to get the entailed estate, which was all the testator had to leave. Of course at that date no legacy-duty was exigible from heirs of entail or from heirs in heritage of any kind who simply succeeded to a landed estate. But then the trust-deed is made a burden on the entail in order that debts and provisions to younger children, and so on, provided by the testator, shall be paid, and paid out of what?—Out of the rents of the entailed estate, which but for this burden the heirs of entail successively would have enjoyed in full. There was no other source out of which these debts and provisions could be paid. But it would be manifestly absurd to make heirs in heritage—and heirs of entail are just heirs in heritage—who would have been liable in no legacy-duty whatever if their succession had been unburdened, liable to legacy-duty simply because their father and ancestor has burdened his eldest son and grandson with certain provisions which he had no other means of paying to his younger and less favoured children. A succession which if unburdened would be free of legacy-duty cannot become liable to duty simply because burdens are imposed upon it whereby it is lessened. No doubt the parties in whose favour the burdens are imposed, the creditors in the burdens, may be liable in legacy-duty because they have got sums or provisions charged upon or payable out of the testator's real estate. But this in no degree applies to the testator's son or heir at law or heir of taillie, who gets the real estate itself, though unfortunately for him burdened with provisions to third parties. It is from not attending to this obvious distinction, or rather from not attending to the real nature of the case, that the fallacy of the argument for the Inland Revenue has arisen. The Inland Revenue would never have dreamt under the old law of asking legacy-duty from an heir who had only succeeded to an heritable estate but who succeeded to it at once and without burdens or restrictions. But because the heir's estate was burdened and limited, they have got confused, and at last, after thinking of it for nearly sixty-years, they have fairly converted the heir of entail into a legatee.

Accordingly, Mr Paterson's trust deed in no degree interferes with the efficiency and full operation of the deed of entail. The heirs of entail successively completed their title to the estate as heirs of entail, and that under the deed of entail just as if there had been no trust deed at all. The successive heirs have been in possession of the mansion-house, offices, pleasure grounds and home farm of considerable extent, and of the management of the woods. They have exercised all the powers of heirs of entail by settling localities upon spouses and provisions upon younger children, and in short they have been to all intents and purposes heirs of entail in possession, excepting only that a portion of the free rents has been every year retained in order to provide for the debts incurred and provisions granted by the original entailer. But surely this is no reason for subjecting that portion of the rents which the heirs of entail have actually enjoyed to the payment of legacy-duty. Quite as reasonably might the Inland Revenue authorities demand payment of legacy-duty on the value of the mansion-house, pleasure grounds and home farm, which in terms of the trust deed the trustees who are infeft therein have permitted the successive heirs of entail to possess and enjoy.

I am quite clear therefore that no legacy-duty is due in respect of the annuities or share of rents which the heirs of entail of Castle Huntly have received and enjoyed during the subsistence of the trust and prior to the death of George Paterson the third. On the death of George Paterson the third, and under the Succession Duty Act (16 and 17 Vict. 51), succession duties may be and I suppose are leviable, but these I understand have been paid, at all events no question regarding succession duties under the recent Act arises under the present action. I think the defenders are entitled to absolvitor.

The Court adhered.

Counsel for the Lord Advocate (Reclaimer)—Solicitor General (Macdonald) — Rutherfurd. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for Defenders—(Respondents)—Pearson. Agents—J. & F. Anderson, W.S.

Saturday, May 17.

SECOND DIVISION.

[Lord Rutherfurd-Clark Ordinary.

REID'S TRUSTEES *v.* REID.

Succession—Liferent to Wife, and Conjunct Fee to Son and Wife whom he might Marry—Where Son's Wife alone Survived Liferentrix.

A trust-disposition and settlement *inter alia* provided a liferent of the residue to the truster's wife, and on her death that the fee should be paid to his son, but the latter under the fullest discretionary powers to the trustees to give or withhold it in certain circumstances. Further, in the event of the son marrying, if the trustees should not have deemed it prudent to hand over the residue absolutely to him, it was provided that they should hold it for his behoof and for that of his spouse "in conjunct liferent, and the issue of the marriage in fee, such conveyance to be made in such terms and under such conditions, provisions, and declarations as my trustees in their discretion may think proper." The son married, and on his death, soon afterwards, was survived by his mother and his wife, the latter of whom eventually survived the former. *Held* that on the death of the liferentrix she was entitled to the full liferent of the residue, and that the trustees had no right under the terms of the trust-deed "to restrict or terminate that liferent in the event of her marrying again."

This was an action of declarator raised by Walter Laing, manufacturer, Hawick, and others, trustees under the trust-disposition and settlement of Alexander Reid, against Mrs Emily Parkin Gray or Reid, widow of David Reid, the truster's son. *Inter alia* that deed provided in the sixth purpose that the trustees should pay to David Reid one-third of the moveable estate, or such other sum as could be legally claimed as legitim. This actually was paid over to David Reid subsequently to his

father's death on 16th May 1876, and his discharge was obtained for the amount, upwards of £11,000. By the seventh purpose the truster gave to his widow Mrs Helen Reid the liferent of the whole residue. Then followed the eighth purpose, in these terms—"I direct my trustees, should the said David Reid by his steady and upright conduct be in their opinion thoroughly worthy of confidence, and should they consider it safe and prudent, on the death of the longest liver of my said spouse and me to pay, convey, or make over to the said David Reid absolutely the whole free residue of my estate, or such other portion or portions of the free residue and remainder of my said estate and effects as my said trustees in their discretion may think proper; declaring always that the said David Reid shall have no right whatever to call upon my trustees to pay or make over to him the residue of my said estate and effects or any portion thereof, it being left entirely to the discretion of my said trustees whether they pay or make over to him any portion whatever of such residue, my wish and intention being that my said trustees shall have, and I hereby confer upon them, all the powers which I at present possess in the disposal of the said free residue and remainder of my estate, and that they should act towards my son as if they individually stood in the same relationship to him which I do: And in the event of my son David Reid marrying, I direct my trustees, should they not have deemed it prudent to hand over the residue of my estate or any part of it absolutely to him, to hold, retain, set apart, or invest said free residue and remainder of my estate, or the unappropriated part thereof, in trust for the said David Reid and his spouse in conjunct liferent, and the issue of the marriage in fee, or to convey over to or settle in trust for behoof of the said David Reid and his wife, in conjunct liferent for their liferent use allenarly, and to the child or children to be procreated of their marriage or of any subsequent marriage of the said David Reid in fee, such conveyance to be made in such terms, and under such conditions, provisions, and declarations as my trustees in their discretion may think proper; declaring that my trustees shall have full power to pay over or apportion the fee of such free residue amongst the children of the said David Reid, or to settle and secure the same in trust in the marriage-contracts of such children, at all such times, in such manner, and under such conditions, and in such proportions, as they may think proper, or to confer powers of apportionment on the said David Reid or his spouse, should he be married and have issue."

The last provision of the deed directed the trustees, failing their paying or otherwise making over the residue, or any portion thereof, to David Reid, or for behoof of him and his spouse and children, to pay the free residue at such times and in such proportions as they might think fit, to such poor persons in Eskdale, or such charitable, educational, or benevolent societies or public institutions in Scotland as they should select, with power to invest such sums as they should think proper in establishing a bursary or bursaries for young men, natives of Eskdale (comprehending the parishes of Eskdalemuir, Westerkirk, Ewes, Langholm, and Canonbie) who might be or might be about to become matriculated students of any of the universities of Scotland, &c. The residue now left in the hands of the trustees exceeded £21,000 in amount.

Alexander Reid, the truster, died on 20th March 1874, his trust-disposition and settlement bearing date 25th October 1873. He was survived by his wife Mrs Helen Reid, and by an only son David Reid, the issue of a former marriage. David Reid in May 1876 married the defender. He died on 17th March 1877 leaving no issue. His mother Mrs Helen Reid died on 3d January 1878.

The pursuers concluded for declarator that the provisions made in the eighth purpose of the trust-disposition and settlement in favour of the spouse of David Reid never became prestable, and were now ineffectual, and that the defender had no right to or interest in them nor any good claim for payment or implement, and that the pursuers were now entitled to dispose of the residue in terms of the last purpose of the deed; or otherwise, that the defender had no right other than to the enjoyment of the income of one-half of the free residue so long as she should remain the widow of David Reid, and that the pursuers were entitled to hold one-half of the free residue, and to make payment of the income thereof to the defender during her viduity, at such terms, and subject to such conditions, provisions, and declarations as they in their discretion might think proper, and that the pursuers would be entitled, upon the death or second marriage of the defender, to apply one-half of the residue to the purposes provided in the last head of the trust-disposition and settlement; and in the event of the pursuers not obtaining decree in terms of any of the foregoing conclusions that it should be declared that if they elected to hold, retain, set apart, or invest the residue in trust for the liferent use of the defender, they were entitled to make it a condition of the defender's right thereto that it should only be claimable by her during her viduity."

The Lord Ordinary (Rutherfurd Clark) assoilzied the defender, adding to his interlocutor the following note:—

"*Note.*—The pursuers contend that inasmuch as David Reid died before the liferenter, the defender, his widow, took no benefit under the eighth purpose of the trust, or at least that her interest is limited to one-half of the income. In the opinion of the Lord Ordinary their contention in both of its aspects is not well founded.

"If David Reid and his wife had both survived the liferenter, they would, subject to a power vested in the trustees, to which reference is afterwards made, have taken 'a conjunct liferent;' and if the defender had survived him, she would have been entitled to the whole. The question is, whether it is a condition of the defender's right that her husband should survive the liferenter?

"The primary purpose of the trust-deed was to secure the liferent to the widow, and until her death no distribution of the estate could be made. But the ulterior directions are made subject to this purpose only. The truster authorised his trustees, if they thought proper, to hand over the residue to his son; but this power could not be exercised till the liferenter's death. He contemplated the case of his son marrying, and, subject to the power with which he thus invested his trustees, he bequeathed the residue to his son and his wife in conjunct liferent, and their issue in fee. This benefit might have been defeated by the exercise of the power which had been committed to

the trustees. But if it were not exercised—and as the case happened it could not be exercised—the son, his wife, and children, became beneficiaries to the extent above mentioned. The benefit which the children took would not be defeated by their father predeceasing the liferenter. To hold otherwise would be to exclude them from all benefit under the deed. It seems to the Lord Ordinary that the interest of their mother was the same as theirs, and was not conditional on her husband surviving the liferenter. He thinks that the truster contemplated the case of his son marrying during the lifetime of his mother, and intended by his will to make a provision for her and her children. She became, just as her children did, a beneficiary under the trust; and as the liferent given her husband and herself was joint, she became the sole liferenter by reason of his death.

"The only other question is whether the trustees can limit the defender's liferent to the period during which she does not marry again? The Lord Ordinary is of opinion they cannot. They are empowered to make 'conditions, provisions, and declarations.' In strictness, this power is limited to the case where they convey the residue. But assuming it to apply to the case where they exercise their right to retain, it does not, it is thought, authorise them to limit the benefit which the defender takes to what would be less than a liferent. It seems to the Lord Ordinary to be intended to protect or secure her interest, and not to restrict it."

The pursuers reclaimed.

At advising—

Lord Gifford—In this case I am of opinion that the interlocutor of the Lord Ordinary is well founded and ought to be affirmed.

The late David Reid, the deceased husband of the defender, was the only child of the truster the late Alexander Reid, and the question is, Whether according to the sound construction of Alexander Reid's trust-disposition and settlement the defender, who is the widow of his only child, has taken any interest in his succession, and what that interest is? The present action has been brought by the trustees against Mrs Reid, the defender, to have it found and declared that she has no interest whatever in the succession, or otherwise and alternatively to have it found and declared that her interest is limited to the liferent of one-half of the free residue of the trust estate, and that only while she remains the widow of the said David Reid.

It appears to me that the whole contentions of the pursuers as trustees are ill founded. The primary purposes of the trust were, after payment of expenses and of various annuities and legacies, to give the truster's widow Mrs Helen Common or Reid the liferent use and enjoyment of his dwelling-house and pertinents at Craigcleuch, with furniture and plenishing therein. The sixth purpose of the trust was to pay to the truster's son one-third of the moveable estate, which the son was legally entitled to claim as legitim, and the seventh purpose was to pay the annual produce of the whole residue of the estate to the truster's widow Mrs Common or Reid during her life. The eighth purpose disposes of the residue, and it is under this purpose of the trust that the present question arises. Under this purpose the truster first gives power to his trustees, if they are satisfied that his son David Reid by his steady and upright conduct is worthy of confidence, to make over to him absolutely the whole residue of the estate, but the fullest discretionary power is given to the trustees to give or withhold the said residue or any part thereof. This paying over of course could only be done and was directed to be done on the death of the truster's widow, but the son's survivance of the widow is not in any way made a condition of the gift, and the mere existence of a liferent would not *per se* and in the absence of any proper condition suspend the vesting of provisions.

There next follows a very special direction providing for the case of David Reid's marriage, and it is really upon this direction that the whole case turns. The words are—"And in the event of my son David Reid marrying, I direct my trustees, should they not have deemed it prudent to hand over the residue of my estate or any part of it absolutely to him, to hold, retain, set apart, or invest said free residue and remainder of my estate, or the unappropriated part thereof, in trust for the said David Reid and his spouse in conjunct liferent and the issue of the marriage in fee, or to convey over to or settle in trust for behoof of the said David Reid and his wife in conjunct liferent for their liferent use allenarly, and to the child or children to be procreated of their marriage, or of any subsequent marriage of the said David Reid, in fee, such conveyance to be made in such terms and under such conditions, provisions, and declarations as my trustees in their discretion may think proper, declaring that my trustees shall have full power to pay over or apportion the fee of such free residue amongst the children of the said David Reid, or to settle and secure the same in trust in the marriage-contracts of such children, all at such times, in such manner, and under such conditions and in such proportions as they may think proper, or to confer powers of apportionment of the said David Reid or his spouse should he be married and have issue."

Now, in the first place, the events on the occurrence of which this clause comes into operation have taken place—first, David Reid was married to the present defender in May 1876; and second, the trustees had not deemed it prudent to hand any part of the estate over to David Reid. It is, I think, of no consequence whether this arose from the trustees not having confidence in David Reid or simply from their never having had occasion to consider his conduct, he having died before the liferentrix. In either case the result is the same, and the conditions are purified. Then these conditions being purified, the direction is absolute. The trustees are either to hold the free residue for behoof of David Reid and his spouse "in conjunct liferent, and the issue of the marriage in fee," or to convey and settle the residue in similar terms.

It appears to me that this direction must be given effect to so far as this can now be done. No doubt David Reid himself having died on 17th March 1877, nine months before the liferentrix, the residue cannot now be held for or settled upon him, but this does not make the conjunct liferent which is conferred upon his wife or widow inoperative, and does not restrict or destroy her conjunct liferent in the slightest degree. In like manner, if there had been issue of David Reid's marriage—and there might have been—the

circumstance that David Reid himself predeceased the truster's widow would not have in the least affected the children's right to the ultimate fee. In short, the moment it happens that David Reid marries, and if it is fixed in any way whatever that David Reid himself is not to get the residue as his own absolute property, then the will absolutely provides that David Reid and his wife shall get the residue in conjunct liferent, and that the children of their marriage shall get it in fee. Now, the failure of any of these parties will not destroy the gift so far as the others are concerned. If there were no issue of the marriage that would not prevent the spouses from enjoying the conjunct liferent. If David Reid's wife had predeceased him, that would not prevent David Reid himself from enjoying the liferent during his own life, and in like manner I think it is impossible to maintain that the mere circumstance that David Reid predeceased the truster's widow deprived either his own wife or his children, if there had been any, of the independent rights provided to them. David Reid's survivance of Mrs Reid senior is nowhere made a condition of his taking under the provision; much less is his survivance made a condition on which alone should depend the right of his wife or of his issue to take under the deed. It would be monstrous to hold that David's own children, assuming him to have had children, would have been deprived of all interest whatever under their grandfather's deed from the mere circumstance that David Reid himself predeceased the liferentrix. But if David Reid's children could not be so excluded, neither can his widow, for the rights of the widow and of the children stand on precisely the same footing. The true view is that David Reid himself, his wife the present defender, and the issue of the marriage, are three separate and independent objects of the testator's bounty, and the failure of one or more of them will not in any way affect the rights of the others.

This being so, it follows that the present defender as the widow of David Reid is entitled to a conjunct liferent of the whole residue, just as if it had been taken to herself and her deceased spouse—that is, she is entitled to the full liferent of the residue—for a conjunct liferent given to spouses means that the surviving spouse takes the liferent of the whole, and not merely one half-of it. This point was not ultimately disputed.

I am also of opinion that the trustees of the testator have no right under the trust-deed to restrict or terminate the defender's liferent in the event of her marrying again. That would not be to give the liferent under conditions, but to deprive her of the liferent altogether. I agree with the Lord Ordinary that the power to impose conditions was intended to secure the benefit to the beneficiaries, and not to destroy their right. Possibly, or probably, they might declare the liferent alimentary, but there is no power to forfeit it in the event of a second marriage. It follows that the trustees have entirely failed in the present action, from which the defender must be assoilzied with expenses.

Lord Ormidale—I have, although not without some difficulty, come to be of opinion, with the Lord Ordinary, that the defender is entitled to prevail in this case. In any other result the defender, who is the widow of the truster's only son and child, would be deprived of all interest in the trust-estate, although manifestly the truster intended to favour her to a large extent. If the defender's husband had survived his mother, the truster's widow, for however short a time, he and his wife would, beyond all doubt, have had a right of conjunct liferent in the residue in question, and the fee would have belonged to their issue if they had any. And although it is true that the defender only, and not her husband, has survived the truster's widow, I see nothing sufficiently clear in the trust-settlement to the effect that she was in such an event to have no interest at all in the residue. On the contrary, it rather appears to me, as it seems to have done to the Lord Ordinary, that her interest notwithstanding the death of her husband continued the same—that is to say, that the bequest in her favour remained as it was, although, in consequence of the death of her husband before the truster's widow, she on the death of the latter came into the sole enjoyment of the liferent of the residue in place of its enjoyment conjunctly with her husband so long as he lived. This view, I think, receives support from the terms in which the truster provides for the disposal of the fee of the residue in favour of certain young men, apparently entire strangers to him, for it is only failing his trustees "paying or otherwise making over" the free residue, not to his son only, but also to his spouse and their children, that the young men referred to are to succeed.

With these observations, and for the reasons assigned by the Lord Ordinary, I am of opinion that his judgment is right.

The Lord Justice-Clerk concurred.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Dean of Faculty (Fraser)—Robertson. Agents—Duncan & Black, W.S.

Counsel for Defender (Respondent)—Pearson. Agents—C. & S. Douglas, W.S.

Tuesday, May 20.

FIRST DIVISION.

[Lord Craighill, Ordinary.

LIVINGSTONE *v.* THE RAWYARDS COAL COMPANY.

Mines and Minerals—Encroachment—Amount of Compensation where Defender in bona fide, *and Property invaded of Small Extent.*

The lessees of a coal mine wrought out certain coal belonging to a coterminous proprietor in the *bona fide* belief that the coal was included within their lease—a belief shared in by the true owner himself. The mine possessed by the lessees entirely surrounded the property encroached upon, which in extent amounted only to 1 acre 30 falls 21 ells. *Held*, in an action for damages, at the instance of the coterminous proprietor, that the compensation was to be at the rate of the lordship of the surrounding mine, together with a sum for the surface damage, on the ground that there was perfect *bona*