Argued for the petitioners—This was admittedly a clerical error, which the Clerk was not only entitled but bound to correct when he discovered it. The answers were irrelevant, for it was not disputed that the extract was correct and in conformity with the judgment of the Court—*Miller* v. *Lindsay*, June 8, 1850, 12 D. 964; *Allan* v. *Wormser Harris & Company*, June 8, 1894, 21 R. 866, *per* Lord Rutherfurd Clark, 875; Mackay's Practice, p. 320.

Argued for the respondent—Granted that a clerical error may be corrected *de recenti*, and before extract, this error had not been corrected *de recenti*. The real question in the case was whether the diligence against the respondent was good. The petitioners, indeed, virtually admitted that it was bad by coming to the Court and asking to have the warrant for the extract and charge authenticated so as to set up all that followed thereon. The proper action for determining that question was the suspension in the Bill Chamber, and the present petition was unnecessary—*Sykes* v. *Nicol*, July 18, 1848, 10 D. 1499; *Ritchie* v. *Ferguson*. November 16, 1849, 12 D. 119.

LORD PRESIDENT—This question relates to a judgment of this Court, and the parties are agreed that in fact the judgment was given for the sum of £41, 2s. 8d., and not for £14, 2s. 8d.

Lord Low has reported to us the case at present depending before him, and it appears that the judgment was for £41, 2s. 8d., the interlocutor bears to be for £41, 2s. 8d., and the extract is for that sum.

Our attention has been drawn to an irregularity which occurred in the history of the interlocutor, which is the written record of the judgment, and it appears to me that, while certainly it would have been in accordance with regular practice that any alteration upon it should be authenticated by the judge who signed the interlocutor, yet in this case the omission is not shown to introduce any vice into the interlocutor, because in point of fact it accords with the judgment of the Court.

It therefore seems to me that the interlocutor has not been successfully impugned, and we, who pronounced it, inform his Lordship, who has reported the case to us, that the interlocutor does correctly record the judgment pronounced by us. Accordingly, I think that we should find that it is unnecessary to dispose of the petition, and that we should state to Lord Low that the interlocutor is in accordance with the actual judgment of the Court.

LORD M'LAREN—I concur. It must always be remembered that an interlocutor is merely a brief minute of the judgment pronounced, intended for the use of the officer of the Court in the preparation of the form of extract, and that there are no statutory provisions regulating the authentication of such minutes. The signature of the judge is all that is necessary.

I think with your Lordships that after the interlocutor is signed, the Clerk of Court ought not to make the smallest clerical alteration upon it without submitting it to the approval of the judge.

In ordinary course, where the correction consists in the deletion of one word or figure and the substitution of another, the judge would initial it, but that is merely for the purpose of preserving evidence of the fact that the correction has been submitted to his approval.

In the present case the clerical correction was not submitted to the judge, because probably the Clerk of Court thought the parties were agreed that it should be done. The omission of that precaution has led to the present proceedings, but as the Court has now been satisfied that the interlocutor as it stands truly expresses the judgment of the Court, I agree that it is unnecessary that any formal correction should be made.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced no order on the petition, but reported to the Lord Ordinary that the interlocutor as amended correctly expressed the judgment of the Court.

Counsel for the Petitioner—Watt—J. G. Stewart. Agents—Parties.

Counsel for the Respondent—A. M. Anderson. Agent—Alex. Gunn, S.S.C.

Thursday, November 21.

SECOND DIVISION.

WALLACE'S EXECUTORS *v.* WALLACE.

Succession—Universal Settlement—Residuary Legatee—Lapsed Bequests of Heritage.

A testator by his last will and testament, dated 1884, which dealt with his whole estate, heritable and moveable, left certain heritable subjects to one of his nieces as a token of his special favour. He also named her residuary legatee by a clause in the following terms:—"I leave as my residuary legatee my niece, who will pay my funeral expenses and any debts I may justly owe."

Held that she was entitled, as residuary legatee, to take bequests of heritable as well as moveable property which had lapsed during the testator's lifetime, by the predecease of another beneficiary, and that such bequests did not fall into intestacy.

By holograph will and testament, dated 18th March 1884, George Johnstone Wallace of Newton Hall, Fifeshire, bequeathed to his nephew, Adolphus Wallace, "the estate of Newton Hall, in the parish of Kennoway, Fifeshire, Scotland, with farm live stock and farm implements, &c., and, with the said estate, the mansion-house, also the furniture and household furnishings, pictures, &c., subject, however, to the following conditions, viz.—That the mansion-

house with its furniture shall remain and be held by Annie Amelia Wallace for her use and benefit, and for the use and benefit of her sister Margaret Wallace, and for the use and benefit of her sister Priscilla Isabella Wallace, so long as they remain unmarried."

He further bequeathed to his niece Annie Amelia Wallace, "as a token for her devoted attention to my every want since I returned from India," certain heritable property in India to the value, as then estimated, of £10,000. The residuary clause was as follows:—"I leave as my residuary legatee my niece Annie Amelia Wallace, who will pay my funeral expenses and any debts I may justly owe." Miss Annie Amelia Wallace was also named one of his executors. There were no trustees appointed under the will.

The testator died on 24th June 1895. He left no other heritable estate than was specified in his will. He was predeceased by Adolphus Wallace, who died, unmarried and without issue, on 1st November 1894. Adolphus Wallace, if he had survived the testator, would have been his heir-at-law. The testator was aware of his death, but made no new provision as to the bequest, which had lapsed by his death.

In these circumstances questions arose as to who was entitled to the estate of Newton Hall, and to the moveable subjects included in the bequest of that estate. For the settlement of these questions a special case was presented to the Court by (1) the executors; (2) Annie Amelia Wallace, the residuary legatee; and (3) James Newton Wallace, the testator's heir-at-law.

The questions of law were:—"I. (*a*) Is the heritable estate of Newton Hall, comprised in the lapsed bequest to Adolphus Wallace, carried, subject to the liferents, by the bequest of residue in favour of the second party? or (*b*) Is the third party, subject to the liferents, entitled as heir-at-law to the heritable estate comprised in said bequest to Adolphus Wallace? II. (*a*) Are the moveable subjects comprised in said bequest to Adolphus Wallace, subject to the liferents, by the bequest of residue in favour of the second party? or (*b*) Are the first parties entitled, subject to the liferents, to hold the moveable estate comprised in said bequest to Adolphus Wallace for behoof of the testator's whole next of kin?"

Argued for the third party—The special bequest of Newton Hall having lapsed, that estate became intestate succession, and fell to the third party as heir-at-law of the testator. It did not go to the residuary legatee. A "residuary legatee" was a person to whom the residue of the moveable estate was granted; the term was not applicable to a person taking heritage. The whole tenor of the deed showed that the testator's intention was that his niece should get the residue of his moveable estate alone. Executors were appointed, which showed that the testator had in view that moveable property alone was to be dealt with. And the appointment of the residuary legatee was coupled with payment of debts and funeral expenses, which fell to be paid out of moveable estate—Ersk. Inst. iii. 9, 6; *Urquhart* v. *Dewar*, June 13, 1879, 6 R. 1026; *Campbell* v. *Campbell*, November 30, 1887, 15 R. 103; *Grant* v. *Morren*, February 22, 1893, 20 R. 404.

Argued for the second party—The 20th section of the Titles to Lands Act 1868 was directly in point. Words had been used in a will dealing with the whole heritable estate of the testator, which, when applied to moveables, were sufficient to confer on the legatee the right to receive the same. These words were, therefore, equivalent to a general disposition of any portion of the heritable estate, which, by reason of the failure of the specific bequest, fell into residue. Besides, the will expressly showed that the residuary legatee was a person for whom the testator had a special regard, while the heir-at-law, who now claimed the estate, was not mentioned in the will at all. The death of Adolphus Wallace was known to the testator, and he could have altered his will by a codicil if he had wished any other than his residuary legatee to succeed. The presumption of law was always against intestacy, and the whole tenor of the will showed that by it the testator intended to dispose of his whole estate, both heritable and moveable—*M'Leod's Trustees* v. *M'Leod*, February 28, 1875, 2 R. 481; *Forsyth* v. *Turnbull*, December 16, 1887, 15 R. 172. In all the cases quoted on behalf of the third party's contention, with the exception of *Campbell*, the will dealt with moveables alone. In the case of *Campbell*, the reading of the will as making a bequest of heritage was an impossible reading, being inconsistent with the other terms of the deed.

At advising—

LORD JUSTICE-CLERK—The late George Johnstone Wallace, eleven years before his death, executed a last will and testament by which he disposed of all his heritable estate, and after giving certain legacies, appointed a niece, the second party, to be his residuary legatee. The questions in this special case relate to a property called Newton Hall, in the mansion-house of which he had resided before his death. This property he bequeathed with all the stock upon it, and the furniture in the mansion-house, to a nephew, subject to the use of the house and its contents by the second party and her sisters as long as each of them remain unmarried.

The nephew died six months before the testator, and the testator made no alteration upon his will. The questions are whether the property, the gift of which to the nephew lapsed by his death, goes to the second party as residuary legatee, or falls into intestacy and goes, as regards heritable property, to the heir-at-law of the deceased, and as regards moveables, to the next-of-kin?

It is plain that the testator intended by his will to dispose of his whole estate, including in it all his heritable estate. It bears upon the face of it that he had a special regard for the second party, the

deed narrating expressly the great kindness and attention he had received from her, and his desire to benefit her accordingly. There is nothing to indicate that, in appointing her his residuary legatee, he desired to keep back from her anything which he had not specially appropriated to some other relation. The nephew having died many months before his death, there is no good reason for supposing that he did not desire that the property which by that event fell into the residue of his estate, because no longer destined to any particular person, should not be disposed of as the rest of the estate not specially disposed of was intended to be, by his appointment of the second party as his residuary legatee. And as that appointment was made in general terms, and the testator made no alteration upon it, and as it admits of being construed to refer to heritable as well as moveable estate under the existing law, there seems to be no good ground for holding that he died intestate as regards this property. On the contrary, I think that it must be held that under her appointment as residuary legatee the second party takes this property, which at the time of the testator's death stood in the position of not being specially disposed of by the will.

If this view be sound, then it must also follow that the moveables connected with the property of Newton Hall are in the same position. I think that the first alternative of the first question and the first alternative of the second question should be answered in the affirmative.

LORD TRAYNER—I think the language of the residuary clause in the will before us is habile to convey heritage to the residuary legatee named, and that it does convey heritage to her, if the whole tenor and contents of the will are sufficient to instruct that the testator intended thereby to deal with heritage as well as moveables. I think he did so intend. The will was a universal settlement; it disposed of the testator's whole estate. He had destined the property of Newton Hall to his nephew, who was his heir-at-law, but that nephew predeceased the testator, as the testator knew. In these circumstances had the testator intended to convey Newton Hall to the third party, he would probably have done so by a codicil. He must have known that the third party could not take the property under the will as it stood, in which the third party is not even named. But the probability is that nothing was added to the will, and no new provision made concerning the property in question, because the testator regarded the lapsed legacy as falling back into the residue, which had already been conferred on the second party. The special favour with which the testator regarded his niece (the second party) strengthens this view. The testator having made no new provision with regard to the property of Newton Hall, must have intended it to go either to his residuary legatee or to be treated as intestate succession. The latter view is opposed to all the probabilities of the case, and is indeed negatived, I think, by the fact that the testator had originally disposed of his whole estate by the will before us, and intended his property to descend according to his directions, and not according to the disposition of the law.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK was absent.

The Court answered the first alternatives of the first and second questions in the affirmative.

Counsel for the First and Third Parties—Macfarlane. Agents—Henderson & Clark, W.S.

Counsel for the Second Party—H. Johnston—Neish. Agents—Henderson & Clark, W.S.

Thursday, November 21.

SECOND DIVISION.

KENNEDY'S TRUSTEES *v.* SHARPE.

Insurance—Life—Trust Policy for Children—Married Women's Policies of Assurance (Scotland) Act 1880 (43 *and* 44 *Vict. c.* 26), *sec.* 2—*Widower.*

By section 2 of the Married Women's Policies of Assurance (Scotland) Act 1880, it is provided that a policy of assurance effected by any married man on his own life, and expressed to be for the benefit of his children, shall be deemed a trust for the benefit of his children, and shall vest in him and his legal representatives in trust, or in any trustee nominated in the policy or appointed by separate writing duly intimated to the assurance office.

Held (1) that the expression "married man" included a widower; and (2) that the trust vested in the executors of the assured, and not in his testamentary trustees, the latter not having been specially appointed to deal with the policy.

By section 2 of the Married Women's Policies of Assurance (Scotland) Act 1880 (43 and 44 Vict. cap. 26) it is enacted — "A policy of assurance, if effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children, and such policy, immediately on its being so effected, shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy, or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control or form