The question is, Are the School Board responsible? I am clearly of opinion that they are not entitled to send their sewage in these pipes across this fifty foot strip, and into the pipes for receiving surface-water, and so into the stream. They say that this is not due to their fault, but to the superior's failure to prevent such overflow, in terms of his obligation undertaken to them. In my opinion, in a question with the complainer they were not entitled to bargain for an outlet which has resulted in their sewage finding its way into their neighbour's stream. I think they are responsible for the nuisance thereby caused, and that they must be stopped accordingly. The outlet which has been provided has proved insufficient, and it is their duty to find another which will avoid the discharge of the sewage into the complainer's stream.

With regard to the respondent Cameron, he is in the position of having undertaken to find an outlet that would relieve the School Board, and would not cause a nuisance to the neighbours immediately at hand. He has not done so, but has allowed the sewage to pass through these barrels, which he has taken no trouble to clean out, and flow on to the complainer's property. I am of opinion that both respondents are responsible for the nuisance complained of, and I therefore agree with your Lordship that we should adhere to the judgment of the Lord Ordinary.

LORD TRAYNER — I am of the same opinion. The material fact is that the sewage complained of comes from the School Board feu and passes through the respondent Cameron's ground to the ground of the complainer. That is an infringement of the complainer's rights which he is entitled to interdict. The question that we have to determine is, Who is the wrong-doer? In my opinion both respondents must be so described. I can quite understand that where under contract A undertakes to remove, say, noxious matter from B's lands, that B may not be responsible if A puts it in an improper place. But that argument is not applicable to the circumstances of the present case. Here the School Board had to get an outlet for their sewage, and they accordingly contracted with the respondent Cameron to provide that outlet. But the outlet which he provided was an outlet to his neighbour's land. That outlet the School Board are using, and they are thus, to adopt an expression used in some of the cases, the "authors of the nuisance," and as such the present complaint is directed against them. On the other hand, Cameron is under obligation to provide an outlet for the sewage in question, and he, by way of fulfilling his obligation, is carrying the sewage, or allowing it to pass through his land on to the complainer's. He may be interdicted accordingly for so doing; he is encroaching on his neighbour's rights. In my opinion, therefore, both the respondents are doing a wrong to the complainer, and are both liable to interdict.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Complainer — John Wilson, Q.C. — Ralston. Agent — Henry Wakelin, Solicitor.

Counsel for the Respondent William Cameron — Craigie — Laing. Agents — Laing & Harley, W.S.

Counsel for the Respondents the School Board of Polmont—Salvesen, Q.C.—Orr. Agent—Robert D. Ker, W.S.

Thursday, July 12.

SECOND DIVISION.

TURNBULL'S TRUSTEES *v.* TURNBULL'S TRUSTEES.

Succession — Vesting — Fee or Liferent — Declaration that Fee not to Vest till Majority and Expiry of Liferents — Interest of Beneficiary Restricted to Liferent under Power Given to Trustees — Intestacy.

A testator, after providing a liferent of his whole estate to his widow, directed his trustees to hold the residue of his estate, "one-half for behoof of the issue of my said deceased son John in fee, and the other half for behoof of my said son James in liferent and his issue in fee," declaring that the fee should not vest in the issue of either son during the said liferents, nor until such issue should respectively attain majority. He further empowered his trustees to limit the interest of any beneficiary of whose conduct they did not approve to a liferent, and to suspend the vesting of the fee of his share during his life, and to hold the same for behoof of his or her issue. The trustees validly and properly exercised the power of restriction in the case of W., a son of John, while he was still in minority. W. attained majority, and died without issue, survived by a sister.

Held that no right of fee had vested in W., and that on his death without issue the fee of his share fell into the intestate succession of the testator.

Lindsay's Trustees v. *Lindsay*, Dec. 14, 1880, 8 R. 281; and *Dalglish's Trustees* v. *Bannerman's Executors*, March 6, 1889, 16 R. 559, *distinguished.*

William Turnbull, Daldowie, Old Monkland, who died on 20th December 1869, left a trust-disposition and settlement dated 23rd October 1866, whereby he conveyed his whole estate to certain trustees for the purposes therein specified.

By the second purpose of his settlement the testator provided a liferent of his whole estate to his widow.

The third purpose was as follows:—"In respect I gave outfits to my sons John Turnbull, now deceased, and James Turnbull, farmers at Daldowie (my whole children), I direct my trustees on the decease of my widow, or on my death in

the event of my surviving her, to hold the whole residue of my estate, one-half for behoof of the issue of my said deceased son John Turnbull in fee, and the other half for behoof of my said son James Turnbull in liferent and his issue in fee, the share of each son's family to be divided among them and their issue *per stirpes* in such proportions as may be pointed out by any writing under their ancestor's hand, and failing such appointment equally among them *per stirpes*. . . . And I further declare that the shares of the fee of my estate shall not vest in the issue of either of my said sons during the subsistence of either of the liferents thereof above provided, nor until such issue shall respectively attain the age of majority, but it shall be in the power of my said trustees, if they think proper, to pay to or expend for behoof of any minor not only the income, but also any part or the whole of the capital of any share of my estate which will apparently fall to such minor, for the purpose of maintaining, clothing, and educating him or her, or by way of apprentice fee, capital wherewith to commence business, outfit on marriage, or such other objects as my trustees may deem advisable and proper, any such advances being always imputed to account of and deducted from the share of my estate to which the party receiving the same, or on whose account they are made, will apparently become entitled, and such advances out of capital during the subsistence of my widow's liferent and during the lifetime of my son, the ancestor of such minor, shall be always with their consent: Declaring further, that should any of my beneficiaries conduct themselves so as not to meet the approbation of my trustees, it shall be in the power of my said trustees, if they think fit, to limit the whole or a part of the interest of such beneficiary to a liferent of the whole or a part of his or her share, and to suspend the vesting of the fee of such share, either in whole or in part, during his or her life, and to hold the same for behoof of his or her issue in such proportions as may be pointed out by any writing under his or her hand, and failing such appointment, equally among such issue *per stirpes*, with power also to my trustees, after having exercised the above power, to withdraw and cancel the restriction at pleasure."

The testator was survived by his wife, one son (the said James Turnbull), and by three grandchildren—the only children of his other son John Turnbull, viz., William Turnbull, Fanny Jackson Turnbull, and Elizabeth Turnbull. John Turnbull predeceased the testator without having made any appointment of his prospective interest in the testator's estate. The testator's widow died on 11th July 1870. Fanny Jackson Turnbull died on 9th November 1879 in minority and unmarried. William Turnbull, the testator's grandson, died on 10th July 1898, also unmarried, survived by his mother and by his sister Elizabeth. The testator's son James Turnbull died on 18th November 1888, survived by a widow and nine children, and leaving a trust-disposition and settlement, by which he conveyed his whole estate to certain trustees therein named for behoof of his widow and children. The testator's estate, which was at his death wholly moveable *quoad* succession, amounted to about £7000. After the death of Fanny Jackson Turnbull, one-fourth of the residue was held by the testator's trustees for William the testator's grandson, and with accumulations of income during his minority, namely, until 31st December 1882, when he attained majority, amounted at his death to about £2800 of capital value. On 29th December 1880 the trustees under the testator's deed of settlement executed a minute in the following terms, viz., "In terms of the power conferred on them by the deed of settlement of the deceased, the trustees resolved to limit, and hereby accordingly limit, the interest of the children of the late John Turnbull, the testator's son, to a liferent of their respective shares, and hereby suspend the vesting of the fee of such shares in whole during the respective lives of the said children, or until this restriction is withdrawn or cancelled by the trustees, all in terms of the deed of settlement." The trustees subsequently on 28th and 29th December 1882 executed a formal deed of declaration in the same terms. So far as regards the share of William, the grandson, the said restriction and suspension was never withdrawn or cancelled. William Turnbull, the grandson, left a holograph writing in the following terms, addressed to the law-agent in the trust:—"*West Farm, May 2nd* 1893. Mr John Turnbull, writer. Dear Sir—You will as usual discharge the duties in connection with Daldowie estate for the benefit of my sister Eliza, reserving the one-half of said accumulated interest to be given to my mother, after paying funeral expenses. WM. TURNBULL." The "Daldowie estate" was the trust estate held under the testator's deed of settlement, and the "accumulated interest" therein referred to was that accruing subsequent to 31st December 1882, when William Turnbull attained majority. Elizabeth Turnbull having been decerned executrix-dative *qua* sole next-of-kin of her brother William Turnbull, the said holograph writing was so far acted upon that the accumulated interest, amounting to £215, 19s. 11½d., less funeral expenses, was divided equally between William Turnbull's mother and Elizabeth Turnbull.

Questions having arisen with reference to the share of the trust-estate of which William Turnbull the grandson enjoyed the liferent, a special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the trustees under the testator William Turnbull's trust-disposition; (2) the trustees under James Turnbull's trust-disposition and settlement; (3) Elizabeth Turnbull; (4) the widow of John Turnbull.

The parties were agreed that in the case of the grandson William there were sufficient grounds for the trustees exercising

their power of restriction and suspension, and that the power conferred on them by the testator was validly exercised in so far as he was concerned by the minute and the deed of declaration before referred to, but that there was no ground in fact, so far as the third party was personally concerned, for the restriction and suspension. Accordingly, the trustees intimated that they now formally withdrew and cancelled the restriction and suspension so far as affecting the share of the third party.

The second parties maintained that, upon the death of the grandson without issue, the share liferented by him fell into intestacy of the testator, and belonged to his heirs *in mobilibus ab intestato* as at his, the testator's, death, and that consequently one-half thereof fell to the second parties as in right of James Turnbull, one of the two children of the testator, and the other half to the representatives of John Turnbull, the other son who predeceased the testator.

The third party maintained that the said share belonged to her in respect (*a*) that as soon as the said deed of restriction was executed the fee thereof vested in her, or otherwise, that the fee of said share, notwithstanding said deed of restriction, vested in her brother subject to defeasance only in the event of his leaving issue; or (*b*) that she was entitled to it under the holograph writing of 2nd May 1893, by which her brother William Turnbull effectually tested upon the same, and bequeathed it to her, subject to payment of the one-half of the accumulated interest therein referred to, to the fourth party, which had already been made; or (*c*) that she was entitled to said share as executrix-dative *qua* sole next-of-kin of her said brother under and by virtue of the testament-dative in her favour.

The fourth party concurred in the contention of the third party.

The questions of law for the opinion and judgment of the Court were—"(1) Does the share of the testator's estate, of which the grandson William Turnbull enjoyed the liferent, fall into intestacy of the testator, and now fall to be paid to the extent of one-half to the second parties, and to the extent of one-half to the representatives of John Turnbull? Or (2) Is the fee of said share vested in the third party, and does it now fall to be paid wholly to her?"

Argued for the second parties—William Turnbull, the grandson, never took more than a liferent of his share. By express direction of the testator nothing could vest in a grandson till he became 21; and the power of restriction conferred on the trustees was exercised prior to that date. There was here no independent gift of fee; William's right depended entirely on the view which the trustees might take of his conduct, and it was admitted that their exercise of the power to restrict his interest to a liferent was valid and proper—*Dalglish's Trustees* v. *Bannerman's Executors*, March 6, 1889, 16 R. 559; *Muir's Trustees*, v. *Muir's Trustees*, March 19, 1895, 22 R. 553. Accordingly, the share liferented by him fell into the intestate succession of his grandfather.

Argued for the third party—The fee of William Turnbull's share of the trust-estate had vested in him on his reaching majority, by virtue of the testator's absolute direction to divide the share of each son's family among them. Alternatively, the fee had vested in him, subject to defeasance only in the event of his leaving issue, which he did not do. The only purpose was to protect William's succession for the benefit of his children.—*Dalglish's Trustees*, *supra*; *Lindsay's Trustees* v. *Lindsay*, December 14, 1880, 8 R. 281; *Dunlop's Trustees* v. *Sprot's Executor*, March 9, 1899, 1 F. 722. As he left no issue, his share passed to his sister, either under his will or as his executrix-dative. But if it were held that William took no vested right, then the fee had vested in Elizabeth as the sole survivor of the children of John Turnbull.

LORD JUSTICE-CLERK—I think this case presents no difficulty, and does not resemble any of the cases quoted by Mr Craigie. The testator bequeathed one-half of the residue of his estate to the issue of his deceased son John Turnbull in fee, but with the express declaration that the shares of fee should not vest during the subsistence of the liferents respectively provided to his widow and his son James Turnbull, both of whom survived him. The share of fee bequeathed to William Turnbull accordingly did not vest in him at the testator's death, according to his express direction. Further, the testator declared that his trustees should have power, in the event of any of the beneficiaries so conducting themselves as not to merit their approbation, to limit the interest of such beneficiary to a liferent, and to suspend the vesting of the fee of his share during his life, and he also empowered them to withdraw and cancel such restriction at pleasure. The trustees did exercise the right conferred upon them by restricting the right of William Turnbull to a liferent, and they did not withdraw that restriction. When, therefore, William Turnbull died nothing had vested in him. In these circumstances it seems to me to be a hopeless contention on the part of Mr Craigie's client that under the testator's will a power of disposal was given. The share liferented by William Turnbull necessarily falls into intestacy, and must be disposed of accordingly.

LORD YOUNG—I have arrived at the same conclusion. I take the case exactly as if the testator had done what the trustees have done, admittedly in exercise of the power given by the testator in carrying out his will, that is, as if he had given William Turnbull merely a liferent. Now, if he had had a liferent, with fee to his issue, directly under the deed of the testator, it is impossible to contend that he would have had power to dispose of the fee by will. That puts an end to the will. There being no issue the fee is undisposed of, and being undisposed of it is intestate succession of the testator. I propose,

therefore, that we should answer the questions accordingly.

LORD TRAYNER — I am of the same opinion. The doctrine established by the cases of *Lindsay* and *Dalglish*, and also in a later case, is one that we would not question. The Court is at one upon the soundness of the principle there laid down, and if it were applicable it would be followed. But that principle has no application to the present case, and for this reason—In these cases there was a gift of fee to the testator's daughters, but that gift was burdened with a trust for their children, if they should have any. The daughters died without issue, and the burden accordingly fell off. The circumstances of the present case are essentially different, because although the trustees were directed to hold one-half of the residue for behoof of the issue of John Turnbull, the testator expressly declared that no right should vest in them until they attained the age of 21. William Turnbull's share in ordinary course would have vested when he became 21, but the trustees had power to restrict the interest of any beneficiary of whose conduct they did not approve to a liferent, and to pass on the fee to his issue, if he had any. The trustees, prior to the period of vesting, exercised this power, and I think, with Lord Young, that the result is the same as if the testator had himself done so. The prospective right of fee was cut down to a liferent, subject to a provision for children. William Turnbull had no children, and I think therefore that the fee of his share of his grandfather's estate fell into the intestate succession of the latter.

LORD MONCREIFF was absent.

The Court answered the first question in the affirmative, and the second question in the negative.

Counsel for the First and Second Parties —M'Clure. Agents—Webster, Will, & Co., S.S.C.

Counsel for the Third and Fourth Parties —Dundas, Q.C.—Craigie. Agents—Forrester & Davidson, W.S.

Saturday, July 14.

FIRST DIVISION.

FACULTY OF PROCURATORS IN GLASGOW *v.* COLQUHOUN.

Administration of Justice — Law-Agent— Misconduct—Removal of Name from Roll —Title to Sue — Notary-Public — Law-Agents (Scotland) Act 1873 (36 *and* 37 *Vict. cap.* 63), *sec.* 22.

Held that the Faculty of Procurators in Glasgow had a good title to present a petition for the removal from the roll of law-agents and list of notaries-public, in respect of professional misconduct, of a law-agent who had recently been a member of their body but had been expelled from it.

A & B, the partners of a firm of law-agents and notaries-public, were each tried on a charge of embezzlement of money belonging to the clients of the firm. A was convicted; B was acquitted, but the jury added to their verdict a record of "their strong opinion of the gross carelessness and neglect he had shown as a partner of his firm." *Averments* on which, in a petition for the removal of B's name from the roll of law-agents and list of notaries-public for professional misconduct, the Court allowed a proof.

Process — Service — Petition to have Name of Law-Agent and Notary Struck Off.

In a petition to have the name of A, a partner of the firm of A & B, who practised as law-agents and notaries-public in Glasgow, struck off the roll of law-agents and list of notaries-public, the Court, in addition to service upon the respondent, ordered service upon the other partner in the firm, the Registrar of Law-Agents in Scotland, the Sheriff-Clerk of Lanarkshire, and the Clerk to the Admission of Notaries-Public in Scotland.

On 31st July 1899 the estates of the firm of J. & D. T. Colquhoun, law-agents and procurators in Glasgow, and of the partners thereof — James Colquhoun and David Turnbull Colquhoun — were sequestrated, when it appeared that there was a deficiency amounting to £150,000. Criminal proceedings were instituted against both of said partners. On 26th September 1899 the said James Colquhoun pleaded guilty, in the Sheriff-Court of Lanarkshire at Glasgow, to a charge of embezzling various sums of money, the property of clients of said firm, amounting in all to £50,511, 15s. He was remitted for sentence to the High Court of Justiciary, and at a sitting of said Court held in Edinburgh on 4th October 1899, sentence was pronounced upon the said James Colquhoun of five years' penal servitude. The said David Turnbull Colquhoun was served with an indictment charging him with embezzlement of £10,095, and after a trial, which proceeded upon 5th December 1899 and the three following days, he was acquitted. The verdict of the jury was in the following terms:—"The jury find the panel not guilty, but they record their strong opinion of the gross carelessness and neglect he has shown as a partner of his firm."

David Turnbull Colquhoun was admitted as a notary-public upon 23rd December 1871, and enrolled as a law-agent on 29th October 1873. He was admitted a member of the Faculty of Procurators in Glasgow on 16th November 1883. He was dismissed from that body on 2nd March 1900.

On June 1, 1900, the Faculty of Procurators in Glasgow; Joseph Macintyre Taylor, the Dean; and John Guthrie Smith, the treasurer, clerk, and fiscal of said Faculty, presented the present petition in the Court of Session.

The prayer of the petition was in the following terms:—"May it therefore please your Lordships to order service of this