At advising—

LORD JUSTICE-CLERK—In this case I agree with the Lord Ordinary that there is no need for a counter issue, and I am of opinion that the issue adjusted by the Lord Ordinary is a sufficient issue for the trial of this case.

I am decidedly against putting into any issue what is not necessary—pressing in points to which the jury's attention is desired to be drawn. All such matters are more properly left to the direction of the Judge.

LORD RUTHERFURD CLARK—I also think that there is no necessity for a counter issue.

Of course if the notice complained of is only a true report of the proceedings the defenders must necessarily prevail. It would be impossible to hold in that case that the publication is false or calumnious, but that I agree is a matter of direction for the Judge at the trial, and not for the issue.

LORD LEE—I do not differ at all. With regard to not putting anything unnecessary in the issue I entirely concur, but I think we may decide there should be no counter issue, on this ground alone, that the issue for the pursuers, as now framed, is sufficient to raise the question whether the words were falsely and calumniously reported, not merely that they were false and calumnious in themselves. But on the understanding that that question is raised by the issue, it is unnecessary to put in anything more.

The Court approved of the issue and disallowed the counter issue.

Counsel for the Pursuers—Graham Murray—Ure. Agents—Smith & Mason, S.S.C.

Counsel for the Defenders Outram & Company—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders Gunn & Cameron—Comrie Thomson—Wm. Campbell. Agents—J. & J. Galletly, S.S.C.

Wednesday, July 17.

SECOND DIVISION.

DUTHIE'S TRUSTEES *v.* FORLONG.

Succession—Trust—Direction to Hold or Invest—Right of Beneficiary to Immediate Payment.

A lady in her trust-disposition and settlement left the residue of her estate to certain persons, named equally—"The said shares of residue to vest at my death; declaring that the share falling to any of the said residuary legatees who are females, and may be married at the time of my death, shall be held by my said trustees, or invested for their behoof, exclusive of the *jus mariti* of their then or any other husband they may afterwards marry, and the annual produce of said share of residue paid to said legatee during her life, and at her death the principal sum shall be paid to her heirs or executors."

Held that the shares of female married residuary legatees vested in them, and that the trustees were not entitled to retain such shares, the declaration above quoted being void for repugnancy.

Miss Elizabeth Crombie Duthie died on 30th March 1885, leaving a trust-deed of settlement dated 7th July 1877 with several codicils thereto. By one of these codicils of 27th September 1877 Miss Duthie, after directing her trustees to pay certain legacies, bequeathed the residue of her estate to a number of individuals named equally, the said shares of residue to vest at the death of the testatrix, "declaring that the share falling to any of the said residuary legatees who are females and may be married at the time of my death shall be held by my said trustees, or invested for their behoof, exclusive of the *jus mariti* of their then or any other husband they may afterwards marry, and the annual produce of said share of residue paid to said legatee during her life, and at her death the principal sum shall be paid to her heirs or executors."

In winding up the estate a question arose as to the effect of this declaration regarding the shares of the residue falling to the females who were married at the time of the death of the testatrix, and a special case was accordingly presented.

The second party, who was one of such female residuary legatees, maintained that it imported an absolute right of fee, which became vested in her, exclusive of the *jus mariti* of her husband, as at the death of the testatrix, and that she was consequently entitled to have the capital sum falling to her at once paid over in cash.

The trustees, who were the first parties, considered that they were not in safety to comply with the demand of the second party, but that they were bound to hold or invest the shares of residue bequeathed to female married legatees for their behoof, and to pay over to them only the annual produce of such shares respectively during the lifetime of the party entitled thereto.

The following were the questions—"(1) Are the parties of the first part entitled or bound to make immediate payment in cash to the party of the second part of the share of residue bequeathed to her under the said trust-deed of settlement and codicils? Or (2) Are the parties of the first part bound to hold the capital of the said share of residue until the death of the second party, paying to her in the meantime the annual proceeds, and on her death to make over the capital to her heirs or executors?"

Argued for the first parties—The case was ruled by the recent case of *Christie's Trustees*, July 3, 1889, *supra* p. 611. It was true that there was here an alternative given to the trustees, either of holding or of investing the shares of married female residuary legatees, but the alternative of investing was ruled adversely to the second party by the former case of *Duthie's Trustees* v. *Kinloch*, June 5, 1878, 5 R. 858. There was here no direction to pay, nor anything that could be construed into a direction to pay, and consequently the case was not within the rule of *Allan* v. *Allan's Trustees*, December 12, 1872, 11 Macph. 216, and the recent case of *Jamieson* v. *Lesslie's Trustees*, May 28, 1889 *supra* p. 538.

The second party was not called on.

At advising—

LORD JUSTICE-CLERK—I think that this case is ruled by that of *Jamieson*, not that of *Christie*.

LORD YOUNG—I am of the same opinion. I think that this lady must have her money, but I am not surprised that the trustees should have brought this case into Court. Indeed it was their duty to do so. It is a very nice question. A very small difference of expression determines the point whether a direction intended for the benefit of the proprietor shall be disregarded as repugnant to the truster's intention, or whether it is operative and may be carried out. If the property is given to anyone, any direct mode of dealing with it would generally be void for repugnancy. It is generally repugnant to the benefit given. On the contrary, there are cases, of which *Christie's* may be taken as an example, although not by any means a perfect one, where the giver may constitute a protection by keeping the fund out of the hands of the object of his bounty, and putting it under the care of managers of his own appointment. There are such cases in which it would certainly be operative, but here there is no operative restraint upon the proprietor. I think the property is here distinctly and absolutely given, and that the restriction as to exclusion of *jus mariti* and preserving the capital for the beneficiaries' own heirs and executors are not operative, and cannot be given effect to. They are repugnant to the gift proper.

LORD RUTHERFURD CLARK and LORD LEE concurred.

The Court pronounced this interlocutor:—

"Answer the first of the questions stated in the case in the affirmative, and the second question in the negative: Find and declare accordingly."

Counsel for the First Parties—Dundas. Agents—Scott Moncrieff & Trail, W.S.

Counsel for the Second Party—Jameson—Fraser. Agent—F. J. Martin, W.S.

Thursday, July 18.

SECOND DIVISION.

(WHOLE COURT.)

HARINGTON STUART *v.* HAMILTON.

Superior and Vassal—Non-Entry—Casualty—Conveyancing Act 1874 (37 *and* 38 *Vict. cap.* 94)—*Composition—Relief.*

John Hamilton of Rodgerton, who was entered with the superior, in 1804 disponed these lands to James Hamilton, who, when summoned to enter, tendered the heir of the disponer, John Hamilton of Greenbank, who was infeft on a precept of *clare constat*. James Hamilton died in 1854, leaving a settlement of the lands in favour of James Dunlop Hamilton, the second son of John Hamilton of Greenbank, and the trustees under the settlement when called upon to enter tendered the heir of the last entered vassal, John Hamilton junr. of Greenbank, who was infeft on a precept of *clare constat*.

John Hamilton junr. conveyed the lands with an *a me vel de me* holding to his brother James Dunlop Hamilton, who held base of his brother down to the passing of the Conveyancing Act 1874. John Hamilton junr. died in 1877. James Dunlop Hamilton died in 1886, leaving a settlement of the lands in favour of his brother William Dunlop Hamilton, who was infeft thereon, and who was the heir-at-law both of the disponer and of John Hamilton junr., the last entered vassal who paid a casualty.

In an action against him by the superior—*held*, by a majority of the whole Court (following the case of *Ferrier's Trustees* v. *Bayley*, May 26, 1877, 4 R. 738), that a new investiture came into existence with the implied entry of James Dunlop Hamilton in 1874, and that the defender was liable in a casualty of composition.

Robert Edward Stuart Harington Stuart of Torrance, Lanarkshire, as superior of the lands of Wester Rodgerton and Highflatt in that county, sued William Dunlop Hamilton, his vassal in these lands, for payment of a casualty of composition in consequence of the death on February 27, 1877, of John Hamilton of Greenbank, Mearns, the vassal last vest and seised in the lands.

The late John Hamilton of Rodgerton, grandfather of the defender, and holding the lands in question of and under the pursuer's predecessors as their vassal, disponed the lands to James Hamilton, writer in Glasgow, by a disposition dated 27th January 1804. James Hamilton was never infeft on the said disposition. When called upon to enter with the pursuer's immediate predecessor as his superior he induced the eldest son of John Hamilton of Rodgerton, John Hamilton of Greenbank, Mearns, to enter in his stead as heir-at-law, and he was infeft upon a precept of *clare constat* in 1838.

James Hamilton died in 1854, leaving a trust-disposition and settlement dated 19th July 1854, the purpose of which, so far as regarded these lands, was to convey them to James Dunlop Hamilton, writer in Glasgow, the second son of John Hamilton of Greenbank. John Hamilton being also deceased, the trustees acting under said trust-disposition and settlement, instead of completing a feudal title in their own persons, induced his eldest son and heir-at-law, the late John Hamilton the second of Greenbank, to enter in the lands. He accordingly obtained a precept of *clare constat*, and was infeft thereon.

John Hamilton second of Greenbank, as heritable proprietor feudally vested in the lands, and in implement of the first named disposition, and of James Hamilton's trust-disposition and settlement, conveyed the lands to his brother James Dunlop Hamilton by a disposition dated 8th and recorded 9th August 1860.

James Dunlop Hamilton died upon the 31st May 1886, leaving a general disposition and settlement in favour of William Dunlop Hamilton, his brother, the defender, dated 28th May and recorded 8th June 1886. The defender was infeft in the lands conform to notarial instrument in his favour.

The pursuer averred that in virtue of the disposition by John Hamilton to James Dunlop Hamilton in 1860, and of the provisions of the