October 1874; Find that when the appellants, in the month of November 1871, purchased the screw-steamer Macedon, then lying at Glasgow, 'with all belonging to her on board and on shore,' under the memorandum of sale No. 11/1 of process, the chronometer in question on shore belonged to her; find that it is not established by the proof that there is any local or general usage of trade that under such a clause the ship's chronometer was not included or intended to be included in the said purchase; but find that the chronometer in question did, in terms of the said clause, pass with the said ship at the time of the said purchase, and is the property of the appellants, William John Armstrong and others; therefore, in the original action at the instance of the appellants against the respondents D. M'Gregor & Company, repel the defences, and ordain the said respondents (defenders) to deliver to the appellants (pursuers) the chronometer in question in terms of the conclusions of the summons, and decern; *quoad ultra*, in respect the remaining conclusions are not insisted in, dismiss the action, and decern; and in the action of multiplepoinding, in respect of the foregoing findings and decree, dismiss the action and decern: Find the respondents D. M'Gregor & Co. liable to the appellants in the expenses of the original action in the Inferior Court, both before and after conjunction; but find the said respondents D. M'Gregor & Co. entitled to be relieved of said expenses by the other respondents Handyside and Henderson: Find the said respondent Handyside and Henderson liable to the appellants in the expenses of the action of multiplepoinding in the Inferior Court, both before and after conjunction: Find the said respondents Handyside and Henderson liable to the appellants in the expenses in this Court: Allow accounts of the said expenses now found due to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for the Pursuer—Solicitor-General (Watson) Q.C. and Asher. Agents—J. W. & J. Mackenzie, W.S.

Counsel for the Defender—Dean of Faculty (Clark) Q.C., and Balfour. Agents—Hamilton Kinnear, & Beatson, W.S.

Wednesday, January 20.

SECOND DIVISION.

[Lord Young, Ordinary

PEEBLES & SON AND MANDATORY *v.* CALEDONIAN RAILWAY COMPANY.

Railway Clauses Act, 1845, *sec.* 90—*General Lien—Tolls—Agreement.*

B, a paper maker at Bridge of Allan, consigned certain bundles of paper addressed to A, his agent in London, and drew two bills against the consignment, which were accepted by A. The practice was for B to pay directly to the Railway Company (with whom by arrangement he ran an account payable monthly) the carriage to Grangemouth. The goods were detained by the Railway Company at Bridge of Allan in security of a general balance due by B for previous carriages. In an action at the instance of A for delivery of

the goods.—*Held* that the goods were not the property of B in the sense of section 90 of the Railway Clauses Act, and were not subject to a general lien for previous carriages.

Railway and Canal Traffic Act, 1854, *c.* 31, *sec.* 7. *Held*—(1) that the initials of a clerk adhibited to a consignment note is not a subscription in terms of the Act; (2) that a condition endorsed on the back of the consignment note introducing a general lien for a general balance and a right of distraint and sale without judicial authority, is not a just and reasonable condition.

The summons in this suit, at the instance of A. M. Peebles & Son, paper merchants, London, and John Latta, S.S.C., Edinburgh, their mandatory, against the Caledonian Railway Company, concluded for delivery of 192 bundles of paper, delivered by Robert Philp, paper maker, Bridge of Allan, to the defenders, as carriers, to be forwarded and delivered to the pursuers in London, and which the defenders had detained in security of a general balance due to them by Philp for previous carriage.

The material facts are set forth in the opinion of the Lord Ordinary.

The pleas in law for the pursuers were—"(1) The sums claimed by the defenders from the said Robert Philp not being tolls in the sense of the 90th section of the Railway Clauses Consolidation (Scotland) Act 1845, they have no lien, and are not entitled to retain the said goods in respect thereof. (2) The alleged agreement between the defenders and the said Robert Philp not being signed by him or on his behalf, and, *separatim*, not being just and reasonable, is ineffectual both at common law and under the provisions of the Railway and Canal Traffic Act, 1854. (3) The pursuers having made advances to the said Robert Philp as against the said goods, and the said goods having been delivered by the said Robert Philp to the defenders, to be forwarded to the pursuers, they are entitled to delivery thereof, and the defenders' alleged right of retention is excluded in a question with the pursuers."

The pleas in law for the defenders were—"(1) The goods in question not being the property of the pursuers, they have no title to sue for delivery thereof, nor to challenge the validity of the agreements between the defenders and the said Robert Philp. (3) The goods in question being the property of the said Robert Philp, and he being due and addebted to the defenders the amount of the account for tolls foresaid, the defenders are entitled to detain the same under and in terms of the 90th section of the 'Railway Clauses Consolidation (Scotland) Act,' 1845. (4) The said goods having been delivered to the defenders under the express stipulation contained in the agreements above quoted, the defenders are, by virtue of the said agreements, entitled to hold the same, subject to a general lien for money due to them by the said Robert Philp for the carriage of other goods belonging to him."

On 14th July the Lord Ordinary (YOUNG) delivered the following Opinion:—

"In this case the material facts are as follows:—Philp is a paper maker at Bridge of Allan. The pursuer is his agent in London, and sells paper for him on commission, making advances on the consignments by accepting bills. The consignments were made from time to time, according to the actual or anticipated demand, of which Philp was apprised by the pursuer, sometimes to enable the pursuer to implement orders already accepted, and sometimes to be kept in stock with a view to future orders. The consignments of 28th and 30th January referred to on record were made in the ordinary course of business, partly for stock and partly to implement existing orders, two bills for £100 each being drawn by Philp and accepted by the pursuers against the consignments. The bills were returned to Philp accepted, on the receipt by the pursuers of the ordinary advice that the consignments had been made, and that the goods were on their way, and these bills have been discounted, and are now current. The goods (the bundles of paper in question) were, on 28th and 30th January, delivered by Philp to the Caledonian Railway Company (the defenders) at Bridge of Allan, addressed to the pursuer, the contemplated and arranged course of carriage being (as it had always been) by rail to Grangemouth, and then by sea to London, in one of Carron Company's steamers. The practice was for Philp to pay directly to the Railway Company (with whom, by arrangement, he ran an account, payable monthly,) the carriage to Grangemouth, and for the pursuer to pay the sea carriage on delivery, charging the same against Philp on settlement.

"The goods in question were detained by the defenders at Bridge of Allan in security of a general balance of £176 due to them by Philp for carriages in November and December preceding, and the question in the case is, whether they are entitled to do so against the pursuer.

"A general lien at common law is not maintained. But the defenders say they have such lien in this case—1st, by express written agreement, and 2d, by section 90 of the Railway Clauses Act, 1845.

"The questions thus raised, though not, in my opinion, attended with difficulty, are of such magnitude and interest to the mercantile community that it is important they should be so decided as to dispel any doubts which may exist respecting them.

"It is not, as I have observed, maintained by the defenders that carriers have a general lien at common law, but I nevertheless think it not amiss, as preliminary to, and having a legitimate bearing on, the remarks which I have to offer on the questions presented, to say that I consider it is quite settled in our law that they have not.

"The interests of third parties (I refer to consignees) in goods delivered to carriers for conveyance to their destination are such that it is, I think, improbable that a usage for a general lien will ever come to exist, though, if it should, the fact of its general recognition and allowance by the trading community would probably be received as sufficient evidence of its consistence with public policy and mercantile convenience, to induce the Court to receive it as part of the law merchant.

"A common carrier is not at liberty to refuse goods tendered to him for carriage to their destination, or so far on their way thereto as his means of conveyance extend. Further, the delivery of goods to a carrier has much legal significance and effect in creating or perfecting rights in the consignee. In the case of a sale, such delivery may, and generally does, divest the consignor (the seller), and invest the consignee (the purchaser), with the property of the goods; and when there is

no transference of property, as in the case of consignment to an agent or factor, a valuable interest may be and frequently is created by the fact of such delivery, for the consignee may (as happened in this case) have made advances or accepted bills on the faith of the consignment so soon as delivery to the carrier on his account was notified.

"These considerations are hostile to a general lien in favour of common carriers. Their position is exceptional, particularly in these two respects which I have noticed, viz., *first*, that on grounds of public policy they are not permitted to refuse to carry goods tendered to them for carriage; and, *second*, that on similar grounds the delivery of goods to them raises, or may and often does raise, rights with respect to these goods in third parties, in whose favour consequently the law imposes duties upon the carrier, for the performance of which he is directly responsible to them, although not parties to the contract of carriage. In the case of the *Scottish Central Railway Company* v. *Ferguson*, it was held, and I think on clear grounds, that the consignee of goods, although no party to the contract of carriage, has a right of action against the carrier for delivery.

"But these considerations are not only adverse to a general lien at common law; they also bear on the question of general lien by agreement. The rule no doubt is that the absolute owner of goods may make any contract about them he pleases, and so by agreement subject them to lien for a prior debt or general balance, just as he may pledge them to any extent. But, independently of the Act of 1854, which, on considerations of public policy, disallows unreasonable agreements with carriers, I should greatly doubt the validity at common law of an agreement between a carrier and the sender of goods which professed to create a general lien to the prejudice of the consignee, to whom the carrier was legally bound to carry them at the usual rate of carriage. It is, however, unnecessary to dwell upon this view, for I think it clear that such an agreement must be disallowed under the Act as unreasonable. A carrier has a particular lien on every parcel of goods for the carriage thereof, and should he choose to give credit and allow his customers to run an account, he has the ordinary legal remedies for recovery of his debt. But he remains subject to the public law, which obliges every carrier to receive and carry goods for the ordinary charge, and it would be unreasonable and detrimental to the interests of third parties and of trade, to allow him, on the tender of a new parcel for carriage to a purchaser or other consignee, to exact an agreement subjecting it to a lien for the prior debt of the sender.

"I cannot therefore allow the defenders' plea that there was here a general lien by special agreement. I may add that I do not think the agreements founded on are signed agreements within the meaning of the Act.

"With respect to the plea founded on section 90 of the Railways Clauses Act 1845, I have no difficulty in disallowing it. I am disposed to agree with the view that the term 'tolls,' as used in the clause, is not limited to tolls for the use of the road merely, and tables of which must be exhibited, but extends to charges for the carriage of goods. But I think the provision does not apply to goods with respect to which the law has imposed on the company as common carriers an obligation or duty in favour of a third party, as in the case of goods received by them for carriage to, or so far on their way to, a consignee according to the address. When they have within their premises goods belonging to their debtor, and in which no other has any legal interest, or with respect to which they have incurred no duty or obligation to any other, they may detain and sell them for the carriage of other goods which were removed without payment. This is sufficient to satisfy the provision without extending it so as to injure the rights of third parties, or annul the company's obligations as common carriers in their favour,—an extension never hitherto, so far as I know, contended for. This is sufficient for the decision. But I must add that I think the clause, so far as it authorizes the detention and sale of goods on the premises for tolls due for goods that have been removed without payment, applies only where goods have been improperly, or without the consent of the company, removed before payment of the tolls demanded therefor. The language and provisions of the group of clauses regarding tolls show that the Legislature contemplated an immediate demand and payment of the tolls exigible for carriages of goods before removal from the company's premises, and that the sharp and summary remedy of clause 90 was intended to apply to cases of evasion, and not to cases where credit was given by contract. At the date of the Act, railway companies had not settled into the position of common carriers which they now occupy, and the practice of running monthly or other periodical accounts for tolls was not contemplated in any of the provisions of the Act. In this view I think it is in the power, and according to the duty of the Court, by construction, to restrain the powers of section 90 within reasonable limits, and to refuse to permit them to be exercised under circumstances or in a manner which would do injustice or inflict hardship not contemplated by the Legislature. When a railway company has, by agreement (or otherwise), deliberately allowed a customer to run an account and get largely into their debt for carriages, it would in my opinion be unreasonable and unjust, and not according to the true intent and meaning of the Act, to permit them to detain and sell goods subsequently handed to them for carriage to the persons to whom they were consigned in the ordinary course of trade.

"It is so important that the law on the several points to which I have adverted should be settled one way or other, that I have stated my opinion and the grounds of it at a length somewhat disproportioned to any difficulty which I have experienced. The result may be summarised in these propositions:—*First*, that common carriers have not a general lien at common law. *Second*, that a common carrier is bound to receive goods for conveyance at the ordinary rate of carriage, and is not entitled to refuse to receive them except on the condition of the sender agreeing to subject them to a general lien for his debts to the carrier. *Third*, that with respect to goods consigned to third parties in the ordinary course of business, and delivered to a carrier for conveyance, an agreement between the consigner and the carrier that they shall be subject to a general lien for the debts of the former to the prejudice of the interests of the consignees, must be disallowed as unreasonable under the Act of 1854. *Fourth*, that when a Railway Company allows a customer to run an

account for carriages, they are not warranted by section 90 of the Railways Clauses Act to detain and sell for any debt due on such account goods which the customer has delivered to them as common carriers for conveyance to persons to whom they have been consigned in the ordinary course of business. The interlocutor will therefore be, Repelling the defences, and ordaining the defenders forthwith to deliver to the pursuers the bundles of paper referred to in the summons, reserving to the pursuers to move for decree for the value thereof in money, should the same not be delivered in obedience to this order; find the pursuers entitled to expenses, and remit the account thereof to the auditor."

The defenders reclaimed.

Authorities—Deas on Railways, 439; *Scottish Central Railway Co.* v. *Ferguson*, 7 Macph. 739; *Wallis* v. *London and North-Western Railway Co.*, L. R., 5 Exch. 62; *North British Railway Co.* v. *Carter*, 8 Macph. 998; *Caledonian Railway Co.* v. *Guild*, 1 Rettie, 198; *Field*, 27 L. J. Exch. 396.

At advising—

Lord Justice-Clerk—The questions raised under this reclaiming note are of very considerable importance. The action is brought by Messrs Alexander Peebles & Son, who are paper merchants in London; and it appears from the proof that they acted as consignees and agents for the sale of paper manufactured by Robert Philp, papermaker, Bridge of Allan. The course of dealing, as explained by Mr Peebles, was that the London agents sold in their own name to customers—sometimes out of stock transmitted by Philp, and sometimes in anticipation of consignments of paper to be sent, crediting Philp in either case with the price received, charging their commission against the manufacturer. Philp was in the habit of drawing on his consignees against consignments either already made, or in anticipation of those which had been ordered.

Without going into the proof, which is clearly summarised in the Lord Ordinary's opinion, it seems sufficiently clear that Philp had drawn on the pursuers for the two parcels of paper due in question to the extent of £200, and that these bills had been accepted by the consignee before delivery. These parcels of paper were delivered on the 28th and the 30th of January 1874 to the defenders, the Caledonian Railway Company, addressed to the pursuers, the consignment note bearing that they were to be forwarded to A. M. Peebles & Son, Carron Company's steamer to London, from Robert Philp. There is no doubt that the Company undertook to deliver on board the Carron Company's steamer at Grangemouth. Philp sent the invoices to the pursuers, and advised them by post that the goods had been sent. The Company received the goods, but they did not forward them, claiming a right to detain them in liquidation of an unpaid balance on general account alleged to be due to them by Robert Philp. The account in question is produced, and contains a record of transactions extending over several months, and amounts in all to £176, 0s. 7d., being charges for goods carried on his account. The question is, whether this claim for retention and liquidation is good against the pursuers.

In regard to the position of the pursuers, I am of opinion that they are onerous consignees—that Philp was under an onerous obligation, in respect of their advances, to deliver goods to them to the amount which these advances covered, and that this obligation was duly fulfilled by Philp, by delivery to the Railway Company, as carriers, of the parcels in question. From the date of delivery to the defenders the goods were at the disposition of the pursuers for the purpose of the consignment, they paying the charges incident to the carriage. It is immaterial in this question whether the consignees were proprietors or not, seeing they were consignees for value. If they had sold by anticipation—and Mr Peebles explains that he cannot precisely tell whether it was so or not in the present instance—they might be held to be substantially in the position of buyers,—but that is immaterial.

It is certain that the Railway Company, as public carriers, had no right at common law to retain these goods in liquidation of a general balance due by Philp; but the claim is maintained on two grounds,—1st, That the goods were delivered subject to certain conditions indorsed on the back of the consignment note,—one of which bears—(Art. 10) "That all goods delivered to the Company will be received and held by them subject to a general lien for money due to them, whether for carriage of such goods or for other charges; and in case the general lien is not satisfied within a reasonable time from the day when the Company first received the goods, the same will be sold by the Company by auction or otherwise, and the proceeds of sale applied to the satisfaction of such lien and expenses." It is said that the goods were delivered on this condition only, and the plea is founded on the terms of the Railway and Canal Traffic Act, 1854, chap. 31, sec. 7.

This section requires, first, that to make such conditions effectual they must be signed by the customer; and secondly, that they must be such as the Court shall adjudge to be just and reasonable.

In regard to the first of these requisites, I am of opinion that the initials of the clerk adhibited to the consignment note is not a subscription in terms of the statute; and in regard to the second, that the condition is not in itself just or reasonable. It is an attempt to introduce by convention not only a general lien for a general balance, but in addition a right of distraint and sale without judicial authority to enforce these conditions against consignees. I agree with the Lord Ordinary in his observations on this head. It is inconsistent with the ordinary duties of carriers, and plainly adverse to the public interest, that the carrier having undertaken to carry and deliver the goods as addressed can convert his contract into one of pledge, as here, for an illiquid balance arising out of prior transactions.

The case of the *Scottish Central Railway* v. *Ferguson* seems to be conclusive on this head.

The second ground on which the defence is founded rests on the 90th section of the Railway Clauses Act, and raises some considerations of great public importance. That section is as follows—"If on demand any person fail to pay the tolls due in respect of any carriage or goods, it shall be lawful for the company to detain and sell such carriage, or all or any part of such goods; or if the same shall have been removed from the premises of the company, to detain and sell any other carriages or goods within such premises belonging to the party liable to pay such tolls, and out of the monies arising from such sale to retain the tolls

payable as aforesaid, and all charges and expenses of such detention and sale, rendering the overplus, if any, of the monies arising by such sale, and such of the carriages or goods as shall remain unsold, to the person entitled thereto; or it shall be lawful for the company to recover any such tolls by action at law."

It has been found in England, in the case of *Wallis* (Law Reports, 5 Excheq., p. 62), that this clause only applies to tolls due for the use of the line. Had the case turned on this question, I should have been anxious to have had farther argument. My first impression was that that judgment could not be supported. The reverse was certainly assumed in the recent case of *Carter*, in the First Division, and has been very elaborately maintained by Lord Shand in the case of *Guild* v. *The Caledonian Railway*. But although I think the judgment by the English Court is placed on very narrow ground when rested on the meaning of the word "tolls," I wish to reserve my opinion as to the scope and construction of this clause. The clause does not appear to me intended to create any lien between carrier and customer, but to create a right of retention and sale between the owners of the railway and the carrier using it. It was intended to give the owners of the line a right against the carriages and goods of the traders carrying their own goods along the line, or common carriers using the line to carry the goods of others, and that for payment of the tolls due for the use of the line. The right is incident to the contract of hire, not to the contract of carriage; and when the Company became themselves common carriers, I doubt if the section applies. It certainly would not, as far as I see, without something in the Special Act, give any such claim to a railway company running over the line of another company; and I do not think it was meant to regulate the relations of carrier and customer at all.

But the words are general, and certainly ambiguous; and assuming that they have the construction contended for by the defenders, they have two important qualifications. The primary right created by this clause, in any view of it, is to enable the owners of the line to retain carriages and goods for payment of the dues of carriage for which they are liable at common law, and also to sell without judicial authority after a demand has been made. This last power is of course a stringent and important privilege. But as regards goods other than those, the tolls on which are in arrear, these are only subject to the terms of the clause—*first*, provided the goods primarily liable have been removed from the Company's premises; and *secondly*, when they are the property of the debtor.

It is thus seen that the clause does not introduce a general lien for a general balance over any goods in possession of the Company belonging to the debtor. The lien is, in the first instance, special over the goods, the carriage of which is unpaid; and it is only in the event of their being removed that the Company can have recourse to other goods within the Company's premises. The Lord Ordinary thinks that these words refer to improper or surreptitious removal. This is perhaps stating the proposition too broadly. I think it also includes the case of carriages and goods necessarily removed from the custody of the Company, owing to the nature of the service required. But I doubt greatly if this substituted or accessory lien will ever emerge if possession is voluntarily parted with without demand for the tolls, and much more if delivery be voluntarily made on an established course of credit, by which payment of the debt is conventionally postponed. A specific lien is discharged by credit being given for the debt; and though it may revive when the period of credit expires if the subject of it remain in the possession of the creditor, yet if possession be voluntarily parted with it is absolutely extinguished.

I have thought it right to indicate these views, because they seem very material on the construction of this clause, and would certainly prevent railway companies, which act as common carriers, combining a system of giving credit for their tolls with this substituted right of lien. But even supposing that the clause is to be construed as the defenders contend for, the ground on which I wish to place my judgment, coinciding as I do in the result at which the Lord Ordinary has arrived, and his forcible exposition of the views by which he reaches it, on the fact that these bales of goods could only be dealt with by the Railway Company as the property of their debtor, subject to the onerous right acquired in them by the consignee. The pursuers had an absolute right to delivery in any question with the carriers, whatever the rights of the latter might be, if they were only in a question with their debtor; and holding that the goods were not the property of the debtor in the sense of the statute, I think the case must be decided on the same principle and in the same way as the analogous case of *Ferguson*, to which we have been referred.

The other Judges concurred.

Counsel for Pursuers—Dean of Faculty (Clark), and Blair. Agent—J. Latta, S.S.C.

Counsel for Defenders—Solicitor-General (Watson), and Johnstone. Agents—Hope, Mackay, & Mann, W.S.

Saturday, January 23.

SECOND DIVISION.

[Lord Young, Ordinary.

WARDLAW *v.* WARDLAW'S TRUSTEES.

Liferent—Mineral Rents—Intention.

Terms of settlement conferring a liferent o one-third of an estate, *held* to convey the mineral rents of old coal workings on the estate.

By disposition and settlement of 9th July 1833, and codicil of 20th May 1834, William Thomson of Stevenson's Beath conveyed in favour of his daughter Miss Agnes Thomson and her heirs and assignees one third *pro indiviso*, to his other daughter Miss Margaret Thomson and her heirs and assignees one-third *pro indiviso*, and to his granddaughter Mary Leechman, child of his daughter Mary Thomson, and afterwards Mrs Wardlaw, "in liferent for her liferent use allenarly, and her heirs, whom failing to the foresaid Agnes Thomson and Margaret Thomson, and their foresaids, equally in fee;" the remaining one-third *pro indiviso* of all and whole the several lands and heritages then belonging or that might belong to him at the period of his decease. The truster died