have to consider the relevancy of the case stated for him. I am of opinion that it is not relevant. Apparently the occurrence which caused the accident happened thus—The pursuer had led a horse along a passage in the mine, and stopped with it at a trough close to one of the gates which shut off the passage from the coal-pit. The gate was pulled down, and the horse, startled by the noise, backed up against the pursuer, who fell on to a sleeper which, as it happened, was lying at the side of the road, and his right knee was cut by a spike-nail which was in the sleeper. The question arises — First, Whether there is any liability on the bottomer for letting the gate fall? and secondly, if there is none, is the master liable under the Employers Liability Act because the sleeper was placed on the roadway on which the pursuer fell and sustained the injury? As to the first question, I am quite satisfied it was a contingency for which no one is responsible. The bottomer was only doing his duty in letting the gate close. He did not expect the horse would have been startled, and in fact I think the event happened without any fault which can be attributed to the employer. On the second question, I am of opinion that it was the result of a pure accident or misadventure for which the master is not responsible. It may be said that it was a slovenly thing to leave the sleeper lying about, but I think it would be straining the law of liability to an extravagant extent if we were to make the master liable for what I look upon as a mere accident.

Lord Young—The action is laid on the footing that the master, or some other person for whom he was responsible under the Employers Liability Act, was to blame, and I agree with your Lordship that the case as presented is not relevant. I think no blame can be imputed to the master, or anyone for whom he was responsible, for shutting the gate whereby the horse started and threw the pursuer over. There was no neglect of the duties of an ordinarily good master, neither was there any fault on the part of anyone for whom he was responsible under the Employers Liability Act 1880. Then it is said that the fall would have been harmless had the pursuer's leg not come in contact with the sleeper with a nail protruding from it. That was a calamity; but the question is, whether it was the master's fault that the sleeper with the nail in it was there? It was certainly not directly his fault. He did not fail in anything he did, nor in employing fit servants, but it is said that he is responsible because the oversman who picked up the broken sleeper should have taken it away, and not simply put it aside. Well, the consequence of the Act is that a master is to be responsible to the person injured although he is his workman, and though the injury was done by a fellow-workman, just as if he had been not a workman but a stranger lawfully on the premises. In short, he is not to be entitled to plead the law which he could plead before, that a master is not responsible to one servant for the fault of another. I take the case so—and as there are few strangers who could be said to be lawfully on the roadway of a mine, I take the case of an ordinary road leading to a man's house or farm. The owner or someone else has, I will suppose, picked up something lying on the road, and placed it on one side. A stranger passing along is thrown from his horse, and striking against this thing, picked up the minute before, is much hurt by it. Is there any liability *ex culpa* to the stranger? It is one of the things which happen in the ordinary course of life that such a thing found impeding the road should be put on one side, and it does not occur to me that any such action would lie. Since, therefore, I do not think that in such a case there would be any liability to a stranger—and we are to deal with the case as if it happened to a stranger—I think the action irrelevant. I may add that I do not like sending a case of this kind to a jury unless there is a distinctly relevant case set out on record, since there would be a risk of their taking the view that this poor man had lost his leg, and his employers, who were well able to pay, should just have to pay for it.

Lord Craighill—I agree in thinking that there is no relevant case stated. On the second point, I do not think that the person who picked up the sleeper and put it where it was put did anything wrong. There was no need to take it away only to be brought back when it was repaired. The most plausible view presented by the pursuer is that there was a defect in the way—the road. I do not think there was. There was no obstruction on the road. Anyone passing along would not have been obstructed by it in any reasonable sense. It was an unexpected accident, and I think that it cannot be said that in any reasonable sense there was any defect in the "way" in the sense of section 1 of the Act. There was no obstruction to the ordinary use of the roadway.

Lord Rutherfurd Clark—I concur. The pursuer ought, in order to make the case relevant, to have had much more specific statements.

The Court dismissed the action as irrelevant.

Counsel for Pursuer — A. S. D. Thomson. Agent—Wm. Officer, S.S.C.

Counsel for Defenders—Jameson. Agents—W. & J. Burness, W.S.

Tuesday, July 19.

SECOND DIVISION.

BYARS' TRUSTEES *v.* HAY AND ANOTHER.

Succession—Vesting—Payment on Youngest Child attaining Majority.

By his trust-disposition and settlement a testator directed his trustees to retain a share of residue, and invest the same in their own names for behoof of the children, who were named, of his brother, "equally between and among them in liferent, and their lawful issues, born and to be born, equally among them in fee." In the event of the death of the parent payment of the fee was not to be made until the youngest child attained majority. There was a declaration that in the event of any of the children "dying before the period fixed for division of their shares respectively leav-

ing lawful issue, such issue shall come in place of the parent, and take and receive what the parent would have been entitled to if then in life." *Held* that the shares vested *a morte testatoris.*

James Byars of Cherrybank, Forfar, died there, unmarried, on 8th April 1867, leaving a trust-disposition and settlement dated 28th January and registered in the Books of Council and Session 15th April 1867. By this deed he directed the trustees therein appointed to realise after his death all his estate, heritable and moveable, and after paying his debts to divide the free residue into two equal shares—"One share thereof to be retained by my said trustees and invested by them in their own names for behoof of the children of my said brother Andrew Byars, viz., Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, equally between and among them in liferent, and their lawful issues, born and to be born, equally among them in fee, and that *per stirpes* and not *per capita,* the half of my estate being thus destined or divided into four equal shares, one whereof shall descend to the said Robert Byars in liferent and his lawful issue in fee, another to the said David Byars in liferent and his lawful issue in fee, another to the said Jessie Byars or Simpson in liferent and her lawful issue in fee, and the remaining share to the said Margaret Byars or Hay in liferent and her lawful issue in fee: . . . Declaring, as it is hereby provided and declared, with reference to the share or half of my said estate destined to the children of my said brother Andrew Byars in liferent, and to their lawful issues equally among them in fee as aforesaid, that in the event of any of the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, dying before his or her youngest child attaining the age of twenty-one years, the shares of the half of my said estate respectively liferented by the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, shall not be payable to their children, to whom they are destined in fee, until the youngest lawful child of any of the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, so dying shall have attained the age of twenty-one years, but on the youngest child of the family of any of them so dying, attaining that age, my said trustees shall be bound to pay to and amongst that family the share above provided to them: . . . And in the event of any of the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, dying before the youngest of his or her family attaining the age of twenty-one years complete, then I authorise and empower my said trustees to pay or disburse for the board, education, and maintenance of such family such sum or sums of money as they, my said trustees, may think proper, out of the interest, revenue, and profits, arising from the share destined in fee for that family, with power also to my said trustees to advance to any of the members of such family, out of the principal of the share falling to such family, such sums of money to account of his or her share of my means and estate as my trustees may resolve upon for their education and maintenance, or for forwarding them in business or otherwise advancing their prospects in life, and that before the period appointed for division; and with regard to any surplus or reversion of the interests, revenues, and profits arising upon each of the said shares after deduction of all expenses and necessary outgoings in connection with the same, and all payments made therefrom in terms of this deed, I direct and appoint that the same be accumulated along with the principal sum or share, and divided in the same way and manner as the said share itself. . . . Declaring further, as it is hereby further provided and declared, that in the event of any of the children of the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, dying before the said period fixed for division of their shares respectively leaving lawful issue, such issue shall come in place of the parent, and take and receive what the parent would have been entitled to if then in life."

Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, all survived the testator. Mrs Margaret Byars or Hay, the youngest niece of the testator, had by her first marriage one child, Jane Byars Hay, born 17th May 1866. After the death of her first husband she married Charles Keith, and by him had two children, Robert Wilson Keith and James Simpson Keith, both of whom died in infancy, although one of them survived her for about two months. She died on 11th November 1877. Jane Byars Hay attained the age of twenty-one on 17th May 1887, at which time the period of payment of the legacy arrived. The total amount of the share falling to the issue of Margaret Byars or Hay was at that time £830, 18s.

This was a Special Case to decide who was entitled to payment of that legacy. James Byars' trustees were the parties of the *first* part; Jane Byars Hay was the party of the *second* part; and Charles Keith, her stepfather, was the party of the *third* part.

The second party maintained that no right or interest under the said trust-disposition and settlement vested in her or the other children of the said Mrs Margaret Byars or Hay until the period of distribution mentioned in the deed, viz., when the youngest child of the said Margaret Byars or Hay attained the age of twenty-one years, and that her brothers-uterine, the said Robert Wilson Keith and James Simpson Keith, having died without issue, she, as the only surviving child of her mother, was entitled to the whole of the said sum of £830, 18s.

The third party maintained that vesting took place in the children of his late wife, Margaret Byars or Hay, *a morte testatoris*, or at least at the birth of each child, and that one-third share of the one-eighth share of the residue liferented by their mother was vested in each of his two children, Robert Wilson Keith and James Simpson Keith, prior to the dates of their respective deaths, and that he, as their father and next-of-kin, was entitled, on being confirmed executor to them, to receive payment of the shares so vested in them respectively.

The questions of law for the opinion of the Court were—"(1) Is the second party entitled to the whole of the said sum of £830, 18s.? Or (2) Is the third party, on confirming as aforesaid, entitled to receive two one-third shares of the said sum of £830, 18s., or any portion thereof?"

Authorities cited by the second party—*Taylor*

v. *Gilbert's Trustees*, November 3, 1877, 5 R. 49—*revd.* July 12, 1878, 5 R. (H. of L.) 217, and L.R., 3 App. Cas. 1287; *Laing* v. *Barclay*, July 20, 1865, 5 Macph. 1143; *Waters' Trustees* v. *Waters*, December 6, 1884, 12 R. 253; *Pursell* v. *Newbigging*, May 10, 1855, 2 Macq. 275.

Authorities cited by the third party—*Wilson's Trustees* v. *Quick*, February 28, 1878, 5 R. 697; *Jackson* v. *M'Millan*, March 18, 1876, 3 R. 627; *Ross' Trustees*, December 18, 1884, 12 R. 378; *Miller* v. *Finlay's Trustees*, February 25, 1875, 2 R. (H. of L.) 1; *Peacock's Trustees* v. *Peacock*, March 20, 1885, 12 R. 878; *Lindsay's Trustee* v. *Lindsay*, December 14, 1880, 8 R. 281; *Wallace*, January 28, 1808, M., *voce* Clause, App. No. 6; *Snell's Trustees* v. *Morrison*, March 20, 1877, 4 R. 709; *Fraser* v. *Fraser's Trustees*, November 27, 1883, 11 R. 196.

At advising—

LORD RUTHERFURD CLARK—The question in this Special Case is, whether a certain legacy left by the settlement of the late James Byars vested *a morte testatoris*, or did not vest until the period of distribution mentioned in the deed, namely, when the youngest child of Mrs Hay attained the age of twenty-one? After a consideration of all the clauses in the deed I have come to be of opinion that the legacy vested *a morte testatoris*, and therefore that we are bound to answer the second question in favour of the third party.

By the clause in the trust-deed with which we have to deal the truster directs that after his death his estate shall be divided into two equal shares, and regarding one share the direction is as follows—"One share thereof to be retained by my said trustees and invested by them in their own names for behoof of the children of my said brother Andrew Byars, viz., Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, equally between and among them in liferent, and their lawful issues, born or to be born, equally among them in fee, and that *per stirpes* and not *per capita*, the half of my estate being thus destined or divided into four equal shares, one whereof shall descend to the said Robert Byars in liferent and his lawful issue in fee, another to the said David Byars in liferent and his lawful issue in fee, another to the said Jessie Byars or Simpson in liferent and her lawful issue in fee, and the remaining share to the said Margaret Byars or Hay in liferent and her lawful issue in fee." Now, there is thus created in the most distinct manner possible rights of liferent and of fee in Margaret Byars and her children respectively, and of course if there be nothing in the rest of the deed to control this clause there can be no doubt that the issue of Margaret will take a right to the fee *a morte testatoris*, but it is said that there are certain later clauses in the deed which qualify this right, and show it to have been the intention of the truster to postpone vesting. But I take leave to say with respect to these clauses that they do not postpone the gift—they do not relate to the gift at all—they relate entirely to the period of division or payment. The first of these clauses declares, "as it is hereby provided and declared, with reference to the share or half of my said estate destined to the children of my said brother Andrew Byars in liferent, and to their lawful issues, equally among them, in fee as aforesaid, that in the event of any of the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay dying before his or her youngest child attaining the age of twenty-one years, the shares of the half of my said estate respectively liferented by the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay shall not be payable to their children to whom they are destined in fee until the youngest lawful child of any of the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay, so dying, shall have attained the age of twenty-one years." Even here there is no clause providing for any survivorship or destination-over, but there is a clause further on which is said to introduce that element. That clause provides—"In the event of any of the children of the said Robert Byars, David Byars, Jessie Byars or Simpson, and Margaret Byars or Hay dying before the said period fixed for division of their shares respectively, leaving lawful issue, such issue shall come in place of the parent, and take and receive what the parent would have been entitled to if then in life." That is the clause which creates the only difficulty which this deed presents, and I do not say that it does not occasion some difficulty. But in the first place, as I have said, it is a clause which is applicable to the period of division, and does not affect the words by which the gift is conveyed in the first instance. The words of gift confer an absolute fee on the objects of the gift, and do so at once, and I confess I would require very strong and unequivocal language indeed before I could accept it as detracting from the absolute nature of the gift, and say that not an absolute but only a conditional fee is given. In the second place, I think it has been commonly said with respect to such a clause, which merely substitutes children for their parents, that it has very little effect on the question of vesting, as being merely an expression of what the law itself would imply. In the next place, I should be inclined to say that this clause may possibly be referred to the division of the estate which the testator directed to be made immediately after his death, but if not to that, then that is a clause which provides for the divestiture of the beneficiaries if in point of fact the case happened which made such divestiture necessary. That case does not occur here, and therefore I have no occasion to consider the clause further. I have only to consider it with reference to the question, at what period did the shares vest?

The view therefore which, on the whole, I am inclined to take is this—I find that by a very express clause the fee of the capital is given to certain persons—the children of Margaret Byars—that that fee is given without qualification or condition, and creating as it does a right in these beneficiaries at the moment of the truster's death, I do not see that that right has been taken away or in any way limited by what occurs in the subsequent parts of the deed, so as to make one prefer a later period of vesting to that which is the natural or presumed period of vesting, namely, the death of the truster.

LORD CRAIGHILL and the LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court answered the first question in the negative, and the second in the affirmative.

Counsel for the First and Second Parties—Pearson—Law. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Third Party—Gloag—Kennedy. Agent—Robert Finlay, S.S.C.

Tuesday, July 19.

SECOND DIVISION.

[Lord Lee, Ordinary.

THOMSON AND OTHERS *v.* ANDERSON AND OTHERS.

SYNOD OF UNITED ORIGINAL SECESSION CHURCH AND OTHERS *v.* ANDERSON AND OTHERS.

Trust—Church—Failure of Purposes—Title to Sue.

The title to certain heritable subjects in South Clerk Street, Edinburgh, was taken to trustees "for the congregation of United Original Seceders presently worshipping in Adam Square (Edinburgh), under the pastoral charge of the Rev. Archibald Brown." In consequence of the ill-health of the minister the church was closed in 1878, and the congregation, which had greatly dwindled in numbers, ceased to meet. Subsequently the trustees let the subjects and applied the rents in paying off debt affecting them. An action was raised against the trustees by four surviving members of the South Clerk Street congregation, who after 1878 had become members of a congregation of limited Original Seceders meeting in Victoria Terrace, Edinburgh (which congregation had been formed by a secession from the original Adam Square congregation in 1857), with these declaratory conclusions—that the subjects in question were held in trust for behoof of the pursuers and other remanent members of the South Clerk Street congregation; that the defenders should convey the subjects, and pay the rents, to the kirk-session of the church in Victoria Terrace, or to the Synod of the Original Secession denomination; and for an accounting. *Held* that the pursuers had no title to sue, and action *dismissed.*

Trust—Nobile officium—Cy-près.

In a petition presented by the United Original Secession Church to have the trustees above mentioned ordained to convey to the petitioners the heritable subjects vested in them, to be administered in the support of certain schemes in connection with that church, answers were lodged for the trustees and other members of the congregation, in which they stated that they were desirous that the property should be held upon the existing trust, in order that when the debt was paid off a minister might be obtained who would resume public worship in accordance with the principles of the United Original Seceders. *Held* that there had been no failure of the trust purposes, and petition *dismissed.*

On 22d October 1886 an action was raised by Robert Thomson, baker, 123 Rose Street, Edinburgh, and James Sinton, 15 Buccleuch Street, and their wives, as the surviving members of the congregation of the United Original Seceders, sometime worshipping in South Clerk Street, Edinburgh, under the pastoral care of the Rev. Archibald Brown, against Henry Anderson, residing at 12 Clifton Terrace, Edinburgh, and Charles Lyon, residing at 36 Reid Terrace there, as the sole surviving trustees and managers for the said congregation of the United Original Seceders under a disposition in favour of them and two other trustees, since dead, dated 15th and recorded in the Register of Sasines 20th September 1871, to have it declared (1) that the defenders held certain property, consisting of a hall (used as a church) and a dwelling-house in South Clerk Street, Edinburgh, in trust for the pursuers and other remanent members of the said congregation; (2) that the defenders should produce an account of their intromissions as trustees and managers of the said subjects; and (3) that they should convey the said subjects and make payment of the rents and revenues to the minister and elders forming the kirk-session of the church of United Original Seceders in Victoria Terrace, Edinburgh, under the pastoral charge of the Rev. John Sturrock, "in trust for behoof of the congregation of said church of United Original Seceders in Victoria Terrace, Edinburgh, or to the Synod of the United Original Secession denomination, or to such other persons or for such other purposes as our said Lords may consider most in accordance with the purposes of the said trust-disposition."

The congregation, of which the pursuers and defenders were all members, worshipped originally in a church situated in Adam Square, Edinburgh, which had been purchased in 1844. The title to this church had been taken to certain persons as trustees, and to the survivors and their successors, assignees, and disponees, "but that always in trust for the use and behoof of the said congregation or of those members thereof who continue to adhere to and maintain the principles presently exhibited in the Testimony emitted by the United Associate Synod of Original Seceders for the Covenanted Reformation attained to by the Reformed Church of Scotland between 1638 and 1650, and against the several steps of defection therefrom in former and present times."

About the year 1857, in consequence of certain charges made by Mr Brown in the course of discussion in the Synod, Mr Brown was libelled, and suspended from his charge. As the result of these dissensions about half the members of the congregation (being that part of it which agreed with the governing body or Synod which had suspended Mr Brown) left, and formed the congregation which met in Victoria Terrace. About half of the congregation, however, sympathised with and adhered to Mr Brown, and kept possession of the Adam Square church.

On 4th October 1870 the property in Adam Square was purchased by the City Improvement Trustees at the price of £2500. Thereafter a hall and dwelling-house were purchased for the use of Mr Brown's congregation in South Clerk Street. The title to the hall and dwelling-house was dated 15th September 1871, and was taken to and in favour of "Charles Lyon, Thomas