This was an action concluding for payment of £5000 in name of damages for slander raised by J. B. Greig, banker, Laurencekirk, against John Balfour & Company, publishers of the "Montrose Standard.'

Within a week of issues being adjusted in October, the defenders lodged a tender of £50 with expenses; and at the trial in January at which the Lord President presided, a jury awarded the pursuer £25. Accordingly, when the verdict was applied the defenders were found liable in expenses up to the date of the tender, and entitled to expenses after that date.

Upon the Auditor's report on parties' accounts coming up for approval, the defenders objected to the following items in the pursuer's account—(1) a charge of four guineas for taking the pursuer's precognition and making a copy thereof, and (2) a charge of nine guineas for two copies of the precognitions sent to counsel immediately after the adjustment of issues. Both of these had been allowed by the Auditor. In the taxation of the defenders' account the defenders objected to the Auditor disallowing twenty-five guineas as senior counsel's fee for the trial. It was stated at the bar that the trial had lasted from ten in the morning till twenty minutes past nine at night, and that although comparatively few witnesses were examined for the defenders, a large number of precognitions had to be read. With reference to the precognition of the pursuer, the defenders relied on *Rough* v. *Lyell*, January 21, 1854, 16 D. 381.

The pursuer argued that no good reason had been shown for altering the decision of the Auditor, and in particular that twenty guineas was a sufficient fee for one day's work.

LORD PRESIDENT—This pursuer's account looks rather much considering the early stage at which the line is drawn up to which the pursuer gets expenses; and when we come to particulars I do not think this is a good charge for the precognition of the pursuer himself, and I think it should be struck out. Then it seems to me that two copies of the precognitions for counsel so early in the day as immediately after the issues were adjusted in a case which did not go to trial till after the new year will not do. So I am for striking that out. As regards the defenders' account, the question is whether twenty-five guineas should not be allowed for senior counsel. Now, it is the case that this was a long trial, and it happened that the requirements of the First Division on the following day made it a matter of practical necessity that it should finish on the first day. But I think that this is a case where we may take it that the work done by counsel really represents a day and a half, and so I think we may give twenty-five guineas.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

The Court sustained the defenders' objections to the Auditor's report on their account *quoad* the sum taxed off from the fee to Mr Jameson and his clerk, and decerned against the pursuer for the taxed amount of the account *plus* the said sum. As regards the defenders' objections to the Auditor's report on the pursuer's account, the Court sustained the same *quoad* the fees for drawing pursuer's precognition and the fee for two copies of the precognitions, and decerned against the defenders for the taxed amount of the account less the above sums.

Counsel for the Pursuer—Shaw, Q.C.—F. T. Cooper. Agent—A. W. Gordon, Solicitor.

Counsel for the Defenders — Jameson, Q.C.—A. S. D. Thomson. Agents—Welsh & Forbes, S.S.C.

Thursday, March 17.

SECOND DIVISION.

BRUCE'S TRUSTEES *v.* BRUCE.

Succession — Vesting — Repugnancy — Burden on Fee becoming Inoperative before Period of Payment — Conditio si sine liberis.

A testator disponed and assigned the residue of his estate, heritable and moveable, to his two sisters *nominatim* jointly, and to the longest liver of them in liferent, and to his nephew J. in fee, whom failing his nephew T. in fee, whom failing his niece I. in fee, "but divisible in the events and in manner after mentioned," whom all failing to his own nearest heirs in fee, declaring that on the death of the longest liver of the liferentrices, if either survived him, or, in the event of both predeceasing him, on his own decease, the residue of his estate, heritable and moveable, should be divided into as many equal parts and shares as there should then be existing in number of his nephews J. and T. and his niece I., and each of them then alive should be entitled to an equal share.

J. predeceased the testator, T. and I. survived him. Both predeceased the longest liver of the liferentrices, but both left children who survived her.

Held that the fee of the residue of the testator's estate vested wholly in T. *a morte testatoris.*

By disposition and deed of settlement dated 10th March 1853 Archibald Bruce of Bankton disponed "to and in favour of my sisters Mrs Isabella Bruce or Torrance, wife of George M'Mikin Torrance, Esquire of Threave, and Miss Margaret Jane Bruce, presently residing in Hillside Crescent, Edinburgh, jointly, and to the longest liver of them in liferent, for their liferent use allenarly, and to James Bruce, son of my deceased brother Thomas Bruce, Writer to the Signet, in fee, whom failing to Thomas Bruce, also son of my said deceased brother, in fee, whom failing to Isabella Bruce,

daughter of my said deceased brother, in fee, whom all failing to my brother John Bruce, in liferent for his liferent use allenarly, and to my own nearest heirs in fee, heritably and irredeemably, all and whole my estate of Bankton . . . And farther and in like manner as aforesaid I dispone, assign, convey and make over to and in favour of my said sisters, Mrs Isabella Bruce or Torrance, and Margaret Jane Bruce, jointly and to the longest liver of them in liferent, for their liferent use allenarly, and the said James Bruce in fee, whom failing, the said Thomas Bruce in fee, whom failing, the said Isabella Bruce in fee, but divisible in the events and in manner after mentioned, whom all failing, to my brother John Bruce in liferent, for his liferent use allenarly, and to my own nearest heirs in fee, my whole other heritable estate and property and my whole moveable or personal estate, heirship moveables included, presently belonging or which shall belong to me at the time of my death. . . . Declaring further, that on the death of the longest liver of the said Mrs Isabella Bruce or Torrance and Margaret Jane Bruce, if either survive me, and in the event of them both predeceasing me, then on my own decease, the whole of my heritable and moveable means and estate (excepting the lands and estate of Bankton and others hereinbefore specially described), but subject to and under burden of any legacies, bequests, or annuities left by me in manner foresaid, shall be divided into as many equal parts or shares as there shall then be existing in number of the said James Bruce, Thomas Bruce, and Isabella Bruce, and each of them then alive shall be entitled to an equal share—that is to say, if they be all then in life, in three equal parts or shares, or if only two be then alive, in two equal parts or shares, and in the said division, whoever of the said James Bruce, Thomas Bruce, and Isabella Bruce shall have succeeded to my said lands and estate of Bankton and others, will notwithstanding draw an equal part or share with the others or other; and if there should be only one of the said persons then alive, he or she shall be entitled to the whole of my said other means and estate along with the said lands and estate of Bankton."

On 24th April 1867 Archibald Bruce died leaving the estate of Bankton and certain moveable estate. James Bruce, his nephew, predeceased him, but he was survived by his two sisters Mrs Torrance and Miss Margaret Jane Bruce, and by two children of his deceased brother Thomas, viz., Thomas Bruce and Isabella Bruce, the latter of whom had married Alexander Wilson on 9th March 1891 Archibald Bruce's next-of-kin at the date of his death were therefore his two sisters, Mrs Torrance and Miss Margaret Jane Bruce, and the children of his deceased brother, viz., Thomas Bruce and Mrs Isabella Bruce or Wilson.

Thomas Bruce married in July 1868, and conveyed all the personal property to which he might become entitled on the death of his aunts to his marriage settlement trustees. He died on 12th May 1890 survived by his wife and two children.

Mrs Isabella Bruce or Wilson died on 28th January 1897 survived by six children, and leaving a trust-disposition and settlement.

Mrs Isabella Bruce or Torrance died without issue on 11th March 1874, leaving a trust-disposition and settlement dated 16th January 1872, under which Miss Margaret Jane Bruce was appointed her residuary legatee. Miss Margaret Jane Bruce died on 19th November 1807, leaving a trust-disposition and settlement by which she conveyed her whole estate to trustees.

In these circumstances questions arose regarding the destination of the residue of Archibald Bruce's estate other than the estate of Bankton, and for the settlement of these questions a special case was presented to the Court by (1) Miss Margaret Jane Bruce's trustees, (2) Thomas Bruce's marriage settlement trustees, (3) Thomas Bruce's children, (4) Mrs Isabella Bruce or Wilson's children, (5) Mrs Isabella Bruce or Wilson's trustees, and (6) the judicial factor appointed on the trust-estate of Archibald Bruce.

The questions at law were—"(1) Does the said residue of Archibald Bruce's estate now fall to his heirs *in mobilibus?* Or (2) Does the said residue fall to be divided between the third and fourth parties equally *per stirpes* in virtue of the *conditio si sine liberis?* Or (3) Does two-thirds of said residue fall to the third and fourth parties equally *per stirpes*, and the remaining one-third to the testator's heirs *in mobilibus?* Or (4) Did said residue vest wholly either (*a*) in the said Thomas Bruce or (*b*) in the said Mrs Isabella Bruce or Wilson? Or (5) Did said residue vest in the said Thomas Bruce and Isabella Bruce or Wilson in equal shares?"

Argued for the first parties—(1) The date of the death of the surviving liferentrix was the date of vesting, and as neither James Bruce, Thomas Bruce, nor Isabella Bruce was alive at that date, the residue fell to the testator's heirs *in mobilibus* in the proportions of two-thirds to the first parties as representing the testator's sisters, and one-third to the second and fifth parties equally between them as representing the testator's brother. Survivance of the period of vesting must be read as a condition of the gift to those called *nominatim*, and this excluded the application of the *conditio si sine liberis*—*M'Call* v. *Dennistoun*, December 22, 1871, 10 Macph. 281. (2) If the *conditio si sine liberis* was held to apply, the third and fourth parties were only entitled in virtue thereof to two-thirds of the residue, the remaining third falling to the testator's heirs *in mobilibus* in the proportions above specified, as it had been decided that accrescing shares do not fall under the *conditio si sine liberis*—*Young* v. *Robertson*, February 14, 1862, 4 Macq. 337; *Aitken's Trustees* v. *Wright*, December 22, 1871, 10 Macph. 275; *Neville* v. *Shepherd*, December 21, 1895, 23 R., opinion of Lord M'Laren 357.

Argued for second parties—(1) The date

of the testator's death was the date of vesting, and the whole of the residue vested in Thomas Bruce. (2) Alternatively the residue vested equally in Thomas Bruce and Mrs Wilson *a morte testatoris*. (3) If it was held that the date of vesting was the date of the death of the last surviving liferentrix, they concurred in the second argument of the first parties.

Argued for third and fourth parties—The residue vested on the death of the last surviving liferentrix, and they were entitled to the whole of the residue equally between them *per stirpes* in virtue of the *conditio si sine liberis—Aitken, supra; M'Culloch's Trustees*, May 14, 1892, 19 R. 777; *Allan* v. *Thomson's Trustees*, May 30, 1893, 20 R. 733.

Argued for fifth parties—(1) The residue vested equally in Thomas Bruce and Mrs Wilson *a morte testatoris*. (2) If it was held that vesting took place on the death of the last surviving liferentrix, they concurred in the second argument of the first parties.

At advising—

LORD TRAYNER—Mr Archibald Bruce, the testator, disponed his whole estate, heritable and moveable (except the estate of Bankton) to his two sisters, and the survivor of them in liferent allenarly, and to "James Bruce in fee, whom failing the said Thomas Bruce in fee, whom failing the said Isabella Bruce in fee, but divisible in the events and in manner after mentioned, whom all failing . . . to my own nearest heirs in fee." James predeceased the testator; Thomas and Isabella survived him, but both predeceased the survivor of the liferenters. In these circumstances, the principal question submitted for our decision is, in whom did the fee of the estate vest under the destination I have quoted. I have no doubt that the fee vested in Thomas, the first here called in the destination, who survived the testator, and (as the liferent did not suspend vesting) that vesting in Thomas took place *a morte*. That vesting in Thomas evacuated the destination to Isabella called to the succession after him.

But the conveyance to Thomas was burdened or limited by a declaration to the effect that if Thomas and Isabella survived the extinction of the liferent (I leave out James who predeceased), then the fee should be divided between them, if only one survived, the survivor should take the whole. In the event which happened, this declaration became inoperative. Neither of the two fiars, successively called, survived the longest liver of the two liferenters. The declaration as to the division of the fee never having thus come into effect by reason of the failure of the condition on which it proceeded, the fee remained, as destined, in the person of Thomas, free from the limitation or burden which, had the event provided for happened, would have been imposed. I think, therefore, that the first branch of the fourth question should be answered in the affirmative.

In the view I have expressed, it is unnecessary to answer any of the other questions.

LORD YOUNG and the LORD JUSTICE-CLERK concurred.

The LORD JUSTICE-CLERK read the following opinion of LORD MONCREIFF, who was absent:—I am of opinion that question 4 (*a*) should be answered in the affirmative. This question depends upon the construction of two clauses in the settlement of Archibald Bruce of Bankton. It was intended that they should be read together, because in the first clause the latter clause is distinctly referred to in the words "but divisible in the events and in manner aftermentioned." We must therefore, so far as possible, reconcile the two clauses, and I think that this can best be done by sustaining the argument for the second parties and holding that the operation of the latter clause was confined to an event which has not occurred, namely, of one or more of the parties named surviving both the liferenters, and that therefore right to the whole of the residue vested in Thomas Bruce, who survived the testator, succeeded to Bankton, but predeceased the longest liver of the liferenters. I think the leading feature of the testator's scheme of disposal of the residue was that it should go along with the estate of Bankton, the destination being precisely the same as that which regulated the succession to Bankton. Otherwise the destination in the first clause would be absolutely without meaning. But notwithstanding this, the testator, somewhat inconsistently, wished and directed that if any of the parties called to the succession survived the date of payment—that is, in the event which happened, the death of the longest liver of the liferenters—the residue should suffer division, or in the event of only one of the conditional institutes surviving he or she should take the whole.

But none of these events occurred, and all the favoured parties predeceased the liferenters. We are therefore thrown back upon the first clause, which will now be read without the words "but divisible in the events and in manner after mentioned." I may add that, in my opinion, the parties being called *nominatim*, and their participation in the residue being dependent on survivorship of a certain term, there is no room for the application of the *conditio si sine liberis*. I think that succession to the residue is as strictly limited to the individuals named as is the succession to the estate of Bankton. The modification of the first clause by the second was, I think, introduced solely out of personal and individual favour to the parties named—*M'Call* v. *Dennistoun*, 10 Macph. 281; *Blair's Trustees*, 3 R. 304; *Gillespie* v. *Mercer*, 3 R. 561.

I would also observe that in the later clause there is no ulterior destination to meet the event of none of the parties surviving the liferenters. This, I think, goes to show that the former clause is in that event to rule.

The Court answered the questions by declaring that the residue of the estate of the deceased Archibald Bruce vested wholly in Thomas Bruce, subject to the liferent of the now deceased Mrs Isabella Bruce or Torrance and Miss Margaret Jane Bruce.

Counsel for the First Parties—Cullen. Agent—F. J. Martin, W.S.

Counsel for Second and Sixth Parties—Macfarlane—Sym. Agents—Wallace & Guthrie, W.S.

Counsel for the Third Parties—Kincaid Mackenzie. Agent—F. J. Martin, W.S.

Counsel for the Fourth Parties—Cook. Counsel for the Fifth Parties—Vary Campbell. Agents—Fraser, Stodart, & Ballingall, W.S.

Thursday, March 17.

SECOND DIVISION.

[Sheriff of Lothians and Peebles.

HEDDLE *v.* MAGISTRATES AND COUNCIL OF LEITH.

(*Ante*, p. 44.)

Title to Sue — Complaint under Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 67.

Section 67 of the Burgh Police (Scotland) Act 1892 provides that any person assessed, and dissatisfied with the accounts made up by the statutory commissioners for the purposes of the Act, may complain against the same by petition to the Sheriff within three months after the accounts are approved by the commissioners.

Held that a ratepayer has a title to bring a complaint under the above section although he does not aver any hardship which he personally suffers through the irregularities in the accounts of which he complains, or any benefit which he would derive from their being corrected.

See former case between same parties, reported *ante*, p. 44.

James Heddle, tenant and occupier at No. 1 James Place, Leith, and assessed as under the provisions of the Burgh Police (Scotland) Act 1892, presented another petition under the provisions of the 67th section of that Act to the Sheriff of the Lothians and Peebles against the Magistrates and Council of Leith as coming in room of the commissioners of the burgh, and prayed the Court to find that there were certain irregularities in the commissioners' accounts and to ordain that these irregularities should be rectified. The specific cravings were of a similar nature to those in the former petition.

The petitioner did not aver in the condescendence annexed to his petition any particular hardship under which he suffered by reason of the irregularities in the accounts of which he complained, or any special benefit which he would derive from these irregularities being rectified.

The defenders admitted that the pursuer along with the Misses Lamb was assessed for the Burgh General Assessment under the Burgh Police (Scotland) Act 1892 for the year ending 15th May 1897, the amount in respect of which he was so assessed being £1, 3s. 4d., and that he along with Miss Jane A. Lamb was liable for the like assessment during the current year to the extent of £1, 9s. 2d. They pleaded, *inter alia*, (1) No title or interest to sue. (2) The action is incompetent. (3) The action is irrelevant. (4) *Res judicata.*

On 19th January 1898 the Sheriff (RUTHERFURD) pronounced the following interlocutor:—"Finds that the petitioner has not a sufficient right, title, or interest to insist in the present application: Therefore sustains the respondents' first plea-in-law, and finds it unnecessary to dispose of their second, third, and fourth pleas-in-law: Dismisses the petition, and decerns."

Note.—"This is a petition under the 67th section of the Burgh Police Act of 1892, which provides that any person assessed, and dissatisfied with the accounts made up by the statutory commissioners for the purposes of the Act, may complain against the same by petition to the sheriff within three months after the annual audit and approval of the accounts.

"It appears to the Sheriff that the purpose of this enactment was to enable any ratepayer who may have been improperly assessed, or who may have suffered hardship in consequence of irregularities in the commissioners' accounts, to obtain redress in a summary manner.

"But in the present instance the petitioner is unable to allege that he has any interest whatsoever in the result of the application; and his purpose in presenting it has not been explained. It is the third petition of the same kind, and the Sheriff does not think that the Legislature intended that an individual ratepayer, with no pecuniary interest at stake, should have it in his power, year after year, to adopt proceedings against the commissioners which can be productive of no benefit to himself, unless it be the gratification of a morbid craving for notoriety, or possibly some ulterior motive.

"In a former case between the same parties the Sheriff sustained an objection to the petitioners' title to insist in such an application on grounds fully set forth in the note to his interlocutor—(See *Heddle* v. *Magistrates of Leith*, 1897, 35 S.L.R. p. 44). That interlocutor was brought under review of the Second Division of the Court of Session; but their Lordships did not consider it necessary to dispose of the question, inasmuch as (the parties having renounced probation) the Sheriff, who had heard them on the merits, indicated an opinion to the effect that the petition was not well founded. In these circumstances the Court remitted to the Sheriff to dispose of the case on its merits, which he accordingly did.

"But the parties to the present proceed-