

subsequent rents, interests, and annual profits of the trust-estate of the deceased Robert Ker: Find neither party liable to the other in expenses of process hitherto incurred and not already decerned for.

“DUN. McNEILL, J.P.D.”

Agent for Raisers—William Waddell, W.S.  
Agent for Major Weller—William Sime, S.S.C.  
Agent for Mr Justice, &c.—Thomas Ranken, S.S.C.

M'LACHLANS v. GARDNER (*ante*. vol. i. p. 259).

*New Trial.* Motion for a rule on the ground that a verdict was contrary to evidence refused, the sole question before the jury being one of credibility. Observations as to the principles on which new trials on that ground should be allowed.

This was a motion for a rule. In an action of damages at the instance of the widow and children of a fireman at Solesgirth Colliery, near Kirkintilloch, who was killed there on 6th June 1865, the issue, whether the death was caused through the fault of the defender, was tried before the Lord President and a jury on 9th and 10th April 1866. The jury by a majority of nine to three found for the pursuers, and assessed the damages at £100 to the widow, and £5, £10, and £20 to the three children respectively.

The defender having moved for a rule, W. M. THOMSON was last week heard in support of the motion.

The Court to-day refused the motion.

Lord DEAS said—I think we ought not to grant this rule. The whole question for the jury was whether the accident happened in consequence of one of the spokes being broken or being insufficiently secured. There are four witnesses who swear that it was broken, and if it was, that was sufficient to account for the accident. On the other hand, seven witnesses swear as distinctly that it was not. The jury have believed the four against the seven. It was a question of credibility peculiarly within the province of the jury. Such a question is not to be determined by numbers; and if it is not, it is not possible to suppose a more obviously jury question. Even if I were disposed to lean to the side of the seven instead of that of the four witnesses, I don't think that would be a sufficient ground for granting a rule. But I am not prepared to say that I believe the seven instead of the four. Two of the seven were deeply interested in the matter. It was the duty of one of them to repair the spoke when it broke, and it was the duty of another to see that he did so. The means of knowledge of the seven were not greater than those of the four; and, besides, there is a circumstance of real evidence which affects my mind considerably. If the accident did not happen in consequence of a broken spoke, there is no other way suggested in which it did happen. On the whole, therefore, had I been a jurymen, I think I would rather have inclined towards the opinion of the majority of the jury.

Lord ARDMILLAN—There are two classes of cases in which we are asked to allow new trials. In the one class, where juries draw inferences from admitted or clearly proved facts, and the Court are very clear that the jury has gone wrong, we generally, when a strong case is made out, allow a new trial. But where the case is one of antagonistic evidence, and the sole question is the credibility of human testimony, I am always very slow to interfere with the opinion of the jury who saw

and heard the witnesses, and observed their demeanour in the witness box. I would require a very strong case for that. I think this case belongs to the latter class. I also agree with Lord DEAS that it is a strong circumstance in this case that no other explanation of the accident is suggested, while the want of a spoke is sufficient to account for it. I don't say what verdict I would have returned had I been on the jury. I think the question was one of great nicety.

Lord PRESIDENT—I must confess that at the trial I concurred with the opinion of the minority of the jury; but the case was a very nice one, and as your Lordships agree that the motion for a rule should be refused, I am not prepared to dissent.

Agents for Pursuers—Macgregor & Barclay, S.S.C.

Agent for Defender—George Wilson, S.S.C.

Thursday, Nov. 8.

M.P.—HILL'S TRUSTEES v. HILL AND OTHERS.

*Trust—Bequest of Interest—Vesting—Intestacy—Accretion.* A person by his trust-deed appointed a sum of money to be distributed in 1878, and the intermediate interest accruing to be paid to his brother, who survived him, but died in 1864. Held that the bequest of interest had vested in the brother by his survivorship, and his executor preferred thereto in competition with the trustor's heirs *ab intestato*, and the persons among whom the money was to be ultimately distributed, the latter claiming right to it *jure accretionis*.

By trust-disposition and deed of settlement, dated 6th November 1860, the late David Hill of Hillgarden conveyed his whole heritable and moveable means and estate to certain trustees for the purposes therein mentioned. These purposes, so far as necessary to be here narrated, were as follows:—“*First*, In respect that the main object of this trust is to form a clear capital trust-fund of £6500 sterling, to be disposed of under the management of my trustees in manner under written, and that over and above the said Coupar-Angus heritable properties, the disposal whereof is hereinafter provided for, I declare and enjoin that my brother Robert shall provide funds to my trustees for paying all my just and lawful debts, my death-bed and funeral expenses, and the expense of the executry, including the stamp of the inventory of my personal estate, leaving the other expenses of this trust to be paid out of the first and readiest of the funds under my trustees, and the legacy-duties to be paid by the respective legatees, or retained by my trustees off their legacies: *Second*, My trustees shall make over to my brother Robert the lease of Hallyards for the whole remaining years thereof, and also my whole crop, stocking, household furniture, and moveables thereupon, and my other moveable means and estate wherever situated, and also my heritages, except what is hereafter specially disposed of, at the sum of £3500 sterling, which he shall be required to pay over to my trustees as soon after my death as he and they arrange, and at least within six months thereof; and as this sum, with £3000 I now have in the bank, will form a capital of £6500, which will be the full money fund under the trust, I direct this amount of capital to be disposed of in manner following, viz.:—My brother Robert shall have the whole interest of £6000 thereof until the youngest

son of my brother, Dr Andrew Hill, attains the age of twenty-one years complete, and at this period the said £6000 shall be divided as follows: each of my brother Andrew's two youngest sons, George and David, shall be paid the sum of £2000, and my nephew Robert, only son of my brother James, shall be paid the sum of £1000, and each of his two daughters, Jane Ann and Jessie, shall be paid the sum of £500 sterling."

The truster died on 16th Nov. 1860. He was survived by his three brothers, Robert, Andrew, and James. Robert provided funds to pay the truster's debts to the extent of £1101, 12s. 10d., and paid or became bound for the sum of £3500, referred to in the second purpose of the trust-deed. The lease of the farm of Hallyards was made over to him by the trustees, and he received payment of the interest accruing on the sum of £6000 until the term of Martinmas 1863. But he died upon 18th February 1864, leaving a widow and child; and a question then arose as to the right to the accruing interest from Martinmas 1863 to 12th December 1878, when David Hill, the youngest son of Andrew Hill, will attain majority. To determine this question the trustees brought the present multiplepounding.

Three claims were made to the fund *in medio*. It was claimed—(1) by Robert Hill's executor, on the ground that the bequest of the whole interest vested in Robert Hill by his survivance of the truster; (2) by the next of kin of the truster, on the ground that the event which had occurred had not been contemplated by the truster, and that in regard to the interest accruing after Robert Hill's death he had died intestate; and (3) by the children of Andrew and James Hill, among whom the capital is to be ultimately distributed, on the ground that the right to the interest having fallen by Robert Hill's death, it now belonged to them *jure accretionis*.

The Lord Ordinary (Jerviswoode) pronounced the following interlocutor:—

"Edinburgh, 14th March 1866.—The Lord Ordinary having heard counsel in the competition, and made avizandum, and having considered the Record as closed therein, with the pleas of parties and whole process.—Finds that, under a sound construction of the trust-disposition and settlement of the deceased David Hill, it was the intention of the truster to bequeath or direct his trustees to make over the whole interest of the sum of £6000, from the term of Martinmas 1863, being the term immediately preceding the death of the truster, until the youngest son of Dr Andrew Hill (mentioned in the Record) shall attain the age of twenty-one years, to the now deceased Robert Hill, brother of the truster: Finds that the said Robert Hill did, in terms of the provision contained in the first purpose of the said trust-disposition and settlement, provide funds to meet the truster's debts and others mentioned in the trust-deed, to the extent of £1101, 12s. 10d. or thereby, and paid or arranged for payment of the whole sum of £3500, which he was required by the truster to pay over to the trustees of the latter: And Finds, with reference to the above findings, and to the terms of the trust-disposition and settlement above set forth, that the legacy or provision of the interest of the sum of £6000, which interest forms the fund *in medio* in this process, fell to, and was vested in, the said Robert Hill on his survivance of the truster, and on his fulfilment of the condition of payment above referred to, and that such interest now falls and is due to the claimant, his executor, until the period when the

youngest son of Dr Andrew Hill, as mentioned in the said deed and in the Record, shall attain the age of twenty-one years; and therefore sustains the first plea in law for the said claimant, and ranks and prefers him in terms of the first branch of the claim for him, as stated in the Revised Condescendence and Claim, No. 19 of process: Finds no expenses due to any of the parties in the competition; and decerns.

"CHARLES BAILLIE.

"Note.—The question which has here formed the subject of an ingenious and able argument has arisen in relation to the terms of a deed of peculiar and unusual terms, so far at least as it has relation to the particular question of which alone the Lord Ordinary has been called on to dispose.

"It is here maintained with much force, that, as there is no destination over or provision for the payment to the heirs of Robert Hill of the interest of the sum of £6000 which may fall in after the death of Robert Hill, and before the youngest son of Dr Andrew Hill shall attain twenty-one years of age, this interest is either to be dealt with as intestate succession, or is carried to the parties to whom the fee of the principal sum is ultimately destined.

"But it has appeared to the Lord Ordinary that, under the sound construction of the deed, when read in relation to the circumstances which must be held to have been within the contemplation of the truster in executing it, he intended to make a remuneratory bequest to his brother Robert, so as in some respect to operate as a compensation to him for such burden or risk as he might have to undertake in providing funds under the first and second purposes of the deed. It is true that there is no declaration that the interest of the £6000 is to fall to Robert's heirs, but that interest is given as a whole to Robert, until Dr Andrew Hill's son shall attain twenty-one, as a special and remuneratory bequest, which Robert was entitled to assign and deal with as his own.

"On the whole, after examining with care the various cases quoted, which have some analogy to the present, but which cannot rule it, as in none of them, so far as the Lord Ordinary can see, did a bequest of so peculiar a character occur, the Lord Ordinary has come to the conclusion that the claim of the party who takes directly and properly as in the place and right of Robert ought to be preferred.

"C. B."

The unsuccessful claimants reclaimed.

LORD ADVOCATE and H. J. MONGREIFF were heard for the heirs *ab intestato*, and cited Turnbull *v.* Cowan, 17th March 1848, 6 Bell's App. 222, and Lord *v.* Colvin, 23 D. 132.

A. R. CLARK and WATSON, for the beneficiaries of the capital sum, cited Pursell's Trustees *v.* Newbigging, 19 D. 71, and 4 Macq. 992; and Sturgis *v.* Campbell, 23 D. 1128, and 3 Macq. (H. L.) 70.

FRASER and DEAS supported the judgment of the Lord Ordinary.

The Court unanimously adhered.

At advising,

The LORD PRESIDENT—The question brought before us is as to what is to become of this interest from 1864 to 1878. There are various claims brought forward. The representatives of Robert Hill claim it as having belonged to him. The heirs of the truster claim it as undisposed of residue. The beneficiaries, among whom the sum is to be ultimately distributed, claim it as belonging to them. The Lord Ordinary has decided in favour

of the representatives of Robert. I think that the persons who are the beneficiaries are not entitled to the interest. It appears to me that this deed provides a definite sum of £6500, neither more nor less, to be dealt with in a particular way. That sum is to be apportioned among certain persons at a certain period. Then the deed provides what is to be done with the interest until the period of division. It did not omit to deal with it. It was destined to Robert Hill and was not left to follow the capital. Then it was contended that the interest was in fact residue, and a passage was read to us from the judgment of Lord Cottenham in the case of Turnbull, where his Lordship, speaking of certain decisions which had been cited, says—"They turn entirely upon this rule of equity in this country that where a residue is given upon a future contingency, the intermediate income goes with the principal, but that where land is given upon a future event the intermediate rents do not go, and for this most obvious of all reasons, which seems to have been lost sight of at the bar very much; a gift of land is a gift of a specific thing, and if that is only to commence at a future period there is nothing in a gift of land the interest in which is to commence *de futuro*, to show an intention to give the intermediate interest, and therefore it descends to the heir. But where you give the residue of personalty, then, from the comprehensive nature of the term 'residue,' the Court says, it is quite immaterial that the intermediate interests are not given; they are not given in terms as intermediate interests but they are given under the term 'residue,' and therefore a gift of the residue of personalty *de futuro* carries with it all the intermediate income. But the gift of a specific sum of money does not, unless there is something showing an intention to give an intermediate interest in the meantime." Now in this deed there is a gift of a specific sum to be divided at a certain time. The word "residue" does not occur in it. If there was any room for saying that the interest was residue, it was disposed of in this way, that it was to be paid to Robert Hill. Therefore, I do not think these parties have any right here. Then in regard to the heirs *ab intestato*, I don't concur either in the view that this interest is to be taken up as intestacy. It is not residue, as I have said, or if it be, it was made over to Robert. But it appears to me that there is here a disposal of the interest. Robert is to pay all the debts, and he did so. Then he is to take over the lease, &c., and is to pay down £3500 therefor in six months. In respect of doing so he is to have the whole interest of £6000 until the youngest son of Andrew Hill shall attain majority. Robert survived the testator. He thus acquired full right to this bequest, which is obviously part of the arrangement by which the £6500 was raised. Moreover, I think that this was the intention of the trustor himself. It is said that the interest only comes in from time to time. Well, that would be the case with the rents of an estate also. A more difficult question might arise as to what would become of the interest if all Andrew Hill's sons died before attaining majority. If the youngest died before doing so, then the age of the next youngest might vary the period during which the interest would be payable; but nothing of that kind has occurred here. I therefore think that the interlocutor of the Lord Ordinary is right.

Lord DEAS—It cannot be disputed that the whole of the trustor's estate is given to the trustees, and it is not to be presumed that any part is undisposed of. I am of opinion that nothing is

here undisposed of. What Andrew Hill's children are to get is a share of a sum at a certain time. If they get the interest they now claim, they will be getting more than the testator has given to them. The only way in which anything like plausibility is given to the view that this interest is residue, is by supposing that the testator had calculated what would remain, and that it is therefore to be called residue. But there is nothing on the face of the deed to show that he so calculated. He gave a specific sum. I cannot therefore see how the children of Andrew and James can maintain their claim. But I am not prepared to say that if they had made out their claim otherwise they would have been excluded by the principle that because the capital had not vested the interest could not. I am not clear that the capital has not already vested in the children as a class, notwithstanding the clause of survivorship. That question, however, is not now before us. What I proceed upon is that the words of this deed are unambiguous. What is given to Robert is the interest of a certain sum up to a certain period, which we now know to be 1878. That is no more ambiguous than if the trustor had bequeathed to him the £6000 itself. A man may bequeath to another a thing to arise *de futuro*, and if that is done, it is as much his, and goes to his heirs, as if it was already in existence. Unless it can be shown on the face of this deed that the words don't mean what they say, then the words must receive effect. But I see nothing of that kind here. On the contrary, as your Lordship has said, I see a great deal pointing the other way. I don't think it necessary to go on the onerosity of the bequest. It was onerous to a certain extent. Robert was to pay the trustor's debts and a considerable sum of money, but it may very well be that he got an advantage by the transaction.

Lord Ardmillan concurred.

Lord Curriehill absent.

Agents for Robert Hill's Executor—Jardine, Stodart, & Frasers, W.S.

Agent for Andrew Hill's Children and Others—William Mitchell, S.S.C.

Agents for Trustor's Heirs *ab intestato*—Hill, Reid, & Drummond, W.S.

## SECOND DIVISION.

### MALCOLM v. DICK.

*Title to Sue—Executor.* One of the next of kin of the deceased grantor of a disposition *omnium bonorum* having raised a count and reckoning against the trustee without having obtained a *decree-dative*, held that he was not entitled to sue, and that the objection was not obviated by his subsequently obtaining and producing a *decree-dative* in his favour. Observations as to the rights of action of an heir apparent.

This was a note of suspension brought by John Malcolm, residing at Forrest Hill, in the county of Clackmannan, v. William Dick, labourer, residing at Fens, Dunblane, the eldest son and nearest and lawful heir of the deceased Robert Dick, sometime carrier in Dunblane, and sometime residing at Dollar Mains, and executor of the said Robert Dick, or otherwise representing him. Malcolm had been charged at the instance of William Dick to make payment of the sum of £250, alleged to be the balance due by him upon his intromissions as trustee for himself and his lawful creditors, under a disposition *omnium bonorum*, dated 21st December 1843, granted by Robert Dick in favour of the