Solicitor-General and Birnie, for the reclaimers, argued that trustees were not bound to denude till offered exoneration for their whole actings with reference to the trust-estate; that the trustees here had not sufficient funds in their hands or deposited in Court to secure them against the result of the threatened reduction; and that they were not safe to denude in favour of the heir in heritage until the issue of the appeal as to the moveables should be ascertained. Farther, that if the heirs in moveables were held not to have been the nearest relations of the deceased, and therefore to have been wrongously preferred to the moveables, their brother, the heir in heritage, must have been wrongously preferred to the heritage. (*Elliot's Trustees* v. *Elliot*, 1828, 6 S. 1058; *Edmond* v. *Blaikie and Anderson*, 1860, 23 D. 21.)

Watson and Johnstone, for the respondents, replied that after the heir had obtained decree in his favour, the trustees could no longer lawfully withhold from him the disposition to the heritage; that they had acted *ultra vires* in granting a lease of the heritage after the case was in the hands of the Court, and that, therefore, they could not claim exoneration for actings subsequent to the date when the action was brought into Court.

At advising—

Lord Justice-Clerk—Had the trustees raised a question of this nature before the date of the multiplepoinding, the case would have been different. But by that action the entire property in dispute was lodged in the hands of the Court, after which the trustees ceased to be proprietors in the ordinary sense, and they have, therefore, no right to withhold the heritable property from the heir, who has obtained a decree in his favour. With regard to the lease granted by the trustees, it may turn out advantageous to the heir, or it may turn out to have been granted by them *ultra vires*. In any event, the heir is entitled to get possession of the estate; and the question whether the administration of the trustees subsequent to the raising of the action of multiplepoinding has been beneficial is a mere question of accounting, and must be settled afterwards. With regard to expenses, in a matter in which the trustees have been litigating for their own interest, and have been unsuccessful, I see no reason why they should not be held personally liable.

Lord Cowan—I think it was a somewhat extraordinary act on the part of the trustees to grant the lease in question without the authority of the Court, in whose hands the whole estate was placed, but I cannot at present say whether that act was *ultra vires* or not. I am clearly of opinion that the disposition must be given up by the trustees, but that they are entitled to exoneration for their administration of the trust-estate previous to the raising of the action.

Lord Benholme—I am of opinion that the trustees must give up the disposition to the heir *de plano*.

Lord Neaves concurred.

The Court pronounced the following interlocutor:—"Find that the reclaimers are entitled to be exonered and discharged of their whole actings and intromissions up to the date of bringing the action into Court, and exoner and discharge them accordingly, and decern. *Quoad ultra*, adhere to the Lord Ordinary's interlocutor: Find the reclaimers liable in expenses since the date of that interlocutor, and remit," &c.

Agents for Reclaimer—Tods, Murray, & Jamieson, W.S.

Agent for Respondents—T. J. Gordon, W.S.

Wednesday, May 22.

M'ALLEY, PETITIONER.

Poor's Roll.

> *Held* that an applicant for the benefit of the poor's roll, who adduced no evidence as to his circumstances but his own statement, and was alleged by the kirk-session to be a person unworthy of credit, must prove his poverty in some other manner satisfactory to the Court.

This was a petition by William M'Alley, residing at Cupar Fife, for admission to the benefit of the poor's roll, with a view to enable him to raise an action in the Court of Session. The petitioner produced a certificate from the kirk-session of Cupar, containing his own declaration as to his circumstances, unsupported by farther evidence, and a statement by the members of the kirk-session that they regarded him as a person unworthy of credit. The petitioner admitted that his earnings as a tile-maker amounted to 16s. per week during five and a-half months of the year; that during the remainder of the year he earned about 12s. a week by letting lodgings; and that his wife, from whom he was separated, and his adult children, were not maintained by him.

Kirkpatrick for the petitioner.

Asher and Millie for the respondents.

At advising—

Lord Justice-Clerk—The applicant cannot obtain the benefit of the poor's roll unless he establish his poverty in some satisfactory manner. The kirk-session report that his credibility is not to be relied on, and we therefore cannot grant his petition on his own *ex parte* statement. Assuming, however, the applicant's statement to be true, I should be inclined to hold that his circumstances are not such as to entitle him to be admitted to the poor's roll.

The other Judges concurred.

Agent for Petitioner—R. A. Veitch, S.S.C.

Agents for Respondents—Leburn, Henderson, & Wilson, S.S.C.

Thursday, May 23.

FIRST DIVISION.

SPECIAL CASE—EDWARD SNELL AND OTHERS.

Succession—Heritage—Vesting.

> A testator conveyed his whole heritable estate to his spouse, for her liferent use allenarly, whom failing by decease to his daughter, also in liferent, for her liferent use allenarly; and to and in favour of the children of the said daughter, procreated or to be procreated of her existing or any future marriage, and the survivors or survivor of them; and failing the said children, to and in favour of three nephews and a niece, and the survivors or survivor of

them. The daughter survived the testator, his widow, and the nephews and niece, and was herself survived by a son and a daughter, who died without issue.

Held that, upon the death of the testator's daughter, her surviving children took the absolute right to the fee of the estate, equally between them, and that this right transmitted to their heirs.

Alexander Black died on 1st April 1828, and at the time of his death he was possessed of, and infeft in, certain heritable properties consisting of—(1) subjects at Dundee ; (2) subjects at Ferry-Port-on-Craig, both held in feu of subject superiors. He was survived by his widow, Eliza Crease or Black, who died on 23d February 1837, and by his only child, a daughter, Elizabeth or Betsy Black. The said Elizabeth or Betsy Black was married—(1) to Lieutenant Robert Snell, who died in July 1824; and (2) to Andrew Low, surgeon at Ferry-Port-on-Craig, who died in April 1870. The said Alexander Black left a disposition and settlement of his whole estate, heritable and moveable. By this deed of settlement, which was dated 2d September 1818, he "conveyed his whole heritable estate of every description then belonging to him, or which might belong to him at his death, and specially, but without prejudice to the said generality, the subjects in Dundee above mentioned, to and in favour of the said Eliza Crease or Black, his spouse, in liferent for her liferent use allenarly in case she should survive him ; whom failing by decease, whether before or after him, to and in favour of the said Elizabeth or Betsy Black, his daughter, then wife of the said Lieutenant Robert Snell, also in liferent, for her liferent use allenarly, and under the burden therein written ; and to and in favour of Elizabeth Mary Snell, daughter of the said Elizabeth or Betsy Black, and Robert Snell, the son then lately procreated by them, and not then named (afterwards named William Black Snell), and any other child or children that might be procreated by the said Elizabeth or Betsy Black of her then present and any future marriage into which she might enter, and the survivors or survivor of them, equally between or among them if more than one ; and failing the said child or children, to and in favour of William Greig, George Greig, Robert Greig, and Barbara Greig, children of the marriage between George Greig, tenant at Easter Denside, and Isobel Black, his sister-german, and the survivors or survivor of them, equally among or between them, in fee heritably."

By the same deed he appointed certain persons to be his executors, and gave directions as to the disposal and distribution of his whole moveable estate.

By a codicil to this settlement the said Alexander Black, *inter alia*, in the event of the death of his wife and daughter before the children of the latter should have attained majority, disponed to Dr Andrew Low, his daughter's second husband, the liferent use and right of his whole property.

The said Elizabeth or Betsy Black survived the testator, and his widow, her mother, and died on 20th March 1865. She had issue of both her marriages, but only two of her children survived her—viz., Edward Keats Nelson Snell, a son of her first marriage, and Sophia Low, a daughter of her second marriage.

On the death of Dr Andrew Low, and the consequent expiration of his liferent, in April 1870, questions arose as to the party or parties entitled to the fee of the said subjects, and it was agreed to have the conflicting claims of the parties determined by the Court on a Special Case to be adjusted for that purpose. There were four parties who claimed the heritable property in whole or in part—(1) Edward Snell; (2) George Low White, James Tofts, and Catherine Tofts, trustees of the deceased Dr Andrew Low ; (3) Isobel Greig or Stiven, Ann Greig or Smith, and Agnes Greig or Kyd, the surviving children of the deceased William Greig, the testator's nephew; (4) Robert Kerr, only surviving son of the late Barbara Greig or Kerr, the testator's niece.

MARSHALL, for the first party, Edward Snell, claimed on three grounds alternatively. In the first place, he claimed as heir served and retoured to Edward Keatts Nelson Snell, arguing that the whole heritable estate was vested in the said Edward Keatts Nelson Snell as the last surviving child of the testator's daughter; in the second place, he claimed as heir-at-law to Elizabeth Mary Snell and Edward Keats Nelson Snell, the children of the testator's daughter who survived the death of his widow, on the ground that on the death of the widow the right to the fee vested in the testator's grandchildren; and in the third place, he claimed as heir-at-law of William Black Snell, Elizabeth Mary Snell, and Edward Keatts Nelson Snell, the testator's grandchildren who survived him, on the ground that the right to the fee of the estate vested in them on the testator's death.

J. G. SMITH, for the second parties, claimed as being trustees to Dr Andrew Low, who was heir served and retoured to his daughter Sophia Low, the only child of Elizabeth or Betsy Black, who survived her, except Edward Keatts Nelson Snell. The trustees, therefore, claimed one-half of the estate, whether vesting should be held to have taken place at the death of the testator or at the death of Elizabeth or Betsy Black.

WEBSTER, SHAND, and BALFOUR, for the third and fourth parties contended that Elizabeth Black's children having all died without issue, and without making up any title, the issue of William Greig and Barbara Greig became the parties having right under the destination in the deed; that the succession descended to them *per stirpes;* and that therefore the third and fourth parties were entitled to one-half each of the fee of the property.

The question submitted for the opinion and judgment of the Court was, "Which of the parties to this case has or have right under the said disposition and settlement by the late Alexander Black, or otherwise, to the said heritable subjects, and if more than one of the said parties have right thereto, in what proportions have they respectively right to the same?"

At advising—

LORD PRESIDENT—Alexander Black, the testator, left his property to his widow in liferent, and after her death to his only daughter, also in liferent, for her liferent use allenarly, and under burden of maintaining and educating her children ; and as to the fee, he dispones it "to and in favour of Elizabeth Mary Snell, daughter of the said Elizabeth or Betsy Black, and Robert Snell, the son lately procreated by them not yet named, and any other child or children that may be procreated by the said Elizabeth or Betsy Black of her present and any future marriage into which she may enter, and the survivors or

survivor of them, equally between or among them, if more than one; and, failing the said child or children, to and in favour of William Greig, George Greig, Robert Greig, and Barbara Greig, children of the marriage between George Greig, tenant at Easter Denside, and Isobel Black, my sister-german, and the survivors or survivor of them, equally among or between them in fee." Now this destination, being to the future as well as to the existing children of Betsy Black, it established in her, on the testator's death, a fiduciary fee for all her children. It is quite true that her children when they were born took an interest in the estate, but an interest of uncertain amount, and subject to the survivance of their mother. Upon her death, however, the surviving children took the fee equally among them, they then got the beneficiary enjoyment of the fee, which vested absolutely *in* them.

It is, however, argued against this view that this settlement is not to be construed as merely a provision to children, but that it is of the nature of an entail, and that the Greigs are not conditional institutes but substitutes. Now, if this settlement is an entail, it is curious that it defeats the principal object of entails, in that, instead of making provisions to keep the estate together, its effect and apparent object is to cut up the estate and divide it. Besides, the idea of the Greigs being substitutes is negatived by the way they are called, for they are called in the same way as Betsy Black and her children are, and the words "survivors or survivor," as applied to the Greigs, has reference to the same time as when applied to the Blacks—viz., the time when the liferent comes to an end. When that time came—that is, when Elizabeth or Betsy Black died—there were only two of her children and none of the Greigs in existence, and it is impossible to maintain that the rights of these surviving children of Elizabeth or Betsy Black were defeated by the children of the Greigs.

I am therefore of opinion that Edward Keatts Nelson Snell and Sophia Low, having survived Betsy Black, took an absolute right to the fee of the property, and that that right transmitted to their heirs, and that therefore the first and second parties in this case have each of them an absolute right to the fee of one-half of the estate.

Lord Deas—I arrive at the same conclusion. The first thing to keep in view is that by this settlement a trust is constituted in Betsy Black for behoof of her children and the survivors or survivor of them. So when Betsy Black dies and leaves two children, the fee vests absolutely in them.

Lords Ardmillan and Kinloch concurred.

Agents for First Party—Mitchell & Baxter, W.S.
Agent for Second Parties—Wm. Archibald, S.S.C.
Agents for Third Parties—Webster & Will, S.S.C.
Agents for Fourth Party—Henry & Shiress, S.S.C.

Thursday, May 23.

SECOND DIVISION.

SPECIAL CASE—MILNE AND RAMSAY.

Poor Law (8 *and* 9 *Vict. c.* 83, § 76)—*Settlement.*

Held that a residential settlement in a parish was acquired by a residence of five years, notwithstanding occasional absences of short duration, where the pauper's wife and family continued to live and be maintained by him in that parish.

Robert Galashan was born in the parish of Kincardine O'Neil about the year 1835. He learned the trade of a shoemaker, and usually worked as a journeyman shoemaker; but sometimes he acted as a farm servant or cattle-man, as afterwards stated. On 1st August 1863 he went with his wife and family to the adjoining parish of Lumphanan, where he resided until 12th September 1866, working chiefly as a journeyman shoemaker, and sometimes engaging himself as a farm-servant. During about six months, however, in 1864, he worked as a shoemaker in the parish of Kincardine O'Neil, sometimes remaining there all night, and sometimes returning for the night to his wife and family, who continued to reside in Lumphanan. On 12th September 1866 he went to Dorsinsilly in the parish of Glenmuick, eighteen or twenty miles distant from Lumphanan. He had entered into an engagement to go there and to remain until Martinmas (22d November) 1866, as a farm-servant in room of one who had left. During his engagement he was employed as cattle-man, (having been engaged chiefly in that capacity), but worked occasionally at the harvest. His wife and family continued to reside in Lumphanan, in a house containing furniture and other property belonging to him, and he visited them only twice,—once when sent for by his wife, and once on his way to a feeing market. He was not engaged for Dorsinsilly at a feeing market, but was sent for by a person who knew him, and engaged him for the farmer at Dorsinsilly. From Martinmas 1866 till 6th August 1869, he resided with his family in Lumphanan, where he worked as a journeyman shoemaker, except for about six months in 1868, when he worked in the parish of Cluny, about eight miles distant, returning home for a night weekly or fortnightly, as suited his convenience, and for some weeks in 1868, when he worked as a "harvest hand" in Midmar parish, also about eight miles from his house, returning home to his wife sometimes weekly and sometimes once a fortnight.

On 6th August 1869 he made an application for parochial relief to the parish of Lumphanan, which was granted; and on 31st August of that year he was lodged in the Lunatic Asylum in Aberdeen. His wife and family continued thereafter to reside in Lumphanan parish.

The question for the opinion and judgment of the Court was—

"Whether the parish of Kincardine O'Neil, as the parish of birth, was liable for the relief of the pauper; or whether the pauper had acquired a residential settlement in the parish of Lumphanan, and that parish was therefore liable for his relief?"

H. Smith, for John Milne, Inspector of Poor, Lumphanan, contended that the absence of the pauper for two months and a-half in 1866, on a contract of service, and not in pursuance of his ordinary calling, prevented him from acquiring a residential settlement at Lumphanan, and that, moreover, he had been absent for even longer periods in other years—*Beattie* v. *Kirkwood*, 1861, 23 D. 915.

Keir, for Samuel Ramsay, Inspector of Poor, Kincardine O'Neil, replied that the pauper had acquired a residential settlement at Lumphanan, because his absences had been of a temporary nature, he had always shown an *animus revertendi*, and, as