Whitsunday 1886, when the rent of the first half of the year, commencing at Martinmas 1885 and Whitsunday 1886 respectively, being £50, became payable, which rent, less £1, 12s. 2d. for insurance, and £4, 8s. for loss caused by mineral workings remains due and unpaid: Therefore sustains the appeal: Recal the interlocutor of the Sheriff appealed against: Of new ordain the defender to make payment to the pursuer of the sum of £43, 14s. 10d., with interest as libelled, reserving to the defender all action competent to him against the pursuer for all or any of the sums alleged by him to be due to him by the pursuer, and the pursuer's answer thereto: Find the pursuer entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Pursuer — Low — Macfarlane. Agent—George Mill, S.S.C.

Counsel for the Defender—Shaw—M'Lennan. Agent—W. & F. C. M'Ivor, S.S.C.

Tuesday, December 10.

FIRST DIVISION.

THOMSON AND OTHERS (SIMPSON'S TRUSTEES) *v.* SIMPSON AND OTHERS.

Succession — Trust — Heir ab intestato— Residue.

A testator directed his trustees, after paying certain annuities and legacies, to dispone and convey the liferent of the remainder of his trust-estate to his daughter whenever she attained to twenty-one years of age, but for her liferent use allenarly, and to the heirs of her body in fee, share and share alike; and failing his daughter and the issue of her body, the trustees were directed to convey the fee of the residue of the trust-estate to certain trustees for charitable purposes. The annuities and legacies had long been satisfied, and the trustees, without conveying the liferent as directed, had continued to administer the estate for the benefit of the testator's daughter, who had attained the age of fifty-eight.

Held that the charity trustees were only entitled to take benefit under the deed if the testator's daughter had failed before attaining twenty-one years; that as she had survived that period, the trustees were bound to convey the estate to her in liferent, and to her heirs in fee; and that failing the daughter and her heirs, the succession passed to the heirs *ab intestato* of the testator.

The late James Simpson, merchant in Haddington, died on 23rd April 1843, predeceased by James, his son by a former marriage, and by his second wife, and survived by Jean, his only child of the second marriage, who was at the date of this case fifty-eight years of age, and unmarried.

The testator by the third, fourth, and fifth purposes of his trust-disposition and settlement provided certain legacies and annuities for various members of his family.

The seventh purpose was in these terms—"I hereby direct my said trustees, after paying and satisfying the foresaid annuities and legacies, to dispone and convey the liferent of the remainder of my said trust-estate and effects to and in favour of my said daughter Jean Simpson, the only child of my present marriage, and to any other child or children which may yet be born of that marriage, and the survivors of them, equally between them, whenever she or they respectively attain to twenty-one years of age, but for the liferent use allenarly of the said Jean Simpson and such other children of my present marriage as may yet be born, and exclusive of the *jus mariti* and right of administration of the husband of the said Jean Simpson if she marries, and the husbands of any other daughters who may yet be born to me as aforesaid, and to the heirs of her and their bodies respectively in fee, share and share alike; whom failing to the lawful issue of the body of my said son James, equally among them; and failing my said daughter Jean and the issue of her body, and issue of the body of my said son James, I direct my trustees to convey the fee of the residue of my said trust-estate to the minister of the first charge in the Established Church of the parish of Haddington, the Chief Magistrate of Haddington, the Convener of the Incorporated Trades of that town, the town-clerk of Haddington, and the session-clerk of the Established Church of Haddington, all for the time being, and to the said John Richardson if alive at the time, and to the acceptors or acceptor of them, declaring the majority accepting to be a quorum, but in trust only for the ends and purposes following, viz.—In order that these last-mentioned trustees may apply the free proceeds of the said residue of my trust-estate in perpetual charity, in paying to such a number of poor, infirm, and destitute men, at the rate of £8 per annum each, and an equal number of poor, infirm, and destitute women, at the rate of £6 per annum each, all resident in the burgh of Haddington, as my trustees or quorum of them may select and think fit objects of charitable aid, and as the said free proceeds shall afford to maintain at these rates."

The trustees applied the income of the trust-estate which was vested in them for the benefit of Jean Simpson.

A portion of the trust-estate, consisting of house property in Park Street, Edinburgh, recently fell to be conveyed under statutory powers to the Edinburgh University Endowment Trustees, and in order to avoid the necessity for proceedings under the Lands Clauses Act of 1845 an agreement was made for sale of the subjects at the price of £500, in exchange for a proper conveyance by the parties interested in Mr Simpson's trust-deed. The agent for the University Trustees, however, expressed an opinion that under the circumstances of the estate the fee could not vest in the trustees.

for charitable purposes, but belonged either to Miss Simpson and her heirs or to the heir-at-law of James Simpson, the truster, and the University Trustees, under the Lands Clauses Act, consigned the price in bank, amounting to £510, subject to the orders of the Court.

In consequence of the difficulties which arose regarding the disposal of the fee of the trust-estate under the residuary provision contained in the seventh purpose of the deed, the present special case was presented by (1) the testamentary trustees, (2) Jean Simpson, (3) the heir-at-law and next-of-kin of the testator, (4) the charity trustees referred to in the seventh purpose of the deed.

The second party maintained that the trustees of her father were bound to "dispone and convey the liferent of the remainder of the said trust-estate" to and in favour of her and the heirs of her body, in terms of the first direction contained in the above provision for disposal of the residue. The third parties, the representatives on intestacy of the testator, claimed the fee on the ground of failure of the heirs of Miss Simpson's body. The fourth parties, who were *ex officio* trustees for the charitable purposes mentioned in the subsequent destination in the residuary clause, maintained alternatively that the first parties were bound to hold the fee, as hitherto, for Miss Jean Simpson's liferent use allenarly, exclusive of the *jus mariti* and right of administration of her husband if she married, and at her death without heirs of her body (James Simpson junior having already predeceased without issue) to convey it to the fourth parties, in terms of the subsequent destination; or otherwise, that the first parties were bound to dispone and convey the remainder of the said trust-estate to and in favour of the second party Jean Simpson, for her liferent use allenarly, and exclusive of the *jus mariti* and right of administration of her husband if she married, and to the heirs of her body; whom failing to the fourth parties and their successors in office, as trustees for the ends, uses, and purposes mentioned in the said seventh purpose of the said settlement, in fee.

The following questions were submitted to the Court—"(1) Are the first parties bound to grant to the second party in liferent, and to the heirs of her body in fee, a conveyance in terms of the first part of the seventh purpose of the trust-disposition and settlement? (2) If the first question be answered in the negative, are the third parties, or any and which of them, entitled to the fee of the trust-estate? (4) Are the first parties bound to hold the trust-estate until the death of the second party, and thereupon to convey it to the fourth parties for the purposes mentioned in the seventh purpose of the settlement? or otherwise, are the fourth parties entitled, under the seventh purpose of the settlement, to a present conveyance of the fee, subject to the liferent of Jean Simpson, and subject also to defeasance of the fee in the event of her leaving heirs of her body?"

Argued for the second party—The first parties ought to have executed a conveyance in favour of the second party on her attaining twenty-one years of age, and their not having done so could now prejudice her rights—*Ferguson* v. *Ferguson*, March 19, 1875, 2 R. 627. Her right was one of liferent to herself, the fee being destined to the heirs of her body. She was prepared to grant all necessary discharges in favour of the first parties, and the form of disposition should be as in the case of *Beveridges* v. *Beveridge's Trustees*, July 20, 1878, 5 R. 1116.

Argued for the third parties—There was here a failure of the heirs of Miss Simpson's body. She was fifty-eight years of age and unmarried, and the parties entitled to the fee were the parties of the third part—*Lord* v. *Colvin*, July 15, 1865, 3 Macph. 1083. The parties of the fourth part were only to be entitled to take under the deed in the event of Jean dying before attaining twenty-one. This event had not occurred, and they were practically out of the present case. In construing the deed, not merely the intention of the testator but his powers had to be kept in mind. The parties entitled to the fee were the heir and next-of-kin of the testator—*Love's Trustees* v. *Love*, December 19, 1879, 7 R. 410; *Stewart* v. *Rae*, January 18, 1883, 10 R. 463; *Douglas* v. *Thomson*, January 7, 1870, 8 Macph. 374.

Argued for the fourth party — The testator's intention was to give a liferent of his estate to his daughter Jean, and to any other children of the second marriage, and the fee to Jean's issue and to that of any other children of the second marriage, whom failing to James' issue, and failing all them to the charity trustees. Jean was fifty-eight, and unmarried. James had predeceased without issue, and nothing intervened between the charity except Jean's liferent. What the fourth parties claimed was the fee, so Jean's rights were fully protected. The fourth parties were entitled to the fee, subject to defeasance in the event of Jean having issue—*Steel* v. *Steel*, December 12, 1888, 16 R. 204.

At advising—

LORD PRESIDENT—There are two parties who are specially interested in the result of this special case—one of them is Jean Simpson, who is the daughter of the testator by his second marriage, and the other is the heir and next-of-kin of the testator, who claims to take through intestacy. There is also a third set of claimants, namely, certain trustees for a charity, who in the event of certain circumstances occurring are created by the seventh purpose of this trust-deed. Now, this seventh purpose begins by a direction to the testamentary trustees "to dispone and convey" the liferent of the remainder of his trust-estate to his daughter Jean Simpson, the only child of his second marriage, and to any other child or children which might yet be born of that marriage, and the survivors of them, equally between them, whenever she or they respectively attain to twenty-one years of age, but for the liferent use allenarly of the

said Jean Simpson and such other children of his second marriage as might yet be born, and exclusive of the *jus mariti* and right of administration of the husband of the said Jean Simpson if she married, and the husbands of any other daughters who might yet be born to him as aforesaid, and to the heirs of her and their bodies respectively in fee, share and share alike, whom failing to the lawful issue of the body of my said son James, equally among them.

The introductory words of the seventh purpose are these—"I direct my said trustees, after paying and satisfying the foresaid legacies and annuities"—that is to say, the legacies and annuities provided by the preceding purposes of the trust-deed—"to dispone and convey." But these annuities have long ceased to exist, so, though the trustees never actually executed any conveyance when Jean Simpson reached twenty-one (at which time or shortly thereafter the annuities ceased to exist), yet they were bound by the terms of this deed to have done so. This conveyance ought to have been to Jean Simpson in liferent, and her children in fee.

We are informed that James predeceased the testator without issue, so that he may be regarded as out of the present case. If the trustees had made this conveyance, as they ought to have done, on Jean attaining twenty-one, then it is clear that they could not now be called upon to convey the same subjects over again. But this seventh purpose further provides that failing the testator's daughter Jean and the issue of her body, and the issue of the body of the testator's son James, the trustees were to convey the residue of the trust-estate to certain persons named as trustees for the charity I have already referred to. If these charity trustees are to take any benefit from this bequest it can only be as disponees of the testamentary trustees, but how can they in any sense be disponees of estate which must be held to have been already conveyed to other parties?

An attempt has no doubt been made by these charity trustees to show that in the conveyance to Jean Simpson and her issue they were entitled to be substituted in the event of the failure of the institutes, but it seems to me that the language of the clause is much too clear to admit of any such contention. The words are—"And failing my daughter Jean and the issue of her body." Now, what is the meaning of these words? They mean this, I think, that while Jean takes in terms of the disposition she can only take in the event of certain conditions being fulfilled. She must attain twenty-one years, and in the event of her predeceasing that period she can neither take any benefit for herself or her children under the deed. In that event—and in that event alone—the charity trustees are to be entitled to take. I think that the testator's intention on this matter is quite clear, and that it is very difficult to read, the main clause of this purpose in any but one way, viz., a bequest to Jean and her issue, whom failing to the issue of James, but if Jean fails to attain twenty-one years, then the charity trustees are to come in. It is clear that both these sets of parties cannot take, and therefore I think that the charity trustees are not in a position to claim in the present case.

The question therefore is as to the parties entitled to take under intestacy, and it appears that the claim of the heir and executors, if it is given effect to, does not in any way affect Jean's right, which is one of liferent only. If she has children they take the fee; if not it goes to the parties of the third part.

LORD ADAM—I am entirely of the same opinion. It is clear that there can only be one conveyance executed by these trustees, and as to the time at which that conveyance fell to be executed there cannot I think be any doubt. It has been urged by the fourth parties that with a view of preventing this whole fund from falling into intestacy there ought to be read into the seventh purpose of this trust-deed, after the direction to convey to the issue of the testator's son James, a "whom failing" in favour of these charity trustees, but I agree with your Lordship that the language of this seventh purpose is much too clear for any such contention to receive effect.

The date fixed for this conveyance by the trustees is when the legacies are paid, and when Jean Simpson attains twenty-one years of age, and the terms of the conveyance which is then to be executed are very clearly set out in the seventh purpose.

If the event occurs which is then foreseen, then, following the authority of *Lord v. Colvin*, the result is intestacy.

No doubt in certain events the conveyance by the trustees was to be in favour of one set of persons, and in another set of events in favour of other persons, but I am not prepared to read into this provision the words "whom failing," as contended for by Mr Lorimer, in order to enable these charity trustees to take the benefit which will otherwise fall to the heir and next-of-kin of the testator.

Jean Simpson did not fail. She survived twenty-one years of age, and accordingly the testamentary trustees are bound to execute a disposition in her favour as directed by the first part of this seventh purpose of the trust-deed.

LORD M'LAREN concurred.

LORD SHAND was absent.

The Court pronounced the following interlocutor:—

"Find and declare that the first parties are bound to grant to the second party in liferent and to the heirs of her body in fee a conveyance in terms of the first part of the seventh purpose of the trust-disposition and settlement: (2) Find and declare that failing the second party and her issue, the succession passes to the heirs *ab intestato* of the testator: (3) Find and declare that the first parties are not bound to hold the trust-estate until the death of the second party, and thereupon to convey

it to the fourth parties for the purposes mentioned in the seventh purpose of the settlement: And further, that the fourth parties are not entitled under the seventh purpose of the settlement to a present conveyance of the fee subject to the liferent of Jean Simpson, and subject also to defeasance of the fee in the event of her leaving heirs of her body."

Counsel for the First and Second Parties—Shaw. Agents H. & H. Tod, W.S.

Counsel for the Third Parties—Vary Campbell. Agents—T. & W. A. M'Laren, W.S.

Counsel for the Fourth Parties—Lorimer. Agents—H. & H. Tod, W.S.

Friday, November 15.

SECOND DIVISION.

(WHOLE COURT.)

HARINGTON STUART *v.* JACKSON.

Superior and Vassal—Entry—Casualty—Composition—Relief—Implied Entry—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4—*Trust—Power of Sale.*

A testator died in 1865 leaving a widow who was infeft in the liferent of his whole lands, conform to the terms of a post-nuptial contract between them.

By trust-disposition and settlement he directed his trustees to hold the entire estate, heritable and moveable, until the youngest of his children attained the age of twenty-one, and then to divide and make over the heritable estate equally to and between them, "declaring that in the event of any of my children dying before receiving payment of his or her share of my whole means and estate without leaving lawful issue, the survivors and survivor of them shall be entitled to the share or shares that would have fallen or belonged to the deceaser or deceasers, and the same shall be payable in the proportions" as in the case of original shares. Failing all children without issue, the trustees were directed to realise the whole estate, and pay over the proceeds as the testator might direct, or failing further directions, among his nearest lawful heirs. There was also a general power of sale "for the better enabling my trustees to carry the foresaid purposes into effect," but this power was to be exercised only "when they consider it necessary."

The trustees were infeft in 1866, and on the passing of the Conveyancing (Scotland) Act 1874 they were impliedly entered with the superior, but no casualty was ever paid by them in respect of the lands.

The testator left an only child, to whom, on his attaining the age of twenty-one, the trustees conveyed the testator's heritable estate by disposition dated and recorded in 1883.

In an action against him by the superior for a casualty of composition declared to be due in consequence of the death of the defender's father, "the vassal last vest and seised in the lands," *held* (1), by the whole Court, that the Act of 1874 did not confirm by implication the liferent of the defender's mother so as to exclude the claim of the superior; but (2), by a majority of the whole Court, that the defender was only liable in a casualty of relief.

The Lord President, the Lord Justice-Clerk, Lords Mure, Young, M'Laren, Rutherfurd Clark, and Lee *held* that as the defender was the only child of the testator, those trust purposes which were designed to meet the case of a plurality of children had become inoperative; that the trust had existed only as a burden on the radical right of the defender's heir; that he took the estate not under the trust but as heir; and that the conveyance by the trustees did not create a new investiture. Lords Adam and Kinnear *held* that in order to ascertain the casualty due, the implied entry of the trustees was to be disregarded, and that as the defender's father, on whose death a casualty became due, was the vassal last vest and seised in the lands, the defender, as his successor and heir-at-law, was only liable in a casualty of relief.

Diss. Lords Shand, Trayner, Wellwood, and Kyllachy, who *held* that the defender was liable in a casualty of composition, on the ground that there was a new investiture enfranchised in the persons of the trustees, (1) because they held not only for behoof of the heir-at-law, but it might be of others not the heir-at-law of the testator; and (2) because the trustees had powers of sale under which they might have conveyed the estate to strangers.

Superior and Vassal—Disposition of Lands "with the Casualties of Superiority"—Composition.

By a disposition in feu-farm dated 1701 the predecessor of a superior feued out to the predecessor of a vassal certain lands and teinds, "and all and sundrie the casualties of the superiority of the said lands."

In an action by the superior for payment of a casualty of composition, *held* that the vassal could not found on this disposition as importing a renunciation of any claim of composition in respect of the said lands, because composition, although now called a casualty, was not only unknown as a casualty in 1701, but was a right differing both in origin and character from the feudal incidents which were then denoted by that term.

Held that the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act 1887 is not retrospective in its effect.

This was an action at the instance of Robert