said twenty-four registers, and the said register of corrected entries, to authorise new duplicates of them to be made at the sight of the petitioner, and to direct that each of the said new duplicate registers be authenticated by the signature of the petitioner; and to declare that when so authenticated, they shall thereupon become, in all respects, of the same force and validity as the originals; and with regard to the remaining twelve registers, to remit to a proper and qualified person to make inquiry and report as above set forth, and, if satisfied with such report, your Lordships to authorise new register books to be supplied by the petitioner to the said Charles Bruce, or the registrar for the time being, who shall engross therein, in the ordinary way, the particulars of all the entries referred to such report; and to direct that each of the said new registers be thereafter authenticated by the signature of the petitioner; and to declare that, when so authenticated, they shall have the same force and validity as the originals."

The Court ordered intimation upon the walls and in the minute book, and a minute was put in by the petitioner stating that it was proposed that the party to whom the Court should remit to investigate should (1) Ascertain the actual number of events that were recorded, by communicating in person with the registrar, session-clerk, medical practitioners, sexton, and such other parties as may be found likely to possess information. (2) Extract from suitable informants and documents, and insert in appropriate schedules, if possible, all the particulars required to be registered; and (3) Report the result, setting forth the sources of information in each case, and transmitting such schedules to the Court.

The following interlocutor was pronounced:—

"Nominate and appoint Mr George Smythe Dundas, advocate, to inquire and report in terms of the prayer of the petition, with power to him to take and report the evidence of witnesses upon oath; grant commission to Mr Dundas accordingly; and grant diligence against witnesses and havers at the petitioner's instance."

Counsel—J. P. B. Robertson. Crown Agent—James Auldjo Jamieson, W.S.

Wednesday, November 3.

SECOND DIVISION.

SPECIAL CASE—FARQUHAR AND OTHERS.

Succession—Residue—Heir-at-Law—Succession ab intestato*—Intention of Testator.*

A person domiciled in England, and possessed of heritable estate in Scotland, left a will in the English form, in which, after the bequest of various legacies, there was a clause to the following effect: "Whereas I am possessed of an estate in Scotland, and it is at present mortgaged or charged to the extent of £30,000. Now I do declare that it is my intention to free the said estate during my lifetime, but should I fail to do so, then I give and bequeath to my eldest son such a sum of money as will equal the amount of such mortgage or charge as shall remain due at my decease. And as to all the rest, residue, and remainder of my estate and effects," he directed the same to be divided in a particular manner among his children. *Held* that the eldest son was entitled as heir-at-law *ab intestato* of his father to the heritable estate in Scotland.

Testament—Construction.

Observations as to the competency in construing a will of taking into consideration written instructions to an agent as to the terms of the will, and letters of the testator before and after its execution.

This was a Special Case, submitted to the Court for opinion and judgment by the following parties—(1) James Farquhar, formerly captain in the 10th Regiment, and eldest son and heir-at-law of the late James Farquhar, Esq., of Sunnyside, Surrey, and of Hallgreen, Kincardine, *of the first part;* (2) Mrs Diana Farquhar, widow of the said deceased James Farquhar, Esq., Hercules Scott, Esq., of Brotherton, Kincardine, and St Barbe Sladen, Esq., of Reigate, the executors, together with the Rev. E. Farquhar, Captain Francis Farquhar, Captain H. Farquhar, sons of the said deceased James Farquhar, Esq., and Mrs Diana Farquhar, as guardian to her five minor children by the said deceased James Farquhar, Esq., *all of the second part.*

The late Mr Farquhar was twice married, and was survived by eight younger children, besides the first party, and also by his second wife. He was domiciled in England, where most of his personal estate was situated; but he also owned the estate of Hallgreen in Kincardineshire, and certain small heritable properties adjoining, which he had purchased from time to time prior to October 1866, and had incorporated with the estate of Hallgreen bequeathed to him by his uncle. His whole means, real and personal, was at the time of his death on 8th March 1875 valued at £260,000, and of this Hallgreen was estimated to be worth £70,000, with a rental of £2,590.

Mr Farquhar left a will, executed in the English form, dated 6th October 1866, and six relative codicils. After certain directions as to provisions in his marriage settlement and the bequest of various legacies, the will contained the following clause:—"Whereas I am possessed of an estate in Scotland called Hallgreen, and it is at present mortgaged or charged to the extent of £30,000 or thereabouts in all. Now I do declare that it is my intention to free the said estate during my lifetime, but should I fail so to do then I give and bequeath unto my said son James Farquhar such a sum of money as will equal the amount of such mortgage or charge and the interest thereof as shall remain due at my decease. And as to all the rest residue and remainder of my estate and effects whatsoever and wheresoever I direct the same shall be divided into five equal parts, and as to one equal fifth part thereof I give and bequeath the same to my said son James Farquhar one other fifth part thereof to my said son Francis Glennie Farquhar one other fifth part thereof to my said son Edward Mainwaring Farquhar one other fifth part thereof to my said son Harry Rich Farquhar and the remaining one-fifth part thereof I give and bequeath the same unto and equally between all my children and any my child by my present wife Diana Octavia who being sons or a son shall attain

the age of twenty-one years or being daughters or daughter shall attain that age or marry and if more than one in equal shares."

Captain James Farquhar, the first party, maintained that the will of 1866 was not intended to and did not convey or dispose of any of the heritable estate in Scotland, or, at all events, did not convey or dispose of the estate of Hallgreen proper, which Mr Farquhar acquired by succession to his uncle, and that he (Captain James Farquhar) was entitled to take Hallgreen by succession to his father *ab intestato*, as heir-at-law. The second parties, on the other hand, maintained that the Scotch heritable estate was, in respect of the provisions of section 20 of the Conveyancing Act of 1868, effectually conveyed and disposed of by will as part of the residue of Mr Farquhar's estate.

The whole debt which affected the estate of Hallgreen at the time when the will of 6th October 1866 was executed was paid by Mr Farquhar prior to his death.

In support of his contention Captain James Farquhar relied not only on the terms of the will of 1866, but on certain instructions as to making the will, and letters both before and after its execution which tended to show that his father's intention was to leave the Hallgreen estate to descend to his eldest son in course of law, and without special conveyance. On the other hand, it was denied by the second parties that the facts and writings other than the will relied on by Captain James Farquhar could competently be taken into view in construing or interpreting the will.

The parties accordingly asked the opinion and judgment of the Court upon the following questions:—

"(1) Whether the party of the first part is entitled, as the heir-at-law *ab intestato* of his father, the said James Farquhar, to the whole heritable estate in Scotland which belonged to the deceased James Farquhar at his death, or at all events, to the estate of Hallgreen proper, derived by the said James Farquhar from his uncle? Or, (2) Whether the whole of the said heritable estate in Scotland, including Hallgreen proper, or at all events the whole of the said estate other than Hallgreen proper, is conveyed by the said will of 6th October 1866, and falls to be disposed of as part of the residue divisible in terms of that will?"

At advising—

The Lord Justice-Clerk—I think it is perfectly clear that when the testator here dealt with the residue of his estate and effects he did not mean this estate of Hallgreen to be included, and that is quite sufficient for the decision of this case. I don't mean to say that the words, "I direct that the same shall be divided into five equal parts, and as to one equal fifth part thereof I give and bequeath the same," &c., are not quite habile to carry heritage in Scotland, if that had been included in the gift and bequest; but I am quite clear from the whole context that the words, "rest, residue, and remainder of my estate and effects" did not include, and were not intended to include it, and that the only construction the words admit of comes to that. In the first place, the immediately preceding clause deals with the estate in Scotland called Hallgreen, and putting aside altogether the mode in which it was to be dealt with, I think the natural collocation of the words shows that when it comes to giving and bequeathing the rest of his estate, he means the rest exclusive of what he had already dealt with. But when we come to see what the instructions are in regard to Hallgreen, it seems to me that they are clearly inconsistent with the idea that the rest, residue, and remainder of his estate and effects was to be included. For what are they? He declares that it is his intention to free the estate during his lifetime, that is, according to the contention of the second parties, to give £30,000 to pay off the debt upon an estate which was to be divided upon his death into five equal parts, and necessarily converted into money. But not only so; if he does not clear the estate, the result is to be that his eldest son James is to get £30,000—not a fifth part of the value of Hallgreen, but £30,000. Therefore, it is perfectly clear that the rest, residue, and remainder of the estate did not include the estate of Hallgreen; and neither did it include the reversion in the event which happened. And therefore I do not think it necessary to go further into these words. In addition to that, although it is quite true that where the intention is plain, these words, although used before the statute came into operation, would be sufficient to sustain a conveyance of heritage, the testator having survived the passing of the Act, yet the fact of the conveyancer writing this deed at a date when the words would not have conveyed Scotch heritage is a most important fact in ascertaining the intention of the party. On the whole matter, therefore, I should be inclined not to go beyond the four corners of his settlement. I think the testator's intention of leaving Hallgreen to descend according to law without conveyance is plain enough, and I am prepared to give effect to it. In regard to the writings, I think there is a distinction. I don't think that writings prior to a settlement have, so far as I know, ever been admitted to construe the words used in the settlement, for very obvious reasons; and I have not given any weight to the instructions that have been founded on. The declarations of the testator after he had executed his deed are of considerably more importance; for he certainly is the man who knew best the meaning of the words he had used; and if the best witness says he meant one thing, it is a strong thing for a court of law to say another. And, therefore, if I had been asked to give an opinion upon that question, as to the subsequent letters, I should have been inclined to take them into account, and if they are taken into account, they are absolutely conclusive, and leave no doubt about the fact at all. I think that in judging of a question of intention it is a strong thing to leave out of view altogether that which may be the best evidence on the subject. But, apart from that, my opinion is that we should answer these questions in favour of the first party, and find that he is entitled as the heir-at-law *ab intestato* of his father to succeed to the estate of Hallgreen.

Lord Ormidale—I have come to the same opinion, and without any difficulty. In regard to introducing the instructions and other documents consisting of correspondence between the late Mr Farquhar and his agents, I think it would be extremely dangerous to found our judgment upon them at all. The distinction which your Lord-

ship has pointed out between such documents prior to the date of the settlement and subsequent to it is I think a very obvious one. In his letter of 21st June 1873, Mr Farquhar says:—"I hope it will descend to my eldest son in due course of time." That does not give any interpretation to his will—I do not know exactly what it means. Does it mean that his will comprehends it, or that it does not? It is quite indefinite, but that illustrates the danger of founding on these documents at all, and I do not found anything whatever upon them. I think the settlement itself is perfectly clear without going into these extrinsic documents. There are expressions in the will which, to my mind, leave no doubt upon the subject. In the first place, he deals with the estate which he possesses in Scotland called Hallgreen, and goes on to specify what he wishes to do in regard to that estate. It is charged with £30,000, and he declares his intention to be "to free the said estate during my lifetime, but should I fail so to do, then I give and bequeath unto my said son James Farquhar such a sum of money as will equal the amount of such mortgage or charge and the interest thereof as shall remain due at my decease. And as to all the rest, residue, and remainder of my estate and effects."—What can these words mean but that he has dealt already with his estate of Hallgreen, and what he here does is in distinct language to say:—"And now I am to dispose of the rest of my estate," not including, according to the ordinary and fair meaning of language, that estate of Hallgreen which he had already disposed of; and then he goes on to specify how the rest and remainder of his estate and effects are to be dealt with—in provisions to his sons and others. The only difficulty about his intention that has arisen in my mind is this, that he not only gives the estate of Hallgreen, according to the view I take of his settlement, to his eldest son, but he gives him besides an equal share with his other sons of the rest and remainder of his estate. That would rather in one view infer that he had intended all the sons to stand equal. But, on the other hand, when he divides the rest and remainder of his estate into shares in the way he here does, it is a very fair indication, I think, —though it is not conclusive,—as to what the intention of the testator was, viz., that he was dealing in that portion of his settlement with moveable estate which would be so divided. No doubt, though he had expressly and beyond all doubt comprehended in that portion of his estate the landed part of it, the law would give a remedy and entitle the parties interested to have it sold, so as to enable the provision to be made. But still I think the expression which he uses indicates his intention; and on the whole matter I arrive at the same conclusion as your Lordship.

Lord Gifford—I have come to the same conclusion—I must say without any real difficulty at all. The question is a pure question of intention,—What did the testator intend to do with his estate of Hallgreen? And the first question is, whence is that intention to be gathered? Now several sources have been founded upon by the counsel for Captain Farquhar: first, and chiefly (and there is no dispute about this), the words of the will itself are to be looked to. Now I agree with your Lordships, that, from the will itself, and without going any farther, I gather quite clearly—looking of course to the circumstances and position of the parties and of the estate which belonged to him—that he did not intend his estate of Hallgreen to fall under what may be called the residuary clause of his last will and settlement. The residuary clause is very clearly expressed. It follows immediately after a special reference to Hallgreen, and a special bequest with reference thereto; and as I read the words "rest, residue, and remainder of my estate," I think the fair reading is the rest and residue excluding therefrom not only all the special legacies and the special conveyances before written, but also the estate of Hallgreen, as well as the £30,000 which he had provided in reference to incumbrances thereon. The "rest and residue of the estate," according to its fair reading, means "what I have not specially specified above, and specified either as conveyed or as not conveyed,—meaning the estate of Hallgreen, which I think he did not intend to convey at all. And therefore, without going beyond the four corners of the deed, I think I could reach the conclusion with perfect satisfaction that the estate of Hallgreen is not settled by this will,—not intended to be conveyed at all, but left either to be settled by a Scotch deed, or to be taken *ab intestato* according to the laws of succession. The bequest of a sum equal to the encumbrance upon it, if it should turn out to be left encumbered, seems almost conclusive by itself; for see how it would have wrought if the estate had not been disencumbered, and if the contention of the second parties here is well-founded? In that case the bequest of £30,000 would go to the eldest son, not to clear the estate,—not to pay the burden. That may have been the intention, but that intention is only consistent with the idea that the person who is to pay the burden is to get the estate. He would get a sum of £30,000 as a simple pecuniary legacy. It is undoubtedly left to him, and not left to him for the purpose. No doubt the argument is that it was for the purpose of paying-off the debt on the estate, and I entirely concur with that argument, but if that is not to be read in consistency with the party getting the estate which is to be disburdened, it is a simple pecuniary legacy, and it is a pecuniary legacy to his eldest son, to be measured by the amount of the debt on the estate. That is a perfectly unintelligible legacy, and not consistent with any reason which can be put into the mind of the testator. I feel there is great force in the view that at the date of this deed the words used—and not used by an ignorant testator, but by a skilled conveyancer,—were not such as would carry Hallgreen. I think that is an element which must always be looked to when you come to ask what is the intention of a testator. Supposing the testator had been a skilled conveyancer himself in the law of Scotland, knowing the law of Scotland, and that he used words which merely bequeathed his moveable estate, would that not be a very strong element to enable us to reach the conclusion that he did not intend to convey his heritage? Now it is very nearly as strong here, and when the statute of 1868 comes, which makes any words that clearly express intention sufficient to convey heritable estate in Scotland, that is an element no doubt, and the time that elapses after the

passing of that statute is also an element; but these are not conclusive. They must be brought home to the mind of the testator, so as to show that it was his intention now to avail himself of that power. Upon the deed therefore, without going farther, I think the result is quite clear. No distinction has been taken at the bar, and I suppose no distinction is intended to be taken, between "Hallgreen proper" as it is called in the settlement, and the other portions of the heritable estate. I can fancy that there may be some distinction, but I see it stated in the case that they have been incorporated with the estate of Hallgreen, and really form part of it; and I take it that when he spoke in his will of the estate of Hallgreen he meant not only Hallgreen proper, to which he had succeeded from his relative, but also those pendicles which he had purchased himself and added to the estate. I presume there is no question intended to be raised about that, as we have heard no argument upon the subject. Then are there any extrinsic elements to be looked to? As I understand the case, three species of extrinsic elements are spoken of. There is, first, previous instructions given to the solicitor who prepared the deed. Now I agree with your Lordship in the chair that that kind of evidence is not competent. I am not aware of any case in which it has been allowed that jottings have been admitted to control a deed. Such instructions are always tentative; they are always liable to be altered, and we know that they are constantly varied and altered when the draft comes to be gone over. Therefore I would exclude all previous instructions given by the late Mr Farquhar in endeavouring to construe his will. They are not admissible. I think the same principle would very nearly exclude previous writings, although something depends on the nature of these writings. But here I would exclude, and I don't look at, any writings previous to the date of the deed. The second species of extrinsic evidence is subsequent writings. Now, I think it has been decided that when these writings are formal deeds they may be looked to. But I am quite prepared to express my opinion as an individual that holograph writings—authentic writings—fall under the same category. Subsequent to the date of the will a testator may, by a writing under his own hand, even addressed to a third party, give materials at which the Court can reasonably and rightly look, in order to reach the interpretation of a doubtful deed. The third element is conversations. Now I am for excluding these. They are mentioned in the case, but I don't think Mr Asher founded on them. There are statements that he said so and so to the solicitor who prepared one of the codicils. I am for excluding that; but admitting that subsequent authentic writings of the party really puts an end to all difficulty in the case, and I concur with your Lordships in regard to the disposal of it.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the Special Case, are of opinion and find that the party of the first part is entitled, as heir-at-law *ab intestato* of his father, James Farquhar, to the whole heritable estate in Scotland which belonged to his said father at his death, and decern."

Counsel for Captain James Farquhar—Balfour—Asher. Agents—Dalmahoy & Cowan, W.S.

Counsel for the other parties—Solicitor-General (Watson)—Fordyce. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, November 6.

SECOND DIVISION.

[Sheriff of Elgin.

THE GREAT NORTH OF SCOTLAND RAILWAY CO. *v.* JAMES M'CONNACHIE.

Reparation—Railway Company—Reasonable Condition—Carriage of Goods—Loss of Market.

A fish-curer had his goods carried by a railway company at a reduced rate, he by special contract undertaking to relieve the company and all other companies over whose lines his goods might pass from all liability in case of loss, damage, or delay, except upon proof of wilful fault or negligence on the part of the company's servants. The company undertook to deliver the goods within a reasonable time. In consequence of a block on the line, certain barrels of fish sent by him were delayed on their way to market and spoiled. In an action of damages at his instance against the company, *held* that the special contract was reasonable and had the effect of laying the burden of proof on the consignor, but (*dub.* Lord Gifford) that upon the evidence the company were liable in respect that they had neither taken proper measures to guard against the occurrence of the block, nor warned the consignor that there was a risk of delay.

This was an appeal from the judgment of the Sheriff of Elgin in an action at the instance of James M'Connachie, fish-curer in Lossiemouth, against the Great North of Scotland Railway Company. The pursuer sought to recover the sum of £84, 12s. as loss and damages alleged to be due to him by the defenders in consequence of their having failed to deliver timeously a number of barrels of fish despatched by him from one of their stations to Glasgow upon 23d and 25th September 1873. He averred that upon the 23d of September he had sent from Lossiemouth certain barrels of fish addressed to various salesmen in Glasgow, and marked as perishable goods. These goods were to be sent to Glasgow *via* Craigellachie and Boat of Garten, and in the ordinary course of delivery should have been delivered upon the morning of the 24th. They were not however delivered till the 26th. In like manner, fish despatched by him from Lossiemouth upon the 25th and due in Glasgow upon the 26th were not delivered until the 27th. In consequence of this delay, it was alleged that the fish were spoiled and unmarketable. He further stated that had he been warned by the defenders that there was any risk of delay in sending these goods by their line, he would have sent them by the Highland Railway from Elgin.

The defenders admitted that they had received the fish, and did not deny that there had been the delay complained of, but they denied that there was any undue delay which could be