The Court accordingly answered the first question in the affirmative.

Counsel for Mrs Grant—Mackintosh.

Counsel for Miss Grant—Young. Agents—Adam & Sang, W.S.

Counsel for Trustees—Campbell Smith. Agents—Horne, Horne, & Lyell, W.S.

Friday, January 7.

FIRST DIVISION.

SMITH, LAING, & COY. *v.* MAITLAND.

Superior and Vassal—Feu-Charter—Construction—Poor-Rates.

A feu-charter, dated in 1814, contained the following declaration:—"That during the existence of the present feu-right all public and parochial burdens or taxes, imposed or to be imposed, shall be paid by the superior and vassal, as if the former was proprietor and landlord, and as if the latter was tenant under him."—*Held*, on a construction of the deed, that for the purposes of taxation the superior and vassal were to stand to one another in the relation of landlord and tenant, and that the feu-duty was to be taken as the rent on which the superior had to pay.

Opinions—That it was not competent to refer to the relations and circumstances of the parties at the time when the feu-charter was granted, as explained in previous deeds.

Smith, Laing, & Coy., flax-spinners at Russell Mill, near Cupar-Fife, brought this action against James Maitland of Lindores, Fife, whereby they asked for a declarator that the defender was bound, in terms of a feu-charter granted by Charles Maitland younger of Rankeillour, dated 5th May 1814, to free and relieve them of all poor-rates imposed on or paid by them from 15th October 1856, or to be imposed on them in respect of the property of the subjects at Russell Mill conveyed in the feu-charter, and belonging to them. There was a further conclusion for payment of £35, 11s. 3d., being the sum they had paid as poor-rates, less six half-years' feu-duties, of which they had withheld payment from the defender in respect of their claim for reimbursement of poor-rates.

By the feu-charter above mentioned Charles Maitland, on the narrative that he was heritable proprietor of the mills and lands thereinafter disponed, and in consideration of the feu-duty thereinafter mentioned, sold, alienated, and in feu-farm disponed to George Moon, yarn-spinner at Russell Mill, "All and Whole the corn, barley, and lint mills of Russell Mill, now converted into a flax spinning-mill, with the houses and yards belonging thereto; also the ground adjoining to the said mills, consisting of about two acres, and the haugh, the whole of which lands and mills are now possessed by the said George Moon, with full power and privilege to the said George Moon and his foresaids to erect houses, mills, and every other kind of buildings and machinery upon the grounds and river hereby feued; and to hold all and sundry the mills, lands, and others above disponed by the said George Moon and his foresaids of and under me the said Charles Maitland, and my heirs and successors whomsoever, as their immediate lawful superiors of the same, in feu-farm, fee, and heritage for ever, giving yearly the said George Moon and his foresaids for the saids mills, lands, and others above disponed to me and my foresaids, immediate lawful superiors of the same, the sum of £36, 15s. sterling in name of feu-farm duty, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment at Whitsunday 1812, and the next payment at Martinmas thereafter, and so furth, yearly and termly thereafter, during the existence of the present feu-right, but always with and under the following express declarations, and not otherways:—*First*, That the vassal for the time being shall keep the mill-dam and mill-lead always in good order, and buildings at all times on the lands hereby disponed of the value of £150 sterling, and in case of the irritancy of the present feu-right in any manner whatever, the vassal shall put the whole houses, mills, and others, standing at the period of his removal, although exceeding in value the foresaid sum of £150 sterling, in a tenantable order and condition. *Secondly*, That if two full years' feu-duty shall remain unpaid after the term of payment thereof, then this present feu-right shall, in the option of the superior, cease and determine without any process of declarator for that effect, and it shall not be lawful to purge this irritancy at the bar. *Thirdly*, That during the existence of the present feu-right, all public and parochial burdens or taxes, imposed or to be imposed, shall be paid by the superior and vassal, as if the former was proprietor and landlord, and as if the latter was tenant under him. *Fourth*, That these declarations shall be inserted in the infeftment to follow hereon, as well as in every subsequent precept of sasine and infeftment that may be granted of and taken over the said mills, lands, and others, otherways such precept and infeftments, and deeds following thereon, shall be null, void, and of no effect." Moon was infeft on the feu-charter, the instrument of sasine in his favour being dated 7th, and recorded 11th, May 1814.

The pursuers acquired the subjects and others described in the charter in 1856, and obtained entry on 15th October of that year. At that time, and until March 1865, when she died, Lady Maitland, as liferentrix of the subjects in question under the trust-disposition and settlement of her husband, had drawn the whole feu-duties. The said subjects, by the same deed, were destined to the present defender in fee, and from the date of Lady Maitland's death he was in receipt of the feu-duties.

The annual value of the subjects feued by the charter did not at its date exceed £36, 10s., but the erection of extensive works and machinery had increased the value to about £400.

The defender upon record made offer to relieve the pursuers of a proportion of poor-rates payable by the landlord corresponding to a rent of equal amount with the feu-duty, *i.e.*, of £36, 15s.

The defender pleaded, *inter alia*,—"(1) The conclusions of the action are not warranted by the terms of the feu-charter upon

which the pursuers found, and the defender is entitled to absolvitor. (2) According to a sound construction of the said feu-charter the defender, as superior, is not bound to relieve the vassals of taxes payable by the landlord upon a rent exceeding the amount of the feu-duty, and the defender, having offered to pay a proportion of poor-rates effeiring thereto, is entitled to be assoilzied, with expenses. (3) The pursuers' claim is untenable, being inconsistent with the intention of the parties to the said feu-charter, as evinced by the terms thereof, and by the usage following thereon. (4) In any view, the defender is not liable to relieve the pursuers of poor-rates for the period prior to March 1865, when he succeeded to the superiority of the subjects feued."

The defender afterwards put into process a minute stating that Russell Mill was originally a corn, barley, and lint mill, which in 1801 was let for 999 years at a yearly rent of £36, 10s. The mill was shortly afterwards converted into a flax spinning-mill; and it having been thereafter judged expedient to change the tenure from a tack to a feu-right, a renunciation by the parties having right was executed, and the landlord granted the feu-charter mentioned above. The tack and deed of renunciation were produced.

The defender having died during the dependence of this action, his heir and executor were sisted as defenders.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 24th June* 1875.—Having considered the cause, finds that the defenders are not liable to pay to the pursuers the sums sued for beyond the proportion thereof, of which payment has been offered, in terms of the answer to article sixth of the condescendence: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds them entitled to expenses, and remits the account thereof when lodged to the Auditor for taxation, and to report.

"*Note.*—The pursuers are the proprietors of Russell Mill flax-mill, Cupar-Fife, and adjoining ground, in virtue of a feu-charter granted by the late Charles Maitland younger of Rankeillour, in 1814, in favour of the late Charles Moon, and titles following, and they occupy the mill and property in carrying on their business. Having paid poor-rates since they acquired the property in 1856, both as proprietors and tenants and occupants, it seems to have lately occurred to them that they had a claim of relief against the superior for the proprietor's or owner's half of these rates. Accordingly, since Whitsunday 1871, they have withheld payment of their feu-duties, and by this action they seek to have the superior found liable to relieve them of the half of the poor-rates leviable in respect of ownership since 1856, amounting, according to the state No. 28 of process, to £143, 17s. 11d. The defender, the late James Maitland (now represented by his heir and executor, who have both sisted themselves as defenders) objected to the claim entirely for the period prior to March 1865, on the ground that Lady Maitland, who had a life-rent of the superiority from 1840 till her death in 1865, drew the feu-duty annually from the pursuers, granting them receipts for the amount; and that the claim, if to be made, was a proper charge against Lady Maitland, and should have been deducted from the feu-duties paid to her. In regard to the period since March 1865, the defender offered to pay a proportion of the owner's or landlord's share of the rates effeiring to a rent of £36, 15s., being the amount of the feu-duty, and disputed his liability beyond this. The pursuers' claim is founded on a clause in the feu-charter of the property in the following terms:—'*Thirdly*, That during the existence of the present feu-right, all public and parochial burdens or taxes, imposed or to be imposed, shall be paid by the superior and vassal, as if the former was proprietor and landlord, and as if the latter was tenant under him.'

"This clause is expressed in unusual and peculiar terms. The vassals, as owners of the property, are of course assessed for all owner's taxes, and being occupants as well as owners they are assessed for the full amount of all taxes, including those in respect of tenancy or occupancy to which the property is liable; but they claim relief under the clause now quoted of all owner's rates.

"In ascertaining the sound construction of the clause, it is plainly competent, and it is desirable, to look at the circumstances in which the parties to the feu-contract were placed when it was entered into; for the language of the deed ought to receive the effect which the parties then intended it should receive, if in the light of the surrounding circumstances it fairly bears the meaning which will give it that effect.

"The history of the property, as appearing from the deeds produced, is this. It was let by the proprietor Charles Maitland, Esq. younger of Rankeillour, in 1801 for 999 years, from Martinmas 1803, at the rent of £36, 15s. The tenant's right belonged in 1814 to the late Mr Moon, who had purchased the tack and subjects in 1811, but without having completed his title. In 1814, the parties having the title to the lease, by renunciation, dated 5th May of that year, on the narrative that 'the said George Moon has been in possession of the said mills and others since Martinmas 1811, and that it has been judged expedient to change the nature of the tenure by which the said possession is held from a tack to a feu-right, and which the proprietor has been so obliging to grant the said George Moon, therefore to enable him to do so, and relieve the property of the said original tack,' the renunciation follows. The feu-right was granted on the same day. It thus appears that the feu-right of 1814 was merely a different form of title substituted for the previous 999 years' lease, which the proprietor agreed to grant as a favour to the tenant, without consideration or advantage. The feu-duty was the same as the old rent, viz., £36, 15s. Keeping this in view, there appears to me to be no doubt as to the true construction of the clause of relief as to public burdens. These burdens are to be divided, or, in other words, the vassal is to have relief, as if the superior 'was proprietor and landlord,' and as if the vassal 'was tenant under him'—that is, so far as burdens are concerned, as if the relation which existed between the parties under the lease still continued, and the vassal were paying a rent of £36, 15s. in place of a feu-duty of that amount.

"Such clauses of relief are strictly construed. The pursuers must show that the relief they ask is distinctly given by the language used. Even

without the light furnished by the previous history of the property derived from the deeds produced, I do not think the clause would fairly bear the construction put on it by the pursuers, that the superior should relieve them of all owner's taxes. If that had been the agreement, it admitted of being expressed in very simple terms, without any reference to the relation of landlord and tenant. The superior is to relieve the vassal as if he were landlord and the vassal tenant. The relation of landlord and tenant necessarily implies a fixed rent, and the feu-duty supplies the measure of the rent. The clause must, I think, be read as if the words followed at its close 'at the rent herein stipulated as feu-duty;' for the feu-duty is as it were the rent which the parties had in view. The matter is, however, in my opinion made clear when regard is had to the circumstances in which the feu-right was granted, and which quite explain, not only why so peculiar an obligation was undertaken, but give material aid, if that be needed, in the construction of the clause.

"I am further of opinion that as the pursuers recognised Lady Maitland's rights to the liferent income from the superiority, they were bound to retain the poor-rates in making their payment to her, if they intended to enforce such a claim. The right of liferent only gave a claim to the free income or feu-duties, and the pursuers were not entitled to pay more than they owed, and come upon the superior with a claim for sums which were proper deductions to be made annually from the feu-duty."

The pursuers reclaimed, and argued—The Lord Ordinary had proceeded upon the history of the grant, which was incompetent. The feu-contract should be construed on itself alone. The clause in question providing for total relief included the increased value of the subject. If it was competent to go beyond the charter, no further light was given beyond the fact that the subjects were previously held on lease.

Authorities—*Traquair's Trs.* v. *Heritors of Innerleithen*, Dec. 9, 1870, 9 Macph. 234; *Gilmour and Others* v. *Hart*, Dec. 2, 1875, 13 Scot. Law Rep. 105; *Hunter* v. *Chalmers*, July 16, 1858, 20 D. 1311; *Lees* v. *Mackinlay*, Nov. 11, 1857, 20 D. 6; *Paterson's Trs.* v. *Hunter*, Dec. 10, 1863, 2 Macph. 234; *Nisbet* v. *Lees*, June 15, 1869, 7 Macph. 881; *Preston* v. *Magistrates of Edinburgh*, Feb. 4, 1870, 8 Macph. 502.

The defenders argued—The proper construction of the clause was that in regard to taxes the relation of landlord and tenant should subsist. It was competent to refer to the position of parties when the feu-charter was granted if there were ambiguities in the deed itself. For the purpose of the liabilities in question, this deed was to be read as a contract of lease. The purpose of the obligation was that the taxes were to be divided, but the landlord was not to be liable beyond the amount of his rent. According to the pursuer's contention, if the tenant let the subjects, the landlord would have to pay the whole taxes, which was not the intention of the charter. Where there was an absolute relief from taxation, that covered the enhanced value by buildings, and the superior paid the taxes in an absolute obligation accordingly; but here there was division.

Authorities—*Glasgow, Barrhead, and Neilston Railway Co.* v. *Caledonian Railway Co.*, Feb. 10, 1860, 22 D. (H. L.) 1; Hunter on Landlord and Tenant, ii. 291; *Stewart* v. *Duke of Montrose*, Feb. 15, 1860, 22 D. 755, 1 Macph. (H. L.) 25; *Horne* v. *M. of Breadalbane's Trs.*, Jan. 23, 1835, 13 S. 296, 1 Bell 1; *Forlong* v. *Taylor's Exrs.*, April 3, 1838, 3 Shaw and Maclean's App. Cases, 177; *Davidson* v. *Magistrates of Anstruther Easter*, Jan. 28, 1845, 7 D. 342.

At advising—

Lord President—The pursuers here are vassals in a feu-contract, dated the 5th of May 1814, and, being in this position, they bring an action against their superior for the purpose of having it found and declared that he is bound in terms of the deed to free and relieve them and their heirs and successors of all poor-rates from 15th October 1856, imposed or to be imposed, in respect of the property of the subjects at Russell Mill possessed by them, and described in the feu-charter.

This feu-charter is in many respects quite in common form. It dispones to the original grantee a subject described as "All and Whole the corn, barley, and lint mills of Russell Mill, now converted into a flax spinning-mill, with the houses and yards belonging thereto; also the ground adjoining to the said mills, consisting of about two acres, and the haugh, the whole of which land and mills are now possessed by the said George Moon, with full power and privilege to the said George Moon and his foresaids to erect houses, mills, and every other kind of buildings and machinery upon the grounds and river hereby feued." The feued subjects are to be holden "of and under me, the said Charles Maitland, and my heirs and successors whomsoever, as their immediate lawful superiors of the same, in feu-farm, fee, and heritage for ever." The reddendo is of the amount of £36, 15s. yearly, payable at two terms in the year.

So far there is nothing remarkable in the feu-contract, and nothing bearing upon the question to be decided in this action. The only point to be noticed is that power is granted by the vassal to erect houses and mills upon the subjects feued; this, to say the least, is a superfluous clause, as the vassal may exercise this right without a special grant.

But what is remarkable in this charter is found in its later clauses. After all the usual feudal clauses there occurs this one, that sasine is to be given "with and under the reservation before mentioned, as also with and under the following express declarations," and then follow four declarations which are to be inserted in the precept and instrument of sasine, and to be constituted real burdens on the property. These are unusual and remarkable clauses.

The first condition is a peculiar one—(*reads*). So far as regards the first vassal, it is quite intelligible, but when it is contemplated that the right may come to an end, and the vassal be removed, and that, if so, he shall be under obligation to put the buildings in tenantable condition, one cannot help thinking that the clause is one more likely to be introduced into a lease.

When we come to the second condition we are dealing again with a clause which savours much of the quality of a lease, and in the third

condition we find still more and more the terms of a lease and the relation of landlord and tenant.

It is with the construction and effect of this third condition that we are concerned in this action, but it is necessary to keep them all in view, because it is undoubtedly intended that for common purposes this feu-charter shall be dealt with as a lease, so far as is possible consistently with its being a feu-charter. The subject is to to be taken as though it were the subject of a lease, keeping in view the fact that the right is permanent and perpetual, unless destroyed by the diligence of the superior. As regards taxes, the superior is to be dealt with as landlord, and the vassal as tenant. But when these come to be imposed and payment demanded of the poor-rates with which we are specially concerned, the tax is imposed not according to the amount of the feu-duty, but according to the annual value of the *dominium utile* as it would let from year to year. It is the contention of the pursuer that the defender, as landlord, is bound to pay one-half of the poor-rates imposed according to that system. The defender contends that the meaning of parties is that the feu-contract shall be dealt with in the matter of taxation as if it were a lease, and that the feu-duty is to be the rent on which he is to pay, viz., £36, 15s., being the prestation payable annually. If this is to be paid as rent as under a lease, and therefore as a terminable rent, then the result is that the defender will be bound to relieve the pursuers, in so far as he is liable, upon a rent of £36, 15s.—that is, he will be bound to pay as much as if he was landiord under a lease at such a rent.

Between these two contentions we have now to find. As the defender has admitted liability to pay the portion of his share of rates effeiring to the £36, 15s., we have not here to deal with that.

I agree with the judgment arrived at by the Lord Ordinary, but I rest my opinion on the grounds of this feu-contract, and I do not bring in aid of it any of the other deeds on which the Lord Ordinary founds. I have the greatest doubt of the competency of such a course. We are told that the property was held on lease before it was on a feu-right, but it does not follow that the prior lease represents the views of parties. They, on consideration, determined to change the tenure, and it does not seem to me that because it was agreed to substitute this clause from the lease in this part of the deed, that we should in this question have regard to the former document. But taking this deed as regulating the liabilities of parties *inter se* by itself, the fair construction is, that so far as this is a right of property, and therefore a right of perpetuity, the parties are to stand to one another as landlord and tenant of the spinning-mill. So far I adhere to the Lord Ordinary's interlocutor.

Lord Deas — This feu-contract, as your Lordship has said, is a peculiar deed, and I feel that some of the clauses are more like the clauses of a lease than of a feu-contract. In particular, in construing the third of the declarations specified, I agree with your Lordship that in ascertaining what is the extent of the public and parochial burdens of which the vassal is to be relieved, we are to take it as if it were found in a lease, the rent in which is £36, 15s. I think that is the fair and legal construction of the deed taken on the face of it, and in coming to that conclusion we are not interfering with the decisions arrived at in the cases brought before us, of which the case of *Lees* v. *Mackinlay* is one instance. I have had these in view in considering the judgment upon the meaning of the clause relating to public and parochial burdens in the present instance. I am of opinion that we are to deal with this question entirely upon the meaning of this particular deed. It is to operate in the same way as regards taxation as if this was a lease holding.

I do not proceed more than your Lordship does upon the previous deeds, nor upon the considerations which the Lord Ordinary takes into account. Some of these are very doubtful in point of law, and it is safer and better not to rely upon them.

Lord Ardmillan — I concur in the result of the judgment of *absolvitor* pronounced by the Lord Ordinary, and I also agree in your Lordship's remarks.

I cannot rest my opinion on the terms of the previous lease, or on the renunciations, or on any of the documents referred to, apart from the feu-charter of 1814. The rule of law has long been authoritatively settled that such writings, whether before or after the date of the charter, cannot be used for construction of the terms of the charter, which must speak for itself.

I do not think it necessary to express any opinion on the question as to the competency of ascertaining as matter of fact the relations of the parties to each other, and the condition of the parties relative to the subjects conveyed by the feu-charter. It is enough for decision of this case to consider carefully the terms of the charter itself, wherein I think we can find all that is required as materials for judgment.

The structure and terms of the charter are very peculiar. Even apart from the particular clause which your Lordship has read, this deed has a dubious or mongrel aspect, combining strangely the language of a feu-contract with the language of a lease. I need not again allude particularly to the stipulations in regard to buildings at removal, and to the numerous expressions and the numerous provisions and stipulations in the feu-charter, which are more appropriate and suitable to a lease than to a feu-right. Your Lordship has already mentioned them.

But, then, within this deed which has already disclosed so many of the usual relations and usual stipulations of a lease, we find, on reading further, this express and very remarkable declaration: — "*Thirdly*, That during the existence of the present feu-right all public and parochial burdens or taxes imposed, or to be imposed, shall be paid by the superior and vassal as if the former was proprietor and landlord, and as if the latter was tenant under him." On no fair construction of this singular clause can I come to any other conclusion than that expressed by your Lordship, that as regards public and parochial burdens or taxes the parties have agreed that their rights and obligations shall be on the footing that the superior is dealt with as landlord and the vassal dealt with as tenant under him, and of course that the writing which constitutes the relation between landlord and tenant, and which is called a feu-charter, is truly *quoad* this question of the taxes and liability for burdens,

or among them, the free rents, after deducting public and parochial, a species of lease. If the feu-duty of £36, 15s., payable at Whitsunday and Martinmas, is viewed as a rent, that will be in accordance with the obvious intention of the parties, gathering the intention entirely from the deed.

The superior is to relieve the vassal, as if he himself were landlord and the vassal were tenant. The relation of landlord and tenant requires and implies a rent, and here the £36, 15s., payable by the vassal as if he were tenant to the superior as if he were landlord, is truly in the meaning of the charter, and according to the intention of the parties, just a rent. I have no doubt that it was meant to be so, and I think we must hold it to be so. I think that the defender's proposal to pay rates effeiring to a rent of £36, 15s. is a fair and equitable offer, and that the pursuers are not entitled to further relief.

Lord Mure concurred.

The Court adhered.

Counsel for Pursuers—Balfour—Keir. Agents—Webster & Will, S.S.C.

Counsel for Defender—Dean of Faculty (Watson)—Rutherford. Agents—Leburn, Henderson, & Wilson, S.S.C.

Saturday, January 8.

SECOND DIVISION.

SPECIAL CASE—HENDERSON'S TRUSTEES AND OTHERS.

Succession—Testament—Residue—Vesting—Vesting a morte testatoris.

A testator directed his trustees to divide the residue of his heritable and movable estate equally amongst his "children, or the survivors of them, at such times and in such manner" as they might "think proper."—*Held*, in the circumstances, that this direction vested the residue in the beneficiaries *a morte testatoris*, there being in none of the provisions of the deed a postponement of vesting direct or implied.

Succession—Testament—Special Destination—Vesting a morte testatoris.

A testator directed his trustees to "hold for and pay over to" his sons *nominatim*, "whom failing," to their lawful children, the "free rents" of certain houses. In the event of any of the sons dying leaving children, he directed his trustees "to hold and apply the free annual rents of the property hereby directed to be conveyed to such of my said sons for behoof of such child or children until the youngest of them shall attain the age of twenty-five years complete, when the property shall be conveyed to, or, in the option of my said trustees, sold, and the free proceeds thereof shall be divided equally amongst them if more than one." Further, it was declared "that in event of any of my said beneficiaries predeceasing me without leaving lawful issue, the share and interest of my said estates which would have fallen to such beneficiary is hereby declared to form part of the residue of my said estates." None of the testator's sons predeceased him.—*Held* (*diss.* Lord Gifford) that the specially destined subjects vested in the sons *a morte testatoris*.

This was a Special Case, brought by—(1) The trustees of the late James Henderson senior; (2) the widow of James Henderson junior (eldest son of James Henderson senior), as her husband's general disponee; (3) the trustees and widow of the late David Henderson, the original truster's second son; (4) the universal legatee of the third son John Gray Henderson; and (5) the tutors-dative of the second son's two children David and Janetta.

James Henderson senior died on 28th May 1869, leaving a trust-disposition and settlement dated 5th November 1866, by which he conveyed his whole means to the first parties as trustees, for the purposes therein mentioned, viz.:—"To the end and intent that my said trustees and executors may immediately after my decease enter into possession of my estates, heritable and movable, real and personal, generally before conveyed, and, if they consider it necessary and expedient, may, as soon thereafter as convenient (except the subjects hereinafter directed to be specially disponed), sell, dispose of, and convert the same into money," and to hold and apply the premises and prices and proceeds thereof for the following purposes:—*First*, To make payment of his debts, &c. *Second*, Legacy of stock, furniture, and fittings, and goodwill of his business and lease of the premises, subject to trade debts, to his son John Gray Henderson. *Third*, An annuity of £150 to his widow, the said Mrs Agnes Henderson, "payable out of the free income of my said estates, heritable and movable, at the terms," &c. "In the *fourth* place, I direct and appoint my said trustees . . . after making provision for the current expenses of carrying on the said trust . . . to divide the surplus annual income of all of my said heritable and movable estates equally among my children after mentioned, and that at such times and in such manner as to them may seem proper, and in the event of the death of any one or more of my said children leaving lawful issue, such lawful issue shall be entitled to receive the share of said surplus which would have fallen to his or her parent had such parent survived, and upon the death of my said spouse, or should she predecease me, upon my decease my said trustees shall hold for and pay over to my said son James Henderson, whom failing, to his lawful children, equally between or among them, the free rents, after deducting interest on bonds and all other charges, of that tenement of land belonging to me, situated in Florence Street, Hutchesontown, Glasgow, and in the said event I also direct and appoint my said trustees to pay over to my said son David Henderson, whom failing, to his lawful children, equally between or among them, the free rents, after deducting as aforesaid of that property belonging to me, situated in William Street, Anderston, Glasgow; and further, in said event, I also direct my said trustees to pay over to my said son John Gray Henderson, whom failing to his lawful children, equally between