

must be fulfilled. It is not in my opinion a right of servitude in any sense. The *dominium directum* is not a dominant tenement in any legal acceptation. The restriction is a feudal condition and exception on the footing of communication of the superior's right—that is, *jus quæsitum tertio*; that of the feuars could not be, and I am not aware that it ever has been, sustained.

In the present case I think it doubtful whether the case of the feuars comes up to the mark of that community of restriction which is held to give them a derivative title. The restrictions are not identical in the different feus, and, in particular, I do not find the particular restriction here sought to be enforced in the title of the principal pursuers, and had the case remained on that footing I should have much difficulty in giving effect to their demand. But then it is said that the superior concurs in the action, and that his title is unquestionable. On the other hand, it is denied that the superior is here at all as a claimer, as he only concurs in the action.

I much regret that the superior's position was not made more definite, as it certainly ought to have been; but I am of opinion that the superior's concurrence imports into the suit his title and interest as well as that of the vassal, and that he as well as the feuars would be conclusively bound by the judgment to be pronounced. He concurs for his own interest, and no other meaning can, I think, be attached to his concurrence. Had this been a suit by two separate and independent parties having distinct rights and interests in the subject-matter of the suit, I might have participated in Lord Young's difficulties; but that is not the position of the parties here. There are many instances in which one party has the primary, and another a subordinate or derivative, title to enforce the same right, such as laudlord and tenant, trustee and trustee, creditor in possession and fiar, and such like, in which the concurrence of the holder of the radical right will competently validate and fortify the right of action in the holder of the derivative right. The case of superior and vassal is a simple illustration of this form of procedure, and holding it to be clear that the superior would be effectually bound by an adverse judgment, I am of opinion that his title is brought into judgment here, and must be met by the respondent. Neither the respondent nor the Lord Ordinary had any doubt that the superior had given his concurrence, and indeed no question was raised as to the effect of it before him. The condition is clear on the face of the title, and the only remaining question is, whether it has been directly or inferentially discharged? All the superior has to do is to point to the condition in the right which he gave to Hislop. If the vassal plead acquiescence or abandonment, it is for him to prove it. I would refer to Lord Neaves' opinion in the case of the *Clydesdale Bank* (6 Macph. 943), and that of Lord Cowan in *Croall v. The Charlotte Square Feuars* (9 Macph. 323), as entirely establishing this proposition.

On the facts of this case I do not think that any of the alleged violations of the conditions laid on the adjoining feuars were of such a nature as if permitted by the superior would infer discharge of the obligation now in question. The conditions said to have been violated related either to back ground or to the houses fronting Antigua Street, and were there-

fore different in character, or at least in importance, from those relating to the tenements fronting Gayfield Square; and in this respect the facts are in marked contrast to those in the case of the *Clydesdale Bank*, and indeed of any others in which the superior's challenge has been excluded.

The Court adhered.

Counsel for Complainers (Respondents)—Balfour—Wallace. Agent—Lindsay Mackersy, W.S.

Counsel for Respondent (Reclaimer)—Kinnear—Low. Agents—Macandrew & Wright, W.S.

Saturday, December 20.\*

## FIRST DIVISION.

[Lord Curriehill, Ordinary.]

MP.—LOVE AND ANOTHER (LOVE'S TRUSTEES) v. LOVE AND ANOTHER.

*Succession—Vesting—Period of Division—Quod fieri debet infectum valet.*

A testator who died in 1859 directed his trustees to divide his estate among his three sons R. J. and W. (who were themselves trustees under his settlement) in shares of equal value, but so that R. should take his estate of T., J. his estate of N., and W. an equivalent share in cash. Vesting was to take place at the testator's death, so far as to infer a *jus disponendi*, but not to effect transmission by intestate succession until the period of division and conveyance, which was to be as soon as the trustees had paid the testator's debts and valued the estate. If a son died intestate and without issue before the testator, or before the period of division, the estate was to be divided equally between the remaining two, the eldest always to take the estate of T. R. died without surviving issue in 1877, leaving a general settlement in favour of his brothers, but specially excepting the estate of T., which he desired "should descend or transmit to T. in terms of his father's trust-disposition and deed of settlement." No conveyance of the estate had been granted to R. during his lifetime. *Held* that, on the principle *quod fieri debet infectum valet*, division and conveyance must be assumed to have taken place during R.'s life, that the destination in the trust-disposition and settlement regulated the succession to the estate of T., and that therefore the original tripartite destination still held good.

John Love senior of Threepwood died on 6th September 1859 leaving a trust-disposition and settlement dated 4th June 1849, and duly recorded, whereby he disposed and conveyed his whole estate, real and personal, in trust to the trustees therein named. The sole surviving and accepting trustees at his death were his three sons Robert, John, and William Fulton, and also a William Love who acted as trustee till 1863, when he became incapacitated and died in 1866. Robert Love, the eldest son, died on 13th September

\* Decided 19th December.

1877, being then a widower, his only child, a daughter, having predeceased him unmarried in 1865. He left a general settlement dated 12th March 1877, under which he appointed his two brothers his executors. Differences having arisen between the two brothers as to the proper distribution of their father's estate under his trust-deed, and as to the effect thereupon of the general settlement of Robert, the present action was raised in the form of a multiplepounding by John Love and William Fulton Love as sole surviving trustees and executors under their father's trust-deed, pursuers and nominal raisers, against the same parties as individuals, and also as Robert Love's executors, W. F. Love being the real raiser.

John Love senior was proprietor by inheritance of the two-pound land of old extent of Threepwood, to which he added by purchase a portion of Townend of Threepwood (described in the trust-disposition as "lot first"), and of the lands of Netherhill and others, which he acquired by purchase (described in the said trust-disposition and settlement as "lot second"). He was also proprietor of subjects called the Tower of Auchentothie and others, which were conveyed along with his moveable estate under the general description of his other lands and heritable estate.

The first purpose of the trust provided for payment of the truster's just and lawful debts, whether due under personal obligation or secured heritably over the whole or any part of his lands, and of his funeral charges, and the expense of executing the trust; the second for an annuity and other provisions to the truster's wife, should she survive him. Mrs Love predeceased the truster, and the provisions to her therefore lapsed.

The third purpose of the trust provided for the collection of the truster's debts, and gave power to sell and dispose of the moveable estate and the heritages generally disposed in the trust-disposition and settlement, and to apply the proceeds in payment of his debts. After so doing, the trustees were directed to ascertain and fix the balance of debts owing from the estate (if any), and in the event of there being more than enough for paying the debts, the surplus was to be divided equally to and among his three sons.

The fourth purpose provided that the trustees should as soon as possible ascertain and fix the values respectively of the lots of lands first and second specially disposed, and provision was made for ascertaining the values.

"Fifthly, Said trustees will then be enabled, and are hereby directed, to calculate and fix the clear residue of my whole property, heritable and moveable, and to divide the same into three equal shares, to be held in trust as aforesaid for behoof of my said three children or the heirs of their respective bodies, but in case of the death of any one of them and the heirs of his body, then into two equal shares, to be held for behoof of the two survivors, or the heirs of their bodies respectively (declaring that the shares shall vest at the period of my death, so as to be subject to the deeds, but not to the effect of transmitting to the heirs of the beneficiaries then existing, by legal or intestate succession, until the conveyances are granted in their favour as after specified)."

The sixth purpose provided that the trustees should then, or as soon as convenient, dispose

and convey lot first to and in favour of Robert Love, his eldest son, and the heirs-male of his body; whom failing to John Love, his second son, and the heirs-male of his body; whom failing to the said William Love, his third son, and the heirs-male of his body; whom failing, to the heirs-male of the bodies of his sons respectively, according to their seniority, but under real burden of the payment of the shares or proportions of said debts, provision, and others found chargeable on the same. It further provided that the trustees should at same time convey lot second to John Love, the truster's son, or the heirs of his body, under a share of the same burdens as was provided in the case of lot first.

The seventh purpose provided that in case, by the death of Robert Love either before or after the truster without leaving heirs-male of his body, the succession of the foresaid first lot should open to John Love junior and the heirs-male of his body, or to any of the other male substitutes before referred to, then he or they should be bound, at the first legal term thereafter, to make payment to the heirs-female of Robert Love's body of the third share of free residue falling to them; or John Love junior, or the substitutes to him (or the trustees themselves), should, in his or their option, dispose to such heirs-female the subjects comprehended in lot second before described in lieu of such share, but under burden as aforesaid; declaring that if John Love junior or his fore-saids should so succeed, then William Fulton Love, the truster's son, if then alive, should be entitled, in his option, to receive a conveyance of Netherhill, in consideration of which the pecuniary provision falling to him should be diminished according to the value put on these lands and sums fixed as chargeable thereon. And in the event of the death of either Robert Love or John Love junior without leaving issue male or female, and the free residue of the truster's property becoming thus divisible into two shares, then his trustees were directed to dispose to William Fulton Love, the truster's son, and his fore-saids, the subject comprehended in lot second, under burden of such portion of said debts as should equalise said lot in value with lot first.

After the truster's death, on 6th September 1859, all the trust-estate, excepting the lands of Threepwood, being lot first, had been sold, and the proceeds applied in payment of his debts. Threepwood was let to tenants, and was in part occupied by John Love. The Water Commissioners of Paisley took part of the lands, by virtue of their compulsory power, at the price of £1900, with entry at Martinmas 1867. Out of this sum, with the accumulating rents and the proceeds of certain cuttings of wood, the truster's debts, as far as ascertained, had been paid. On 4th January 1869 a sum of £300 was paid to each of the three sons of the truster to account of their interests in the trust estate. On 31st December 1877, a sum of £1000 further was paid to each of the two then surviving sons, John and William, under reservation of all questions as to their respective rights.

The trust estate now consisted substantially of the following items, viz., (1) the Threepwood lands, with a rental of about £300 per annum; (2) the sum of £1254, 16s. 11d.; (3) a sum of £90, with accruing interest, payable by the

local authority of Beith for a small part of Threepwood compulsorily taken by them; (4) rent for a farm and for a dwelling-house and others on Threepwood occupied by John Love, according to their fair value as the same should be ascertained, under deduction of payments made by him to account; and other rents belonging to the trust with which he had intromitted.

Robert Love's general disposition and settlement conveyed to his brothers as executors his whole estate, heritable and moveable, "but expressly excepting from this conveyance my right, title, and interest in and to the lands of Threepwood, in the parish of Beith, to which I obtained right by the trust-disposition and deed of settlement of my late father John Love of Threepwood, and which lands I wish to descend or transmit to the said John Love, my immediate younger brother, in terms of said trust-disposition and deed of settlement."

John Love claimed "to be ranked and preferred to the whole fund *in medio*, less one-third of the value of the trust-estate as at the date of the death of John Love, which one-third shall be paid or secured to the real raiser in terms of the said trust-disposition and settlement." W. F. Love claimed—"(1) To be ranked and preferred on the fund *in medio* for one-half of the clear residue of the trust-estate, as the same shall be ascertained in the course of this process. (2) Or otherwise, to be ranked and preferred on the fund *in medio* for one-third of the trust-estate, and accruing interest from such date of division as may be fixed by the Court, and for one-half of all converted and realised capital and income effecting to any share which may have vested in the deceased Robert Love."

John Love pleaded—"(1) Upon a sound construction of the said trust-disposition and settlement, the estate of Threepwood vested in Robert Love, subject to such burdens as fall to be imposed upon it in order to secure provisions to each of the real raisers and the claimant of one-third of the value of the whole estate of the truster; and the whole rights of Robert Love are now vested in the claimant under the said general settlement. (2) Under the said trust-disposition and settlement the real raiser has right only to one-third of the value of the said trust-estate as at the date of the death of the truster, and the claimant, in his own right under his father's settlement, and in right of his brother Robert Love, is entitled to the whole fund *in medio*, under burden of the real raiser's rights aforesaid."

William Fulton Love pleaded—"(1) On a sound construction of the truster's settlement, the trust estate falls to be divided equally between the claimant and his brother John Love, in respect of the death of Robert Love before division and conveyance without leaving heirs of his body. (2) On a sound construction of the truster's settlement and in the circumstances of the trust, upon the succession to Threepwood opening to John Love by Robert's death without heirs of his body, the said John Love or the trustees are bound to pay or secure one-half of the trust estate to this claimant. (3) In any event, the claimant is entitled to one-third of the trust estate and accruing interest from such date of division as may be fixed by the Court, and also to one-half of all converted and realised capital and income

effecting to any share which may have vested in the late Robert Love."

On 26th July 1879 the Lord Ordinary (CURRIEMILL) pronounced an interlocutor in which, after narrating the facts of the case, his Lordship proceeded—"Finds (16) that according to the sound construction of the trust-deed, and particularly of the fifth purpose thereof, and in respect that the three sons of the truster all survived him, the shares of the said sons in the residue of his estate vested in each of them at the date of the truster's death, to the effect of entitling each son to dispose of his one-third share of said estate by will or settlement, and that the provisions of the trust-deed for a bipartite division of the trust estate have not taken effect." . . .

W. F. Love reclaimed, and argued—By the terms of the father's settlement, if one son died before division or conveyance, his share, if he did not test, should transmit to his issue, failing whom to his brothers. Robert so died, and practically intestate, for his deed simply continued his father's destination in favour of John. Returning then to the father's deed, John could take Threepwood only under burden of paying half its value to William, for Threepwood had not vested in Robert, there having been no division or conveyance. The maxim *quod fieri debet infectum valet* did not apply here; there had been no *mala fides* in the delay. The opposing parties to this suit were the same persons, though in different capacities. They must be held to have elected to substitute for the provisions of their father's deed an arrangement of their own, by which there should be no vesting, but each should have right to a *pro indiviso* share. William was therefore entitled to half of the father's whole succession.

Authorities—Lewin on Trusts, p. 801; *Hogg v. Hamilton*, June 7, 1877, 4 R. 845; *Urquhart v. Dewar*, June 13, 1879, 6 R. 1026; *Howat's Trs. v. Howat*, Dec. 17, 1869, 8 Macph. 337; *Thorburn v. Thorburn*, Feb. 16, 1836, 14 S. 485.

Replied for John Love—Such undue delay had occurred that the administration of the trust must be considered to have ended, and the estate held to have been divided and conveyed within a reasonable time after the father's death—*quod fieri debet infectum valet*. If, then, Robert's share vested in him during life, the original tripartite division under the father's settlement held good, and Robert's deed made no alteration in the original destination of Threepwood. The only possible event in which the decision was to be bipartite, was no longer possible, viz., the death intestate and without issue of one of the sons before the father or before the period of division and conveyance.

Authorities—*Lord Stair v. Lord Stair's Trustees*, June 19, 1827, 2 W. & S. 614; *Scott v. Scott*, Jan. 27, 1877, 4 R. 384; *Dickson's Tutors v. Scott*, Nov. 2, 1853, 16 D. 1.

At advising—

LORD PRESIDENT—I have very little doubt of the general purpose and intention with which the deceased John Love made his settlement of date June 4, 1849. He possessed two parcels of land, one of which passed under the name of Threepwood, and the other under that of Netherhill, and he also possessed certain moveable estate. He had three sons, and his purpose was to make an

equal division among them as regards value, but consistently with that, his intention was that the eldest son should succeed to Threepwood (apparently because he himself had acquired it by inheritance, and it had been in the family), and failing him the second son, and failing him the third. That was the destination he desired to be made of Threepwood, but always consistently with making the three sons equal as to the value of their shares in his succession. No doubt to carry out these purposes it was necessary to execute a deed of some complexity; it might perhaps have been done more simply than it has been, but still it was necessary to anticipate many possible events. He conveys his whole estate to trustees, and there are various directions as to provisions for his widow and so forth; but the important part for this case begins with "*Thirdly*, Said trustees or trustee shall, as speedily as possible, collect the dues due to me, so far as recoverable, and sell and dispose of my moveable property and the heritages generally before disposed" [*i.e.*, other than Threepwood and Netherhill], "and realise such sums as I may have invested in heritable bonds or securities, and apply the proceeds as far as they will go in paying my debts: They shall then ascertain and fix the amount of the balance of the debts owing from my estate (if any), whether in virtue of personal obligations or heritable securities: If, however, there is more than enough for paying said debts and the expenses of the trust, the trustees will divide the surplus, and convey such outstanding debts as may not be realised equally to and among my said three sons or the heirs of their bodies." Then the trustees are directed to get a valuation made of the estates of Threepwood and Netherhill, either at their own estimate or by one or more arbiters or valutors to be named by them; and "*Fifthly*, Said trustees will then be enabled, and are hereby directed, to calculate and fix the clear residue of my whole property, heritable and moveable, and to divide the same into three equal shares, to be held in trust as aforesaid for behoof of my said three children or the heirs of their respective bodies, but in case of the death of any one of them and the heirs of his body, then into two equal shares, to be held for behoof of the two survivors, or the heirs of their bodies respectively (declaring that the shares shall vest at the period of my death, so as to be subject to the deeds, but not to the effect of transmitting to the heirs of the beneficiaries then existing, by legal or intestate succession, until the conveyances are granted in their favour as after specified)." Now, there is an inquiry suggested by this *fifth* purpose which it is essential to solve in order to work out our judgment in this case. A certain time is indicated by the word "then," at which the trustees shall be able to calculate and fix the clear residue of the whole property, *i.e.*, the clear value of the estate after payment of the debts; when they are able to do that in virtue of the previous provisions, they will be enabled, and are directed, to divide the estate. Now, the clause concludes by defining yet another period of time, *i.e.*, when "the conveyances are granted in their favour as after specified;" and that is made quite clear by a provision of a subsequent part of the deed which shows that the conveyances of the three shares are to be granted by the trustees as soon as they have calculated and ascertained the

value of the whole estate after payment of the debts. So the two periods are the same; and this period is important, for the vesting of certain rights and interests depends on its arrival. After the testator's death each son shall have his share vested in him to the extent of exercising a *jus disponendi*, but not to the effect of transmitting by intestate succession until the period which is specified at the beginning and end of the clause. In the interval between the testator's death and the period of division the shares are only vested to the above limited effect.

Then the deed proceeds—leaving out of view in the meantime the possibility of a bipartite division—to direct the trustees in what form they shall make the tripartite division. One share is to go to William in cash; "lot first" [*i.e.*, Threepwood] shall go to Robert, and "lot second" [*i.e.*, Netherhill] to John; and it is provided that "when their respective values shall have been ascertained as aforesaid, the debts due by me, with the value of the annuities to my wife, the said provision to my youngest son, the expenses attending the execution of this trust, and all others chargeable against me or my estate, shall be so apportioned upon said two lots of land respectively as that the free balance of the value of each lot shall be equal in amount the one to the other."

This having been disposed of—the eldest son to get Threepwood, the second Netherhill, and the third his equivalent share in cash—the *sixth* purpose goes on to deal with the destination of Threepwood. This purpose is not merely directed to the trustees by way of instruction, but is intended to regulate the succession to that estate after it had passed to the institute or first heir called. It provides that "Said trustees shall then, or as soon as convenient, dispose and convey lot first of the lands, teinds, and others specially before disposed, to and in favour of the said Robert Love, my eldest son, and the heirs-male of his body, whom failing to the said John Love junior and the heirs-male of his body, whom failing to the said William Love, my son, and the heirs-male of his body, whom failing to the heirs-female of the bodies of my sons respectively, according to their seniority," but under the burdens thereafter specified. It is obvious that there is no condition attached to the succession at all. Robert is to get Threepwood, burdened no doubt so as to provide an equally valuable succession to each son, but still as his own, without condition, and if the destination is not evacuated by Robert during his life, then John is to get Threepwood equally free, as heir-substitute of his elder brother under the father's destination, and so on to William. And so in the same way the testator disposes and conveys "lot second" to John.

The construction so far is not difficult. The testator's meaning is this—"My estate is to be divided into three parts of equal value, but Robert's part is to be Threepwood, either totally unburdened, or burdened only in so far as to make the shares equal. John is to have Netherhill on similar terms; and William is to have sufficient cash to represent one-third of his father's succession." That is quite clear, and also that he was anxious his estate of Threepwood should go to the heirs-male of his body. Now, the trustees under this destination were bound with all speed to ascertain the amount of the testator's debts, and

the value of the heritable property, lots first and second, and having thus got the necessary material for making the distribution of the estate into three equal shares, and for conveying to the three sons, as soon as the period when this could under a fair administration of the trust be effected, then I apprehend the three shares vested absolutely in the three sons respectively, in accordance with long settled principles of our law, whether the conveyance had actually been made or not. In conclusion on this matter, I am of opinion that that period arrived many years before Robert's death, and therefore that the three shares vested in the three sons before that date, unless in the seventh purpose we find anything inconsistent with this proposition.

Now, what is the seventh purpose? It runs thus—"Seventh, In case by the death of the said Robert Love, either before or after me, without leaving heirs-male of his body, the succession to the fore-said first lot of said lands shall open to the said John Love junior and the heirs-male of his body, or to any of the other male substitutes before referred to." Now, what is the case here contemplated? By the operation of the former part of the deed, Threepwood may devolve on John by Robert's death before or after the testator—if before, then John takes as conditional institute; if after, and after Robert has succeeded, then John will take by substitution under the destination which I have read, unless it be evacuated. So this clause refers to all the events in which the estate of Threepwood may pass from Robert to John. Let us see what is to happen—"Then he or they shall be bound, at the first legal term thereafter, to make payment to the heirs-female of the said Robert Love's body of the third share of free residue falling to them." The heirs-female are to succeed not to Threepwood, but to an equivalent—"Or the said John Love junior, or the substitutes to him (or the said trustees themselves), shall, in his or their option, dispose to such heirs-female the subjects comprehended in lot second before described, in lieu of such share, but under burden as aforesaid;" that is Netherhill, for the testator did not care so much about the succession to that estate; but this is qualified again—"Declaring that if the said John Love junior or his fore-saids shall so succeed, then the said William Love, my son, if then alive, shall be entitled, in his option, to receive a conveyance of said lands of Netherhill and others in the parish of Dunlop, in consideration of which the pecuniary provision falling to him shall be diminished according to the value put on these lands, and sums fixed as chargeable thereon, in manner before specified." The meaning of this is that William is to have preferable option to the heirs-female of Robert in the case supposed.

So far the deed is clear enough, but then follows a separate clause, intended to provide for an event which is only contemplated once before in the deed, viz., a bipartite division, "and in the event of the death of either of the said Robert Love or John Love junior without leaving issue, male or female, of their bodies respectively, and the free residue of my property becoming thus divisible into two shares, then said trustees shall dispose to the said William Love, my son, and his aforesaids, the subjects comprehended in lot second above described, under burden of such portion of said

debts and annuities as shall equalise said lot in value with lot first." Now, the only question which remains on the construction of the deed is, what is the event here contemplated?—the death when?—that is the important question. It may be solved by considering what is to follow thereon. The trustees are to dispose and convey Netherhill to William, so it may be assumed that the event which was in the testator's mind could only occur while the estate was undivided and unconveyed in the trustees' hands, *i.e.*, before the point of time at which the trustees would be able, and were directed, to divide the estate. As that time arrived long before Robert's death, the event which is here contemplated has not occurred—viz., Robert or John dying without issue, male or female—and therefore the only event which could open the possibility of a bipartite division has not occurred, and became impossible so soon as the point of time was reached when the estate became divisible.

That exhausts all that I think it necessary to say upon the construction of this deed. The three sons survived the testator; and the contemplated period of division, and therefore the shares became fully vested in them. It is impossible that the bipartite division can now occur.

I shall now say a word as to the effect of Robert's deed. There is no difficulty in regard to it. He makes a general conveyance in favour of his two brothers equally, but he inherited, I presume, his father's feeling as to Threepwood, that the family estate should descend through males only, and he is therefore, and very properly, careful to say while conveying his estate in general terms—"I don't include Threepwood;" and all know how necessary it is in general conveyances to be clear not to convey (if such be the intention) estate which would otherwise be carried. Many questions arise as to general conveyances overruling previous separate destinations, and that seems to have been in Robert's mind. He says—"But expressly excepting from this conveyance my right, title, and interest in and to the lands of Threepwood, in the parish of Beith, to which I obtained right by the trust-disposition and deed of settlement of my late father John Love of Threepwood." These words express conveniently what his right was *de facto* at the time of his executing this settlement. He had not got a conveyance of his share though the time had passed when he should have obtained it, and therefore his right had vested; but *de facto* it was only a beneficial interest under a trust, and he therefore describes it correctly. He then, after this exception, says what he wishes to be done, not with that beneficial interest, but with the lands of Threepwood, "which lands I wish to descend or transmit to the said John Love, my immediate younger brother, in terms of said trust-disposition and deed of settlement." If it is said that this is equivalent under the Conveyancing Act 1874, section 27, to a bequest of the lands, I do not so read it. He desires the old destination to take effect, and I do not know how he could better have expressed this.

That being so, I think there is not under this settlement any conveyance of Threepwood, but rather the expression of Robert's desire that it shall not be conveyed, but left to descend in

terms of the old deed. Accordingly, John takes Threepwood as substitute heir under the destination of the sixth purpose of his father's settlement, but that estate belonged to Robert originally as his third part of the father's estate. This being so, a tripartite division is necessarily involved, and the devolution of the estate of Threepwood from Robert to John takes effect, but not on the footing of any new or different distribution from that which ought to have taken place long before.

I agree, therefore, substantially with the result at which the Lord Ordinary has arrived, but I cannot agree with him in thinking that Robert's settlement imparted a bequest or conveyance of Threepwood to John; and I am therefore for making some alterations in his interlocutor.

**LORD DEAS**—Your Lordship has so fully analysed the deed of John Love senior that it is unnecessary for me to go over its provisions in detail. I shall therefore direct my attention at once to the *fifth* purpose of that deed, which contains what relates to the vesting of the estates conveyed. The question is, When does the vesting take place in these parties to all effects, so as to entitle each to deal with his share as his own property? According to the words of the deed, that is not to happen till the conveyances have been granted in their favour; but there is an important principle in our law, that that which ought to have been done according to the direction of a testator shall be held to have been done. It has been settled by the cases of *Lord Stair*, 2 W. and S. 614, and *Dickson's Tutors*, 16 D. 1 (not to quote other cases), that you are to construe a testator's will as meaning that what he has directed to be done, without specifying a time, shall be done within a reasonable time, and the authorities have further construed a "reasonable time" to be within one year after his death. Consequently we are to deal with the conveyances here on the same footing as if they had been granted within twelve months after the father's death. Now, at that period the three sons were all alive. But in place of one year, the conveyances were not granted at the lapse of eighteen years after the testator's death, so that the principle ought to be applicable here if it is to be applied to any case at all. Now, assuming this to be so, Robert is to be held to have received the conveyance of Threepwood during his lifetime, and therefore to have been entitled in his life to convey it away to anyone he pleased. He did not do that, because he wished Threepwood to descend as his father had destined it, and the way he took to secure that was quite clear and effectual, viz., by saying so expressly in his deed. It is a misapprehension to say that he begins his deed by disposing that estate as well as the rest, and then changes his purpose. His purpose is the same from the first—a general conveyance under the exception of Threepwood—as if he had said—"I might have disposed it away, but I won't exercise my power, because I wish it to go according to my father's destination." That is the substance of the whole matter, and I agree entirely with your Lordship's conclusions.

**LORD MURE** and **LORD SHAND** concurred.

The Court pronounced this interlocutor:—

"The Lords having heard counsel . . . against Lord Curriehill's interlocutor of 26th July 1879, Recal the said interlocutor: Find that by his trust-disposition and settlement, dated 4th June 1849, the late John Love provided that his three sons Robert, John, and William should succeed to his estate in shares of equal value, but that his family lands of Threepwood should descend to his eldest son Robert, and the heirs-male of his body, whom failing his other sons, and the heirs-male of their bodies, in order, and directed his trustees to pay his debts or provide for them in such manner that the lands of Threepwood should pass to his eldest son either burdened or unburdened as the case might be so as to secure that the succession of his sons should be of equal value: Find that according to the sound construction of the said trust-disposition and settlement, if any one of his sons should predecease the term of vesting the estate of the testator was to suffer a bipartite instead of a tripartite division: Find that he appointed that the estate should vest in his three sons on his death to the limited effect of giving to each of them a *jus disponendi* of his share, and should vest in them absolutely when the trustees had so provided for the payment of his debts or for their security over his estate, as to enable them to convey the estate in three shares of equal value, and had conveyed their shares to each of the sons accordingly: Find that the eldest son Robert died in 1877, and that the other two sons survive: Find that many years before the death of Robert the estate might and ought to have been divided and conveyed in terms of these directions; and find that when the estate was susceptible of division and conveyance, though not actually conveyed, the shares of the sons vested in them absolutely, and that thereafter the provision for bipartite division could no longer receive effect: Find that the general disposition and settlement of the said Robert Love, dated 12th March 1877, did not convey or dispose of the estate of Threepwood, but that the said estate was expressly excepted from the general conveyance in that deed, and that the granter thereof, the said Robert Love, expressed his desire and intention to be that the descent of that estate after his death should be regulated and determined by the destination contained in the sixth head or purpose of the trust-disposition and settlement of the said John Love: Therefore find that the claimant John Love is entitled as heir of provision of his deceased brother Robert to the estate of Threepwood as the same stood vested in the said Robert at the time of his death; and also, in his own right, to one-third part in value of the estate of his father as at the period when the same ought to have been divided and conveyed in due course of administration of the said estate under the provisions of his said father's trust-disposition and settlement, and that the claimant William Love is entitled to one-third part in value of the said estate as at the said period: Find the claimer William Love liable in expenses," &c.

Counsel for W. F. Love (Reclaimer)—Asher—  
R. V. Campbell. Agents—Hamilton, Kinnear, &  
Beatson, W.S.

Counsel for John Love (Respondent)—Balfour  
—Young. Agents—Duncan & Black, W.S.

## HIGH COURT OF JUSTICIARY.

Thursday, December 18.

LORD ADVOCATE v. HEIDMEISSER.

(Before the Lord Justice-Clerk).

*Justiciary Cases—Murder—Defence of Mal Regimen while in Hospital.*

A panel pleaded not guilty to a charge of murder, and a defence set up was that the death of the deceased had supervened as the result of improper and careless treatment in the hospital to which he had been removed on receiving the injuries libelled.

*Observations* by the Court as to the distinctions which fall to be made in estimating the value of the defence of *mal regimen*, and direction to the jury upon the facts as disclosed at the trial.

Heinrich Heidmeisser, a German, from the prison of Lerwick, was charged with the murder of Arie Meulendyk, a fisherman sometime on board the vessel "Erstling" of Maaslius, by stabbing him with a knife in the chest and abdomen in Commercial Street, Lerwick, on 28th June 1879, whereby he was mortally injured, and died in Lerwick hospital on 27th July.

The prisoner, who could not speak the English language, tendered through an interpreter the plea of "not guilty," and after witnesses had been examined in regard to the perpetration of the crime, the following evidence was given, by the medical man who had attended the deceased, in support of a defence to the effect that the death had been caused or partly caused by improper treatment received in the hospital to which the patient had been removed immediately on receiving the wounds libelled.

Dr Alexander Pole, Lerwick, in answer to the Solicitor-General, deponed—The deceased was brought to him bleeding from two wounds—one in the chest and the other in the abdomen. Witness prepared a report on the case, and another on the examination of the body twenty-four hours after death. These documents having been read, witness, in reply to Mr TRAYNER, for the defence, said he was a graduate at St Andrews and a member of the Royal College of Surgeons. It was not the wound in the abdomen that caused the death of the deceased, but the wound in the chest. On the morning of 8th July witness found that an unfavourable change had taken place in the condition of the deceased, after he had thought the worst was past. He believed that that had been caused to a slight extent by the removal of the two nurses who had previously been in attendance, and who were replaced by an old man, whom witness considered anything but a fit nurse. The change might have taken place

though the nurses had not been removed; but it was just possible, on the other hand, that it might not. In a case where inflammatory action—which was the immediate cause of Meulendyk's death—was imminent, it was in the last degree desirable that the patient should be carefully watched and nursed. The nurses could understand what the deceased said, and communicate with him. They were not trained nurses, but they were as good as could be obtained in Lerwick. The old man by whom they were replaced was quite inefficient. Witness complained of the removal of the nurses, which he understood was done to save expense, and they were sent back. The hospital was not a very good building. It was rather draughty. In reply to the question whether the fact of the patient having exposed himself to a chill on the night of the 7th July in that draughty hospital would not have accounted for the change which the witness observed on the morning of the 8th, he said that if the patient had not had a very serious wound it would have accounted for everything, and, with the wounds from which the patient was suffering, any exposure to draughts would have aggravated his case.

The SOLICITOR-GENERAL—Looking to the conditions of that man's body after death, supposing the attendance had been continuously the same, could he have recovered?

Witness—He might possibly have done so.

The COURT—Would you say that the wounds were necessarily fatal with the knowledge you now have?

Witness—Not altogether, my Lord. I hold it is possible the patient might have recovered from the wounds.

His LORDSHIP—But there was very great danger.

Witness—Very great danger.

Dr F. D. A. Skae, Lerwick, was next examined. He deponed that the deceased must have had a very good constitution, unimpaired by excesses of any kind. He had considered the patient out of danger, and had ceased to attend him, Dr Pole continuing to watch the case. He was therefore surprised when he found on the 8th that a change for the worse had occurred. The patient was of an excitable temperament, and was given to rising up in his bed—in fact he wanted to get up and go out. Ill attendance and exposure to a chill would certainly account for the unfavourable change in his condition on the 8th.

At the close of the evidence the Solicitor-General (MACDONALD) addressed the jury, and in doing so departed from the capital charge, asking the jury to find the accused guilty of culpable homicide.

The Lord Justice-Clerk (MONCREIFF) in his charge to the jury said:—The first point to consider is, what was the cause of this man's death. The defence as to this seemed to be that the deceased with proper treatment in the hospital would have recovered, but that his death had resulted from improper treatment after the danger from the wound had been removed. This defence is what is technically known as *mal regimen*—that is to say, where an injury has become mortal or fatal by reason of improper treatment. With regard to such a defence there are distinctions to be observed, which I think have been properly and clearly laid down in the