24th section is that payment means not merely that money should be taken out of one man's pocket, but also that it should be put into another's. For in that case the money might be spent and never seen again, and it is in order to prevent this that appeals are competent against *interim* decrees for payment.

The Court refused the appeal as incompetent.

Counsel for Pursuer (Respondent)—H. Johnston. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Defender (Appellant) — Shaw. Agent—George Andrew, S.S.C.

Tuesday, June 1.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

EDMONSTONE AND ANOTHER *v.* JEFFRAY AND OTHERS.

Superior and Vassal—Declarator and Removing—Possession without Title.

Held that a mere right of superiority was sufficient foundation for obtaining decree of declarator and removing against persons who, although they had possessed the subjects in dispute for the prescriptive period, could exhibit no title from a vassal.

Sir William Edmonstone, Bart., was admittedly superior of, and as such infeft in the estate and barony of Kilsyth, including the lands of Barrwood.

These lands of Barrwood, were, when the ground on which the Old Town of Kilsyth was built was feued out in 1679 and subsequent years by Viscount Kilsyth, given out in proportional parts to the feuars, each along with his steading of ground. The feuars were duly infeft in the proportions of the lands conveyed to them, and they were for long enjoyed in common property.

By redeemable disposition, dated May 1748, Daniel Campbell of Shawfield, in consideration of the sum of £57, 3s., sold and disponed to James Marshall, his heirs, successors, and assignees, a tenement in Kilsyth, "together with a privilege or servitude in the Barrwood," redeemable on the 11th November 1827. Marshall took infeftment, and after sundry transmissions part of the subjects and the corresponding right in Barrwood came to be held by Mr William Corbett.

In 1750 the proprietors of the lands of Barrwood agreed to divide the arable portion of the lands of Barrwood, and in December 1808 a process of division was raised in the Court of Session by them for the purpose of carrying through a division. No decree was pronounced, but it was admitted in this action that the lands were in fact divided according to a scheme of which a plan was extant and was produced. After that agreement the lots were held as the exclusive property of the feuars to whom they were allotted. Most of the holdings were for the last thirty or forty years or longer, prior to this action, held on titles containing a particular description of the lot, or portion of a lot, to which they belonged, but in some cases the proprietors possessed on their former *pro indiviso* title as defined by the possession of a divided portion. Lot 39 in the division was allocated—"To Mason's Lodge, No. 29 in Kilsyth, one-third, Henry Corbet, farmer, Donovan Hill, one-half, and Widow Millar, *alias* Jean Welsh, in Kilsyth, one-sixth." Henry Corbet, with consent of the person who had sold the redeemable right to William Corbet but had not granted a conveyance in consideration of a sum paid him by Sir Archibald Edmonstone, renounced, acquitted, and over gave to him part of the foresaid tenement in Kilsyth together with the privilege and servitude of Barrwood corresponding.

On 9th November 1871 a Mrs Agnes Donald or Russell, who alleged that she and her father William Donald, overseer on the Kilsyth estate, had possessed the ground in lot 39 for over fifty years though not on a written title, granted a disposition of it to Robert Hamilton, who subsequently conveyed the ground to James Jeffray and others as trustees. These latter conveyed the minerals on the ground to William Weir and others as trustees for behoof of William Baird & Co.

In these circumstances Sir William raised this action to have it declared that he was proprietor of the whole ground contained in lot 39, together with whole minerals underneath the same, and to have decree of removing therefrom against the defenders, and further, so far as necessary, to reduce (1) the disposition of the subjects by Mrs Agnes Donald Russell in favour of Robert Hamilton; (2) the trust-disposition conveying the subjects from Hamilton to James Jeffray and others, his trustees; and (3) the conveyance of the minerals under the ground by these trustees to William Baird & Co.

He relied (1) upon his superiority title, and (2) upon the singular title above set forth, whereby he contended that he had re-acquired the *dominium utile* of the plot of ground in question.

Jeffray and others defended the action and pleaded—"(1) No title to sue. (2) The pursuers' statements are irrelevant and insufficient to support the conclusions of the summons."

A proof was led upon the latter point, in which the pursuers succeeded in establishing by reference to estate books an identity between the disputed subjects and a lot allocated in the division of the commonty to Henry Corbett, whose *pro indiviso* right was acquired in 1828 by Sir Archibald Edmonstone.

The Lord Ordinary (KINNEAR) found and declared, decerned and ordained, and reduced in terms of the whole conclusions of the summons.

"*Opinion.*—The pursuer is admittedly superior of the lands of Barrwood, which include the piece of ground in dispute, and the defenders claim to hold under him by virtue of a feu-right derived from one of his predecessors. They have no title earlier than the disposition of 1871, which the pursuer seeks to reduce, and the granter of which had admittedly no title.

"But the lands of Barrwood, of which the piece of ground in dispute is a portion, were held in common by feuars in the town of Kilsyth, under rights derived from Lord Kilsyth, the pursuers' predecessor. In 1808 a process of division of the commonty was instituted in the Court of Session; and although no decree was pronounced, the parties are agreed that the land was in fact divided, according to a scheme of division and allotment which is shewn upon a plan produced

in process, and that the lots so divided were thereafter held as the exclusive property of the feuars, to whom they were respectively allotted, and their successors. It is further admitted that although most of these holdings have for thirty or forty years, or longer, been held under separate titles, others have been possessed by the proprietor on their former *pro indiviso* titles alone, and the defenders allege that the subject in question has been held in this manner. They say that no attempt was made to make up a title to this subject as a separate property until the disposition of 1871 was executed for that purpose; but that, nevertheless, it was in fact allotted to one of the feuars under the agreement above mentioned, that it has been possessed as their exclusive property by him and his successors, and that they themselves derive right by a series of transmissions from this original allottee. If the case so averred had been established in fact, I should not have attached much importance to the absence of a written title in the defenders, because they would in that case have been enabled to connect their possession with a *pro indiviso* title—good against the pursuer; and defects in their separate title might still have been obviated, if that were thought necessary. But they have entirely failed to trace their possession to any right derived from feuars who were parties to the agreement for division, or held before the division under a *pro indiviso* title to the commonty. They shew that before the period of prescription the subjects were in the possession of a person named Donald. But there is nothing to shew that he had acquired right from a feuar, or that he was possessing by virtue of any title whatever. The evidence, so far as it goes, seems to support the pursuers' case—that he was a mere occupant by permission of the superior. For I think the pursuer has succeeded in identifying the disputed subject with a lot allocated in the division of the commonty to a person of the name of Corbett, whose *pro indiviso* right was acquired in 1828 by Sir Archibald Edmonstone. The result is, that the defenders have been unable to produce any title to support their possession; and in the absence of any competing title the pursuers must prevail."

The defenders reclaimed, and argued—The pursuer had failed to establish the singular title which the Lord Ordinary had sustained. Though he was admittedly superior, that title alone was not sufficient to ground decree of removing as against the defenders, who had acquired from persons who had possessed the ground for more than the prescriptive period, though they had no written title, and could not connect themselves with any vassal.

Authorities referred to—*Baird & Company* v. *Feuars of Kilsyth*, November 1, 1878, 6 R. 116; Stair, ii, 4, 3; *Laird of Lagg*, M. 13,787; Bell's Prin. 689.

Counsel for pursuers was not called upon.

At advising—

Lord Justice-Clerk—Mr Dickson pleaded his case very skilfully, but he came round to the result at which the Lord Ordinary had arrived, namely, that he had no title. It is left a matter of complete uncertainty what was the real nature of the title upon which he possessed. But I am of opinion that the superior is here within his right. I quite understand that if it could be shown that the pursuers' ground had been given out, and had never been re-acquired by him, there might have been a question how far the heirs of the feuar would be entitled to resist this demand. But the defenders have failed to connect themselves with any feuar or to show any feudal title at all. They cannot therefore raise such a question. I am of opinion that apart from any question as to whether the superior has re-acquired the *dominium utile*, his admitted title as superior is sufficient to justify a decree of removing against the defenders. I think the interlocutor of the Lord Ordinary should be affirmed.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Court adhered.

Counsel for Respondents—Graham Murray—Dundas. Agents—Russell & Dunlop, C.S.

Counsel for Defenders — Gloag — Dickson. Agents—Maconochie & Hare, W.S.

Wednesday, June 2.

SECOND DIVISION.

[Lord Trayner, Ordinary.

CRAIG *v.* CRAIG'S TRUSTEES.

Succession—Vesting—Words held not Sufficient to Exclude Vesting a morte testatoris.

A truster, who died in 1877, by his trust-deed bequeathed *inter alia* certain legacies to his children, and the residue of his estate to his sons and the heirs of their bodies equally, including *per stirpes* the lawful children of any son who might have predeceased, declaring as regarded the date of setting apart or payment of the legacies that his trustees should, at the first term after the expiry of six months from his death, pay or set aside for investment such a proportion of each of the pecuniary legacies as the personal estate should yield, the balance to be paid or set aside for investment at Martinmas 1883 should he predecease that term, "declaring that none of my said children or of their issue shall have any right to sell, or dispose of, or assign, or alienate their shares of or interest in the said fund before it is divided." One of the sons died in 1881. *Held* that both his legacy and his share of residue had vested *a morte testatoris*, and that they fell to be computed in ascertaining his widow's *jus relictæ*, the words quoted being applicable to deeds *inter vivos*, and not such as struck at *mortis causa* deeds, and therefore not such as to exclude vesting.

On 10th November 1884, Mrs Craig, widow of the late Archibald Craig of Birdsfield, Blantyre, who died in February 1881, raised an action against the trustees of her deceased husband for the amount of her husband's estate falling to her *jure relictæ*. She was met by pleas (1) of acquiescence and *mora*; (2) of her election to take benefit under her late husband's trust-disposition and settlement.

The Lord Ordinary (Trayner) repelled these pleas, and appointed the case to be put to the roll for further procedure.