evidence does not annul a verdict on those issues there must be a new trial.

The second issue put the question whether on certain occasions the defender falsely and calumniously called the pursuer "a damned liar." On this part of the case I am content to take the facts from the evidence of the pursuer as set forth in the Judge's notes. Indeed there is no material difference between his account of the affair and that of the defender.

This occurrence was on 3rd August 1888, and came out of a visit of inspection at the defender's mills. There can be no doubt that at the time the defender was drawing the supply of water for his boiler from the old source, and for the use of the water from this source he was charged £5 a-year by the town council. But the pursuer was still under the impression that the defender was abstracting water from the ordinary service pipe without passing it through his meter and consequently without paying for it, and on the occasion of this visit he directly charged the defender with abstracting the water. This was said in the presence of two other persons. The defender lost his temper and called the pursuer "a liar" and "a damned liar". It was suggested that "damned liar" meant habitual liar or convicted liar, but there is no ground for such a suggestion. There is really no meaning in the expletive; and the expression although intemperate, and unjustifiable in point of good taste and propriety, meant no more, and in the circumstances could mean no more than this—"You are stating what I declare to be a lie, a false accusation affecting my character and credit." There is nothing in the case to suggest that the pursuer meant to accuse the defender of knowingly bringing a false accusation against him, and it is noticeable that the pursuer does not himself say that he put such a meaning on the defender's words; on the contrary, he understood and treated them as mere provocative and vituperative language, and replied in a similar strain by threatening to take the "skin off the defender's nose."

The case for the pursuer on the 3rd issue is, if possible, weaker than the case on the 2nd issue. The alleged slander was made at a public meeting of the ratepayers of Macduff, with a view to the election of town councillors, and the occasion was held to be so far privileged that the proof of malice was necessary to the pursuer's case; the issue accordingly was of malicious slander by calling the pursuer "a liar." Of actual malice there is no evidence unless that of the witness Morrison, who speaks to the defender having on one occasion desired him not to employ the pursuer in his trade. There is no corroboration of this statement, which is denied by the defender.

I should not, as a juryman or judge trying the case without a jury, hold that the evidence referred to was proof of express malice. But supposing we are not called on to interfere with the finding of the jury on this element of fact, the case is precisely similar to that raised under the second issue, except that the evidence is conflicting as to the use of the word "liar" by the defender. In this, even more distinctly than in the other case, the pursuer was the aggressor in the duel which took place in presence of the Macduff electors. But on both sides it was a discharge of blank cartridges. The pursuer did not mean to accuse the defender of wilfully causing death or sickness in the town by his withdrawal of the water which should have gone to flush the sewers. Nor did the defender mean to impute the vice of lying to the pursuer if he indeed used the word "liar" in characterising the pursuer's statement. It is evident that in this electoral meeting the atmosphere had become highly electrical, and on both sides there was a licence of expression which was perfectly understood to belong to the occasion.

I think the jury were in error in attributing a serious meaning to such language as was used on these two occasions, and I am accordingly of opinion that the verdict should be set aside and the rule for a new trial made absolute.

The LORD PRESIDENT, LORD ADAM, and LORD WELLWOOD concurred.

LORD SHAND was absent when the case was heard.

The Court set aside the verdict and made the rule for a new trial absolute.

Counsel for the Pursuer—Comrie Thomson—M'Kechnie. Agent—Alexander Morison, S.S.C.

Counsel for the Defender—Lord Adv. Robertson—Watt. Agent—A. C. D. Vert, S.S.C.

Friday, February 7.

FIRST DIVISION.

ELLIS AND ANOTHER (LOGAN'S TRUSTEES) *v.* ELLIS AND OTHERS.

Succession — Vesting — Vesting subject to Defeasance—Liferent and Fee—Liferent Allenarly.

A testator burdened his trustees and the subjects disponed to them with the payment of £500 each to his children, payable at the first term of Whitsunday or Martinmas occurring after the death of the longest liver of himself and his spouse. He then directed that after providing for these special legacies the residue of his estate should belong to and be divided among his children equally on the occurrence of a certain event, and he declared with regard to the whole provisions before written conceived in favour of his daughters, that as the same were intended as alimentary provisions, the *jus mariti* and right of administration was excluded, and that they should not be affectable by their debts or deeds, or assignable by his daughters, his trustees being specially ordained either to divide or

appropriate his estate among his children so as to answer the purposes of his settlement without converting it into money, or otherwise to convert it into money and thereafter to lay out and invest the said legacies and shares of residue, "taking the writing thereof conceived in favour of my said daughters, to the extent of their interests respectively, in liferent for their liferent use allenarly, and to the child or children lawfully procreated or to be procreated of their bodies in fee, share and share alike, and failing such child or children, then the same at their death to return in equal proportions to their unmarried sisters, if any, and failing thereof to the surviving married sisters in the like proportions, and in both cases in liferent for their liferent use allenarly, and upon the other conditions foresaid as to their creditors, and likewise as to their husbands, present or future, and to the child or children lawfully procreated or to be procreated of their bodies, share and share alike, and failing thereof to their next-of-kin or assignees in fee."

Held that the fee of their legacies and shares of residue (except in certain cases otherwise provided for) vested in each of the testator's daughters *a morte testatoris*, subject only to defeasance in the event of their having issue.

Walter Logan, merchant in Glasgow, died on 20th May 1843, predeceased by his wife Mrs Margaret Mitchell or Logan, who died on 15th October 1841, leaving a trust-disposition and settlement dated 2nd May 1832, and three codicils appended thereto, whereby, on the narrative that he had by his contract of marriage with his wife, dated 19th June 1792, become bound, *inter alia*, to provide and pay to the children of the marriage the sum of £1700 sterling, which was to include their mother's tocher, and which sum was to be apportioned among the children according as he might direct, and that he was desirous that the obligations which he had come under by the said contract should be implemented, he gave, granted, and disponed, under the burdens, provisions, reservations, and powers, and faculty thereinafter mentioned, to certain trustees, his whole estate, heritable and moveable, and particularly and without prejudice to the said generality, his 426 shares of the stock of the Shotts Iron Company, and certain other moveable estate.

In the third place, the truster provided, in the event, which happened, of the predecease of his wife, that the annual proceeds of the free surplus of his estate should, after deduction of so much of the capital as might be equal to the payment of the special legacies of £500 thereinafter bequeathed to each of his children, belong and be paid in equal proportions to such of his daughters other than his daughter Margaret as should be in life and unmarried at the time, so long as any two of his daughters should remain unmarried, but that in the event of his unmarried daughters other than Margaret being reduced to one she was to receive in place of the said free proceeds a restricted free annuity of £150 so long as she continued unmarried.

In the fourth place, the truster burdened his trustees and the subjects disponed by him with payment of legacies of £500 each to each of his children *nominatim*.

In the last place, the truster provided that the residue of his estate after providing for the said special legacies should belong to and be divided among his said children in equal proportions, and that as soon as the number of his unmarried daughters other than Margaret, who might survive him and his wife, should be reduced to one, his trustees in that case setting aside a sufficient sum for securing the aforesaid restricted annuity of £150 to such unmarried daughter, and taking the writings thereof conceived to her in liferent, and to her and his other children in liferent and fee in the terms hereinbefore and after provided, "it being hereby specially declared with regard to the haill provisions before written conceived in favour of my said daughters, that as the same are intended as alimentary provisions for them the *jus mariti* in or right of administration thereof by their present or any future husbands is hereby expressly secluded; and further, that the same shall not be affectable by any of their debts or deeds, nor assignable by my said daughters, my said trustees being hereby specially ordained either to divide and appropriate my said estate among my said children, so as to answer the purposes of these presents without converting it into money, or otherwise to sell and dispose of the same and convert it into money, and thereafter to lay out and invest the said special legacies and shares of the residuum of my estate in the purchase of heritable property, or to lend out the same upon undoubted heritable or personal security as they may judge best, taking the writing thereof conceived in favour of my said daughters, to the extent of their interests respectively, in liferent for their liferent use allenarly, and to the child or children lawfully procreated or to be procreated of their bodies in fee, share and share alike, and failing such child or children, then the same at their death to return in equal proportions to their unmarried sisters, if any, and failing thereof to the surviving married sisters in the like proportions, and in both cases in liferent for their liferent use allenarly, and upon the other conditions aforesaid as to their creditors, and likewise as to their husbands, present or future, and to the child or children lawfully procreated or to be procreated of their bodies, share and share alike, and failing thereof, to their next-of-kin or assignees in fee, saving and excepting always any other and different destination that may now exist in regard to the said provisions, or any part thereof, and may be found to be contained in the contracts of marriage of any of my said children to which I am a party." In like manner he declared that the provisions thereinbefore conceived in favour of his said sons being intended by him as alimen-

tary provisions for them, the same should not be affectable by their debts or deeds, or attachable by their creditors, and he directed his trustees "to invest or otherwise secure the same as aforesaid, taking the writings thereof conceived in favour of my said sons according to their interests in liferent for their liferent use allenarly, and to the child or children lawfully procreated or to be procreated of their bodies in equal proportions, and failing such child or children, to their next-of-kin or assignees in fee." He further declared that in the event of any of his said children predeceasing him, the provisions therein contained in favour of any deceaser or deceasers should fall and pertain in equal proportions to his or her children, and failing thereof, should devolve to their brothers and sisters who should survive him in the like proportions, upon the terms and conditions before stipulated as to the investiture thereof, and so as effectually to secure to his said children the intended alimentary provisions.

The foresaid provisions by the truster in favour of his children were declared by him to be in full contentation to them of all provisions conceived by him in their favour by the contract of marriage betwixt him and their said mother, or in any of their own contracts of marriage to which he was or might become a party, as well as of all they could ask, claim, or succeed to by or through his death in any manner of way. But he introduced into the testing clause of his said trust-disposition and settlement this declaration as to the foresaid sum of £1700 provided to his children by his contract of marriage, that it was his intention "that the same should belong to and be divided among them in equal proportions."

The testator had eleven children, five sons and six daughters. Of the latter Margaret Logan died unmarried, leaving a testament whereby she appointed her sisters Mrs Thatcher and Miss Elizabeth Logan her residuary legatees.

Mrs Thatcher, who was predeceased by her husband, and died without issue, left a settlement by which she bequeathed the whole residue of her estate to her sister Elizabeth Logan.

Elizabeth Logan, who was the last survivor of all the children, died unmarried, leaving a will under which she appointed her nephew James Walter Ellis her sole executor.

The estate of the truster, which consisted at his death chiefly of Shotts Iron Company stock, was valued for inventory duty at £9286, 11s. 11d. The stock was retained by the trustees, and was with the exception of £4750 of it ultimately sold so advantageously that the estate, after paying debts and expenses, had realised in 1872—excluding said sum of £4750 Shotts Iron Company stock still held—a nett sum of £28,825. The trustees retained the whole estate in their own names, and never made any special investment for the individual children either sons or daughters, and their issue, as directed by the trust-disposition and settlement.

After the truster's death various payments were made by the trustees in implement of the provisions of the will, to the issue of deceased children of the truster, but at the date of Elizabeth Logan's death there still remained in the hands of the trustees for final division a sum of nearly £10,000, besides £4750 Shotts Iron Company stock, the value of which could not be ascertained, and questions arose as to the manner in which this fund should be divided.

The present case was accordingly presented for the purpose of obtaining the opinion of the Court, *inter alia*, upon the following questions—"(1) Whether, in the circumstances which have occurred, the fee of the legacies of £500 each bequeathed by the truster to his daughters—Miss Margaret Logan, Mrs Thatcher, and Miss Elizabeth Logan, vested—(*b*) In Miss Margaret Logan, Mrs Thatcher, and Miss Elizabeth Logan respectively; or (*c*) in the children of Mrs Gill afterwards Lady Maxwell, and Mrs Ellis, equally *per stirpes;* or whether (*d*) the fee of said legacies, in the circumstances which have occurred, vested in the next-of-kin of Miss Elizabeth Logan at her death, and in which? (3) Whether the fee of the shares of residue effeiring to Miss Margaret Logan, Mrs Thatcher, and Miss Elizabeth Logan, vested—(*b*) In Miss Margaret Logan, Mrs Thatcher, and Miss Elizabeth Logan respectively; or (*c*) in the children of Mrs Gill afterwards Lady Maxwell, and Mrs Ellis, equally *per stirpes;* or whether (*d*) the fee of said shares of residue, in the circumstances which have occurred, vested . . . in the next-of-kin of Mrs Elizabeth Logan at her death, and in which?"

The parties to the case were—1st, James Walter Ellis and another, the testator's trustees; 2nd, James Walter Ellis, the executor of Elizabeth Logan; 3rd, the children or representatives of children of the testator's married daughters; 5th, the children or representatives of children of the testator's sons.

The second party maintained that the legacies and share of residue destined to Margaret Logan, Mrs Thatcher, and Elizabeth Logan vested in each of them, and that Margaret Logan and Mrs Thatcher having both left Elizabeth Logan their residuary legatee, were payable to him as Elizabeth Logan's executor.

The third parties maintained that the fee of the three legacies and shares of residue already mentioned vested in them, the third parties, and on Elizabeth Logan's death without issue became payable to them equally *per stirpes.*

The fifth parties maintained that in the circumstances which had occurred the fee of these legacies and of the four shares of residue vested in the next-of-kin of Elizabeth Logan at her death by virtue of the ultimate destination contained in the truster's settlement.

Argued for the second party—The case must be treated on the footing that the trustees had carried out the direction of the testator, and handed over the daughter's

shares impressed with the destination appointed in the settlement. The question then came to be what effect had the qualification contained in that destination upon the absolute gift both of the legacies and shares of residue which was contained in the earlier parts of the deed? No machinery was provided by the testator to give effect to successive liferents, such as a continuing trust, and the Court would not supply the want of such machinery—*Allan's Trustees* v. *Allan*, &c., December 12, 1872, 11 Macph. 216; *Clouston's Trustees* v. *Balloch*, July 5, 1889, 16 R. 937. The best means of reconciling the apparently repugnant provisions in the deed was by supposing the testator's intention to have been to restrict his daughters to a liferent allenarly for the benefit only of their issue. If a daughter died without any issue that limitation never operated, and there was a fee in the daughter herself—Jarman on Wills, i. 472-475; *Lindsay's Trustees* v. *Lindsay*, &c., December 14, 1880, 8 R. 281; *Dalgleish's Trustees* v. *Bannerman's Executor*, March 6, 1889, 16 R. 539; *Buchanan's Trustees* v. *Dalzeil's Trusteee*, February 28, 1868, 6 Macph. 536. The case of *Fulton's Trustees*, *infra*, was not an authority contrary to *Lindsay's Trustees* v. *Dalgleish's Trnstees*, as the circumstances were not the same in that case, and the same question was not before the Court as in these two cases—*Dalgleish's Trustees*, opinion *per* Lord M'Laren. The destinations-over were mere substitutions which had been evacuated by the settlements of Margaret Logan, Mrs Thatcher, and Elizabeth Logan. The only event in which the succession could have opened to the issue of married sisters was if their mothers had survived their unmarried sisters and taken the liferent of the accrescing shares, which event never occurred. There was no reason to read "surviving" as equivalent to "others" in the case of the married daughters—*Forrest's Trustees* v. *Rae*, December 20, 1884, 12 R. 389. There was no vesting in the next-of-kin *a morte testatoris*. If there was to be vesting in persons conditionally instituted *a morte* subject to defeasance, it was necessary that these persons should be known, and existing at the date of the testator's death—*M'Lay* v. *Borland*, July 10, 1876, 3 R. 1124; *Snell's Trustees* v. *Morrison*, November 4, 1875, 4 R. 709; *Gilbert's Trustees* v. *Crerar*, &c., November 3, 1875, 3 R. 49 (H. of L.) 5 R. 217; *Bell* v. *Cheape*, May 21, 1845, 7 D. 614; *Haldane's Trustees* v. *Murphy*, Dec. 15, 1882, 9 R. 269; *Steel's Trustees* v *Steel*, &c., December 12, 1888, 16 R. 204, *per* Lord President, 208. The arguments of the third and fifth parties involved the novel and inadmissible hypothesis of a series of fiduciary fees—first, in each daughter for her issue, and then in each sister taking accrescing liferent either for the children of married daughters or for the next-of-kin of the original liferentrices.

Argued for the third parties—There were only three classes of cases in which the gift of a liferent was held to carry more than a mere liferent:—(*a*) Where the destination was to a father in liferent and his children in fee; (*b*) Where property was left in liferent but the liferenter was given a *jus disponendi*; (*c*) Where although the beneficiary was restricted to a liferent only, the limitation was to take effect only on a certain event—*cf. Lindsay's Trustees* v. *Lindsay*, &c., *supra*. This was not a case in which there was any beneficial fee vested in the liferentrices. On the contrary, the clear intention of the testator was to restrict them to a liferent allenarly, so that any fee which they took could only be a fiduciary one—*Fulton's Trustees* v. *Fulton*, February 6, 1880, 7 R. 566; *Dawson's Trustees* v. *Dawson's Trustee*, February 24, 1877, 4 R. 597; *Duthie's Trustees* v. *Kinloch*, June 5, 1878, 5 R. 858; *Cumstie* v. *Cumstie's Trustees*, June 30, 1876, 3 R. 921; *Alves*, &c. v. *Alves*, &c., March 8, 1861, 23 D. 712. The testator's intention was, in the first place, that each daughter should enjoy the liferent of her share, and that her children should take the fee. In the event of a daughter dying without issue, her liferent was to accresce to her unmarried sisters if any, and, lastly, if they died without issue, to the "surviving married sisters." There were two periods of vesting of the fee. First, as regarded the original shares a fiduciary fee vested in each of the testator's daughters *a morte*. Secondly, as regarded the accrescing shares, a fiduciary fee vested in each daughter, when she took the liferent of an accrescing share, for the children of all daughters, "their bodies" referring to all the daughters, and "surviving," in the case of married daughters, being merely the equivalent of others. The second party's interpretation of this clause, involved the anomalous assumption that the testator intended the share of the fee which his grandchildren were to take to depend upon the accident of their mother surviving her unmarried sisters.—*Waite* v. *Littlewood*, 1872, L.R., 8 Ch. 70; *Lucena* v. *Lucena*, 1877, L.R., 7 Ch. Div. 255; *Ramsay's Trustees* v. *Ramsay*, December 21, 1876, 4 R. 243. In the present case there was a destination-over beyond the children of married daughters, which was desiderated in *Forrest's Trustees* v. *Rae*.

The fifth parties concurred in the argument of the third parties so far as directed against the contention of the second parties, but argued that the fee of the three legacies and of the four shares of residue vested in the next-of-kin of Elizabeth Logan. There having always been a surviving unmarried daughter, no liferent of accrescing share had ever devolved on married daughters, and that being so the fee of such shares never vested in their children. The assignees could not take before the next-of-kin because no fee vested in the unmarried sisters—*Bell* v. *Cheape*, May 21, 1845, 7 D. 614; *Maxwell* v. *Maxwell*, December 24, 1864, 3 Macph. 318; *Graham* v. *Hope*, February 17, 1807, M., *sub voce* "Legacy," App. 3.

At advising—

LORD ADAM—The late Mr Logan died on the 20th May 1843 predeceased by his wife. He left a trust-disposition and

settlement dated 2nd May 1832, and codicils thereto annexed, by which he disponed his estate to trustees for the purposes therein contained.

His trustees are the first parties to this case.

He had eleven children, of whom nine survived him.

The leading question in this case relates to the fee of a legacy of £500 and a share of the residue of his estate bequeathed by Mr Logan to each of his daughters Margaret Logan, Susan Minot Logan, afterwards Mrs Thatcher, and Elizabeth Logan.

Margaret Logan died without issue on 12th September 1856, leaving a last will and testament by which she appointed her sisters Mrs Thatcher and Elizabeth Logan her residuary legatees.

Mrs Thatcher died without issue on 16th April 1864, leaving a trust-settlement by which she bequeathed the residue of her estate to Elizabeth Logan.

Elizabeth Logan, who was the last survivor of Mr Logan's children, died unmarried on the 20th March 1887, leaving a will by which she appointed Mr Ellis to be her sole executor.

Mr Ellis is the second party to the case, and claims the fee of the legacy of £500 and the share of the residue left to Margaret Logan, Mrs Thatcher, and Elizabeth Logan respectively.

This claim is opposed by the third parties, who are the children, or representatives of children, of the married daughters of Mr Logan, and by the fifth parties, who are the children, or representatives of children, of the sons of Mr Logan.

The question to be determined depends upon the effect which is to be given to the various directions of the trustees with regard to those provisions as contained in his trust-settlement. Various alternative constructions of the settlement were suggested by the parties raising questions of novelty and difficulty, but I have come to the conclusion that the claim of the second party is well founded. The question depends more particularly on the construction to be put on the fourth and last purposes of the trust.

By the fourth purpose Mr Logan burdened his trustees and the subjects thereby disponed with the payment of legacies of £500 to each of his eleven children. The legacies in question in the present case are given in the following terms—"To the said Margaret Logan, my eldest daughter, of the sum of £500; . . . to the said Susan Minot Logan the like sum of £500; . . . and to Elizabeth Logan, my sixth daughter, the like sum of £500."

The legacies given to his other children are all expressed in similar terms, but to that given to Mary Logan, his third daughter Mrs Ellis, there is added a declaration that it is intended to be in implement of the obligation come under by him in her marriage-contract; and there is a similar declaration with regard to that given to Janet Logan, his fourth daughter Mrs Cameron. The legacy to Mary Logan is declared to be payable in terms of her marriage-contract at the first term after his death, and then the truster directs that the said other legacies shall be payable "at the first term of Whitsunday or Martinmas which shall occur after the death of the longest liver of me and my said spouse, with the legal interest of the said legacies from and after the said respective terms of payment thereof till payment of the same."

The trust-deed then proceeds as follows—"And lastly, I direct and appoint that after providing for and paying all my just and lawful debts, the special legacies before mentioned, and the expense of the management of the trust, the residuum of my estate shall belong and be divided among my said children in equal proportions, or share and share alike, and that so soon as the number of my unmarried daughters, other than Margaret, who may survive me and my said spouse, shall be reduced to one," in which case his trustees were to set aside a sum sufficient to secure a restricted annuity of £150 to her, "taking the writings thereof conceived to her in liferent and fee in the terms hereinbefore and after provided." At the death of the truster Elizabeth Logan was the only unmarried daughter other than Margaret, so that the residue then became divisible. The deed then proceeds to declare, with regard to the haill provisions before written conceived in favour of his daughters, that as they were intended to be alimentary provisions for them, the *jus mariti* and right of administration of their husbands was expressly excluded, and that they should not be affectable by their debts or deeds nor assignable by them. The trustees are then directed either to divide and appropriate his estate among his children without converting it into money, or otherwise to sell and dispose of it and convert it into money, and thereafter to lay out and invest the special legacies and shares of the residuum of his estate in the purchase of heritable property, or to lend out the same upon undoubted heritable or personal security as they might judge best. Then follow certain further directions to his trustees, which I shall quote—"Taking the writing thereof conceived in favour of my said daughters, to the extent of their interest respectively, in liferent for their liferent use allenarly, and to the child or children lawfully procreated of their bodies in fee, share and share alike, and failing such child or children, then the same at their death to return in equal proportions to their unmarried sisters, if any, and failing thereof to the surviving married sisters in the like proportions, and in both cases in liferent for their liferent use allenarly, and upon the other conditions aforesaid as to their creditors, and likewise as to their husbands, present or future, and to the child or children lawfully procreated or to be procreated of their bodies, share and share alike, and failing thereof to their next-of-kin or assignees in fee."

The destination which is thus directed to be inserted in the "writing" to be taken is not very happily expressed, and I think it would promote clearness were I to endea-

vour to express it in more technical language. I think the writing to be taken in favour of a daughter—Elizabeth, for example—would run somewhat in these terms —"To Elizabeth Logan for her liferent use allenarly, and to the child or children lawfully procreated of her body in fee, whom failing to her surviving unmarried sisters for their liferent use allenarly, and to the child or children lawfully procreated of their bodies in fee, whom failing to her surviving married sisters for their liferent use allenarly, and to the child or children lawfully procreated of their bodies in fee, whom failing to the next-of-kin or assignees" —either of the said Elizabeth Logan or of the said married sisters, or otherwise, as may be the proper construction of the words "their next-of-kin or assignees" in the last branch of the destination—a matter which was the subject of much discussion by the parties, but which, in the view I take of the case, it is unnecessary to decide.

It will be observed that the directions as to the terms of the writing apply both to the special legacies of £500 and to the shares of the residue.

It is said that the bequest of these to the daughters in the earlier part of the deed is so expressed as to show that the truster's intention was to give the fee thereof to them; whereas it is said that writings containing a destination in the terms above set forth would give them the liferent merely, but no fee, and hence it is said that there is a repugnancy between the several clauses of the deed.

As regards the special legacies, the trustees are, by the fourth purpose of the trust, simply directed by the truster to pay a legacy of £500 to each of the children at the first term of Whitsunday or Martinmas occurring after his death, and by the last purpose it is declared that the residue of his estate shall belong to and be divided among his children, share and share alike.

If these directions had stood alone there can be no doubt, I think, that the children would have taken an absolute right of fee both in the legacies and in the shares of the residue, and if it be that the writings which the trustees are directed to take would give them a right of liferent merely, then there would be repugnancy between the two parts of the deed. But I do not think that is so. I think that all the branches of the destination which the trustees are directed to insert in the writings to be taken by them are, after the first, proper substitutions. If not so read, I do not see how the destination could receive effect, because in that case, and in the absence of a trust, either a daughter would have to be presumed to be a fiduciary fiar, not only for her own children, but for a series of liferenters and fiars, which would be an entire novelty in the law of Scotland, and in my opinion not admissible, or else there would be no one to hold the fee, and this would result in intestacy.

But if the branches of the destination after the first are held to be substitutions, then what we have to reconcile with the directions in the fourth and last purposes of the trust is practically a direction to the trustees to take the writings to a daughter in liferent allenarly, and to her children in fee. If that be so, I think the case of *Dalgleish's Trustees* v. *Bannerman*, 16 R. 559, is a direct authority in this case. In that case a testator directed his trustees to divide the residue of his estate into a certain number of shares, four of which he directed to be paid to each of his four daughters as soon as his estate should be realised and converted into cash. By a codicil he directed his trustees to invest the shares falling to his daughters upon heritable security, and just, as in this case, to take "the rights thereto conceived in favour of such daughters in liferent for their liferent use allenarly, and to the child or children of their bodies if more than one, equally among them in fee." It was declared that such liferents should be purely alimentary, and exclusive of the *jus mariti* of the husband. A daughter died without issue. It was held by the Court, following the principle of the case of *Lindsay*, 8 R. 281, that she took a fee of her share of the residue *a morte testatoris*, defeasible only in the event of her having children, and that accordingly it was carried by her settlement to her executors.

The principle upon which that case was decided appears to me to be perfectly sound, and I think it applies to this case. The result is, that in my opinion Margaret Logan, Mrs Thatcher, and Elizabeth Logan each took a fee of the special legacy and share of the residue bequeathed to them, defeasible only in the event of their having issue, and they not having had issue, these passed by their respective settlements to Mr Ellis, the party of the second part, and now belong to him. Question 1 subsection (*b*), and question 3, subsection (*b*), will therefore be answered in the affirmative.

The fourth question relates to the right to the fee of the share of the residue bequeathed to Mrs Cameron.

By marriage-contract dated 27th January 1830, entered into between her and her husband, to which the truster was a party, she, in consideration of the provisions thereby secured to her by her husband, assigned and disponed to him and his heirs and assignees whomsoever, all debts and sums of money, goods, gear, as well heritable as moveable, then belonging or which should pertain and belong to her during the subsistence of the marriage.

In my opinion the fee of the share of the residue vested in Mrs Cameron *a morte testatoris*, she having died without issue, and her father having died during the subsistence of the marriage, it therefore fell within the assignation in her husband's favour contained in the marriage-contract. It was, no doubt, declared in Mr Logan's trust-deed as regards the "haill provisions" conceived in favour of his daughters, and therefore as regards this provision, that the *jus mariti* and right of administration of their husbands should be excluded, and that they should not be affectable by their debts or assignable by them. But a fee or right of property cannot be given to a person, and

at the same time secured against his debts and obligations. The condition, therefore, that this provision of a share of the residue should not be affected by Mrs Cameron's debts or deeds is of no efficacy. The assignation thereof in the marriage-contract, therefore, carried the fee to Captain Cameron, so that it now belongs to the fourth party, who is the judicial factor on his trust-estate.

I do not think, however, that it was payable until the death of Mrs Cameron, as until that event took place it could not be known that she would not have issue, and so be entitled to the fee.

LORD SHAND—I concur generally in the opinion of Lord Adam, and particularly in the view upon which his judgment is rested, that the words of destination which the truster directed to be inserted in the writings to be executed by the trustees conveying to the daughters and their issue the shares of the estate provided to them, created a substitution only beyond each daughter and her issue, which was evacuated by the settlements of the three daughters whose shares are in question. If the words of destination had ended with the provision in favour of children—I mean if the clause had been to this effect, that the trustees were to convey the separate parts of the estate to each daughter, or the separate shares of the estate converted into money and lent out on real security, taking the writings to the daughters for their liferent use allenarly and to the children to be lawfully procreated of their bodies, share and share alike in fee, with no ulterior destination, the cases of *Lindsay* and *Dalgleish* would clearly have directly applied to the present. In the case supposed, taking the words of bequest and the directions of the testator with reference both to the legacies of £500 and the shares of residue, the provisions would have been substantially the same as occurred in the cases of *Lindsay* and *Dalgleish*. The distinguishing feature of the present case is, that while the truster directed the trustees to divest themselves of the shares of each daughter in the terms prescribed by him, and to convey the shares in the form of heritage or heritable securities, he appointed a series of destinations-over or securities to be inserted in the conveyances, to take effect one after another, and these have raised the novel and difficult question to be determined in this case.

So far as the intention of the testator is concerned, I confess my impression is that he intended that his daughters should have liferent rights only, and that, subject to the liferents of his daughters, original and accruing, his grandchildren by all or any of the daughters should have the fee. After the provision to each daughter of a share for her liferent allenarly and to her children in fee, the destination prescribed proceeded thus:—And failing such child or children, then the same at their death to return in equal proportions to their unmarried sisters, if any, and failing thereof, to the surviving married sisters in the like proportions," the words immediately following giving to the daughters liferent rights only, protected against the husband's *jus mariti* and the diligence of creditors, after which the clause proceeds, "and to the child or children lawfully procreated or to be procreated of their bodies, share and share alike, and failing thereof to their next-of-kin or assignees in fee." The intention I think was that the fund received by each daughter who should die without children should go to the other daughters unmarried, and failing their having children, then to married daughters, but in liferent only, and that the testator's grandchildren by daughters, if any, should ultimately take the fee.

If I be right in so understanding the intention of the testator, this intention could have been very well effected by the testator providing that the trust was to be kept up for the purposes he had in view. If the trustees had been directed to hold the daughters' shares for the purpose of giving effect to the liferents mentioned, and of ultimately giving the fee to the testator's grandchildren, the direction could have been carried out, for the trustees would have retained the control and administration of the estate, and had only to deal with it as directed, and as there were a number of grandchildren, they would have received the fee, and there would have been no room for the argument so fully stated as to the meaning of the concluding words of the destination "to their next-of-kin or assignees in fee." But what the testator might have done in that way he has attempted to do in another way, viz., by destinations-over of the shares liferented by the daughters, the funds in the meantime, however, to be parted with by the trustees, and being therefore no longer subject to their control or trust administration, and that is a method of endeavouring to settle estate on a succession of legatees one after another which the law of Scotland does not permit. If the Court sustained the various destinations-over, in the present case that could only be done on one of two views, either that there was a defeasible fee in each daughter which was to subsist after her death without children, when the estate was no longer in her possession, and no longer in possession even of her heir or executor, but had passed to another daughter as liferenter on some such view as that the deceased daughter should still have the original fee of her share *in hæreditate jacente*, to be vindicated by her heir or next-of-kin after all the other parts of the destinations had been exhausted or evacuated; or secondly, that each daughter became a fiduciary fiar, in the first place for her children, and in the second place, in the event of her having no children, for the daughters who should take afterwards, and their issue if any. Either view would be novel and inadmissible in the law of Scotland. If a testator desires to keep up a fee in the beneficiary first named after a series of liferents and fees given to others, or to create any successive liferents and fees as in the present case, that can only be done by his trustees holding the fund or

estate directed to be dealt with in this way. If he attempts to keep up a fee by a series of destinations-over as here, these become mere substitutions which may easily be evacuated. Such an effect might perhaps have been operated in this case by requiring each daughter receiving her original share to divest herself of the fund after her death without children, had the truster directed this to be done. For example, if there had been a direction that each daughter should bind herself as a condition of receiving the fund to pay it over to her sisters at her death without issue, that would have been effectual, and indeed would have excluded the contention that a fee was given to each daughter in her own share. But in that case there would be a distinction, as the rights of parties would have rested on obligation and not merely on destination. The peculiarity of the present case is that the destinations have reference to a fund which has been parted with and is no longer in the hands of the trustees, and that the destinations practically give the fee to each daughter in whose name the securities are taken.

I think the case of *Buchanan's Trustees* v. *Dalziel's Trustees*, reported in 6 Macph. 536, has a material bearing on the question before us. It was there provided that a fund should be parted with as here, the executor, George Craig Buchanan, being directed to pay £4000 to Jane Craig, the daughter of the testatrix, "but declaring that if the said Jane Craig shall die without lawful issue, then the half of the said sum of £4000 shall return to and belong to the said George Craig Buchanan and his foresaids, but it shall be in the power of the said Jane Craig to dispose of the other half of said sum in any way she shall think proper." Jane Craig having died without issue, £2000 was claimed from her executors by the trustees of George Craig Buchanan, but the Court held that the destination was one which the person receiving payment of the money was entitled to evacuate, and did evacuate by merely having obtained payment of the money from the trustees. There was no necessity for a deed evacuating the destination, because there was in that case no destination to be inserted in the deeds of transfer as here. The Lord President said—"If a legacy is to go to a third person in the event of the legatee dying without issue, that is simply a substitution." Lord Curriehill and Lord Deas expressed the same views. And so on the grounds I have stated, and agreeing in the opinion expressed by Lord Adam, I think that the main question presented in the case should be answered as he proposed.

LORD M'LAREN and the LORD PRESIDENT concurred.

The Court pronounced this interlocutor:—

"Find and declare with reference to the first question, that the fee of the legacies of £500 each, bequeathed by the truster to Miss Margaret Logan, Mrs Thatcher, and Miss Elizabeth Logan, vested in them respectively *a morte testatoris*, subject only to defeasance in the event of their having issue: . . . Further, find and declare, with reference to the third question, that the fee of the shares of the residue effeiring to Miss Margaret Logan, Mrs Thatcher, and Miss Elizabeth Logan vested in them respectively *a morte testatoris* subject only to defeasance in the event of their having issue."

Counsel for the First and Second Parties—H. Johnston—Sym. Agent—George Bruce, W.S.

Counsel for the Third Parties—Low—Gillespie. Agents—J. & A. Forman & Thomson, W.S.

Counsel for the Fourth Party—Lorimer—Wallace. Agent—Hector F. M'Lean, W.S.

Counsel for the Fifth Parties—Dundas. Agents—J. S. & J. W. Fraser Tytler, W.S.

Saturday, February 8.

SECOND DIVISION.

FYFE'S TRUSTEES AND OTHERS.

Succession—Direction to "Divide and Apportion" Whole Estate amongst Children upon Majority of Youngest Child—Postponed Vesting.

A person directed his trustees "to divide and apportion the free revenue of the whole of my . . . estate . . . among the whole of the children" of the marriage in certain proportions, and "out of the share falling to each of them to defray the expense of his or her maintenance, clothing, and education," and upon their reaching majority "to pay over the shares falling to each of them directly . . . and that aye and until the division of my said means and estate as hereinafter provided." He thereafter directed his trustees, upon the majority of his youngest child, "to divide and apportion the whole of my means and estate . . . amongst the whole of the children" of the marriage in the same proportions as the revenue had been divided, "declaring that the lawful child or children of any of my said children deceasing shall have right to the share which would have fallen to the parent equally as if the parent had survived, but if there shall be no such issue, then the share of the party so deceasing shall be divided equally among his or her surviving brothers and sisters." *Held* (*diss.* Lord Lee) that vesting was postponed until the majority of the youngest child, when the estate fell to be divided.

The late John Fyfe of Kingston, Forfarshire, died upon 13th May 1885 leaving a trust-disposition and settlement dated 2nd December 1857. He was survived by a widow and five children. His eldest child William Fyfe died upon 8th December 1887,