been raised whether this is a competent form of process in the present instance. Now, I am personally averse to doing anything which might have the appearance of weakening the settled rules in regard to the forms of process; and if I had thought that this action could not be regarded as competent in accordance with the recognised rules regulating the competency of actions of multiplepoinding, I should certainly not be for sustaining it on the ground of considerations of convenience merely. But I think that the present action is entirely in accordance with the form of process, as it is also in harmony with obvious convenience.

As stated by the pursuers and real raisers on record, the case arises in the following circumstances:—Mr Agnew granted bills to Thorl & Company for the price of certain tiles. The Tile Company are said to have been the real sellers of the tiles, and therefore the true creditors in the bills. The bills were handed to the reclaimer White for discount, and it is said that he, instead of discounting the bills, retained them in bad faith, on the pretext that he had some claim against the Tile Company. The Tile Company then intimated to Agnew that he was not to pay the bills to White, on the ground that he was not entitled to the proceeds as not being the holder in due course. Agnew was not able to meet the bills, and the result is that under the deed of arrangement between him and his creditors the fund *in medio* is the composition of one-fourth the sum in the bills. The Tile Company claims this sum as a debt due to them, while White claims on the bills. The Tile Company reply to White's claim, "You are not entitled to claim on the bills because you hold them by fraud." Now, obviously Agnew cannot be expected to determine this question for himself. What the true facts may be it is no part of his duty to settle. It is sufficient for him that he is distressed by White, the holder of the bills, founding on his right and title as holder, and also by the Tile Company who allege that they are the true creditors, and that White, although in possession of the bills, has no right or title to claim on them as holder. That is a question to be settled between White and the Tile Company, and Agnew has obviously no interest which way it is settled.

Lord Moncreiff—I am of the same opinion. I think that a case of double distress is disclosed on record. The fund *in medio* is the composition payable on a bill accepted by Agnew for a debt due by him. That debt was the price of certain tile machines supplied to him, and the allegation of the real raisers is that the fund *in medio* is claimed by White, the holder of the bill; and by the Self-Lock Roofing Tile Company on the ground that they were truly the vendors of the tile machines to Agnew, and that White having got the bill for discount retained it without giving any consideration. There is no doubt that Agnew's trustee is liable in once and single payment only of the fund *in medio*, and that according to the averments on record he has been called on to pay twice. According to the averments on record there is a serious dispute between White and the Self-Lock Roofing Tile Company, but with the merits of that dispute the real raisers have no concern.

The Court adhered.

Counsel for Pursuers and Real Raisers and Respondents — M'Lennan — Taylor. Agents—T. & W. A. M'Laren, S.S.C.

Counsel for the Defender and Reclaimer —Vary-Campbell—W. Thomson. Agents —W. & J. Burness, W.S.

Wednesday, June 28.

SECOND DIVISION.

ADAM'S TRUSTEES *v.* WILSON.

Succession — Legacy — Amount — Specific Legacy—Demonstrative and Taxative.

A testator directed his trustees to dispose of his property of X, and apply "£4000 of the price thereof" in part payment of a bond for £14,000 affecting his estate of Y, which he directed to be entailed upon a series of heirs mentioned, the conveyance being granted "subject to the real burden of the bond presently affecting said lands to the extent of £10,000 sterling, part of the principal sum of £14,000 sterling therein contained (the sum of £4000 sterling being payable by my trustees in part of the said principal sum as hereinbefore provided)." The lands of Y were purchased by the testator for £14,556, and were valued in 1897 at £11,500. The direction to entail was the leading purpose of the settlement. The lands of X when sold only realised £2455. *Held* that only the price of the lands of X could be applied in paying off debt on Y, and that the heirs of Y were not entitled to have the difference between the price realised and the sum of £4000 made up out of residue.

Succession — Legacy—Amount — Legacy of Price of Lands Sold—Surplus Rents — Expenses Incident to Sale.

Where in terms of a trust-disposition and settlement £4000 of the price of lands directed to be sold was to be applied in paying off debt on other lands directed to be entailed, and the lands directed to be sold ultimately realised less than £4000 — *Held* (1) that accumulations of surplus rents of the lands directed to be sold fell into residue and were not applicable in paying off the debt, and (2) that in ascertaining the sum applicable in paying off the debt there fell to be deducted from the price (*a*) the sellers' half of the cost of the disposition, and (*b*) the expenses of the exposure and sale of the property, but not (*c*) the cost of an application to the

Court for power to sell at a price less than £4000.

Succession—Objects of Gift—Whether Trustees Receiving Legacy as Mark of Regard Entitled to Participate in Residue along with Other Legatees.

A testator directed his trustees "to pay the following legacies which I leave and bequeath to the persons after named and designed, whom I hereby constitute my residuary legatees, viz." [*then followed a list of legacies*], "and to each of my said trustees [*naming them*] £19, 19s. sterling as a mark of my regard for them," and directed his trustees to pay the residue of his estate "to my said legatees in proportion to the amount of the legacies left to them respectively as above specified." The trustees all survived the testator and accepted office. *Held* that the trustees were entitled to a share of the residue proportional to the legacies bequeathed to them.

Succession — Objects of Gift — Moveables Directed to be Delivered to Persons to Succeed to Estate Directed to be Entailed "as a Memorial of the Donor"—Entail.

A testator by his trust-disposition and settlement directed certain articles of moveable property to be delivered over by his trustees to the parties thereinafter mentioned appointed to succeed the testator in the estate of Y (which he directed to be entailed upon a series of heirs mentioned), "to be retained by them as a memorial of the donor." In a question between the person first called as heir of entail, and the other persons called as heirs of entail, *held* (1) that the person entitled to delivery of these articles was the person taking the entailed estate, and not the person first called, whether he took the estate or not, and (2) that the person taking the estate was only entitled to delivery of the articles under the conditions of the gift as set forth in the trust-disposition and settlement.

Opinion reserved as to what would constitute a violation of these conditions, and as to who would be entitled to challenge such a violation.

William Adam of Easter Beltie, advocate in Aberdeen, died on 28th April 1881 unmarried, leaving a trust-disposition and settlement dated 20th December 1878, and codicils thereto, dated respectively 17th May 1879, 16th February 1880, and 7th October 1880, whereby he gave, granted, assigned, and disponed to his nephews Andrew Wilson, farmer, Easter Beltie, Andrew Davie, farmer in Mid Beltie, and Andrew Douglas, farmer in Corfidlie, and the survivors or survivor, acceptors or acceptor of them, and to such other persons as should be assumed by them for the trust-purposes therein mentioned, (1) the lands of Easter Beltie, (2) the lands of Westown of Ranna, and (3) generally all the estates, heritable and moveable, real and personal, of whatever kind or nature, or wherever situated, then belonging or which should belong and be indebted to him at the time of his death.

After providing for (1) payment of debts, deathbed and funeral expenses, and the expense of executing the trust; and (2) for giving over certain articles to his housekeeper if in his service at his death, and for payment to her if in his service at his death of an annuity of £10 secured on Easter Beltie, the truster by the said trust-disposition and settlement provided as follows:—"(*Thirdly*) I hereby direct my said trustees, as soon as they can conveniently do so after my death, to dispose of my property of Westown of Ranna in the parish of Tarland, and apply £4000 sterling of the price thereof in part payment of the heritable bond of £14,000 presently affecting my estate of Easter Beltie, and this being done I appoint and direct my said trustees to hold said estate of Easter Beltie under the burden of the balance of said heritable debt (which will then be reduced to £10,000), and under the burden of said annuity of £10 to my said housekeeper, and also to hold my whole other property, heritable and moveable, in trust during my brother Alexander's lifetime, and until the first term of Whitsunday which shall happen after his death, for the purposes hereinbefore and after mentioned, or which I may specify in any writing to be executed by me hereafter clearly expressive of my will, although the same may not be formally executed. (*Fourthly*) As soon after my death as my said trustees may find it convenient to do so, I appoint them to dispose of my household furniture and whole other effects in my house in Aberdeen, except those articles directed to be given over to my housekeeper Mrs Wyness, and excepting also" a portrait and a French clock, piece of plate, and books presented to him, and relative presentation address, "which portrait, French clock, and other articles, and the address which accompanied them, I do not wish to be disposed of, but to be delivered over to the parties hereinafter mentioned appointed to succeed me in the estate of Easter Beltie, to be retained by them as a memorial of the donor. (*Fifthly*) As soon after the first term of Whitsunday which shall happen after the death of my said brother Alexander as may be found convenient, I appoint my said trustees to realise my whole remaining property, heritable and moveable, falling under this trust (excepting the estate of Easter Beltie, which along with the portrait and other articles excepted under the previous head will fall to be conveyed and delivered by them in manner after mentioned), and out of the proceeds thereof to pay in the first place to those having right to the same in terms of law, the sum now in my hands, amounting to £1298, 18s. 8d. sterling, which fell to my brother Alexander Adam as his share of the personal estate of his late brother George; and in the next place, to pay the following legacies which I leave and bequeath to the persons after named and designed, whom I hereby constitute my residuary legatees, viz."—[*Here followed a list of legacies consisting of sums*

of money to various persons, and, inter alia, a legacy of £50 to the wife of Andrew Wilson, one of his trustees] "and to each of my said trustees, Andrew Wilson, Andrew Davie, and Andrew Douglas, the sum of £19, 19s. sterling as a mark of my regard for them; and whatever residue may be over of my trust-estate after paying the above-mentioned legacies and bequests and defraying the expense of executing this trust, I appoint my said trustees to divide and pay the same to my said legatees in proportion to the amount of the legacies left to them respectively, as above specified."

By the sixth purpose the truster gave certain directions and expressions of his wishes with regard to his brother Alexander.

By the eighth purpose it was, *inter alia*, provided as follows:—"As soon after the death of the said Alexander Adam as may be found possible, my said trustees shall be bound to convey, and I hereby direct and appoint them to convey, under the burdens and conditions after written, my foresaid lands and estate of Easter Beltie to George James Wilson, the oldest son of the said Andrew Wilson, in liferent, but for his liferent use only, and after his death to the heirs of his body in fee; whom failing, to John Simpson Wilson, second son of the said Andrew Wilson, in liferent, but for his liferent use only, and after his death to the heirs of his body in fee; whom failing, to Andrew Wilson, third son of the said Andrew Wilson, in liferent, but for his liferent use only, and after his death to the heirs of his body in fee; whom failing, to William Adam Wilson, fourth son of the said Andrew Wilson, in liferent, but for his liferent use only, and after his death to the heirs of his body in fee; whom all failing, to myself and my own heirs whomsoever: But always with and under the burdens, conditions, and provisions after written; that is to say, the conveyance of said lands of Easter Beltie shall be granted subject to the real burden of the bond presently affecting said lands to the extent of £10,000 sterling, part of the principal sum of £14,000 sterling therein contained (the sum of £4000 sterling being payable by my trustees in part of the said principal sum as hereinbefore provided), with corresponding interest and penalties, and to the real burden of the foresaid life annuity of £10 sterling to my housekeeper Mrs Wyness,—she being in my service at the time of my death,—as also the said conveyance shall be so granted under the fetters of a strict entail to subsist and be effectual so long as but not longer than any sons or daughters of my grand-nephews the said George James Wilson, John Simpson Wilson, Andrew Wilson, and William Adam Wilson shall be in life and in the line and hope of succession to the said lands; and for effecting said entail my trustees shall be bound, and I hereby direct them, to insert in said conveyance a clause for the registration thereof in the Register of Tailzies, and also in the Books of Council and Session, in terms of the Statute 31 and 32 Vict. chap. 101, and to record said conveyance accordingly." Said purpose also provided for the exclusion of heirs-portioners.

By the codicil dated 17th May 1879 the truster appointed Mr James Meston, Accountant, Aberdeen, and his housekeeper Mrs Wyness, to be trustees, and left a legacy of £19, 19s. to Mr Meston if he should agree to act as a trustee, but did not give him any right to a proportionate share of the residue.

The truster was survived by his brother Alexander Adam, who died on 21st February 1897.

The trustees exposed the property of Westown of Ranna to public sale on 28th October 1881 at the upset price of £4500, and again on 8th July 1887 at the upset price of £4000, but no offers were made on either occasion. They also, in the month of May 1887, advertised the property for sale by private bargain, but no offer was received. In June 1897 the trustees had the truster's heritable properties valued by Mr George James Walker, land valuator, Aberdeen.

He valued Easter Beltie at . .	£11,500
And Westown of Ranna at . .	2,050
Total	£13,550

On 12th May 1898 the trustees applied to the Court for authority to sell Westown of Ranna at such price (whether less or more than £4000) as they could obtain therefor, and by interlocutor, dated 9th June 1898, they were so authorised to sell it. On 22nd July 1898 the trustees exposed Westown of Ranna to public sale at the upset price of £2200, but no offer was received. On 5th August 1898 the property was again exposed at the upset price of £2000, and after competition was sold at the price of £2455. The sellers' share of the expense of the disposition to the purchaser was about £38, 18s. 8d. The expenses of the sale and of previous exposures were estimated at £75, 2s. 1d. The expenses of the application to the Court for authority to sell amounted to £45. If these sums fell to be deducted from the price, the net proceeds of the estate were reduced to £2295, 19s. 3d., being £1704, 0s. 9d. less than the amount which the truster directed to be applied out of the price in reducing the debt on Easter Beltie.

The trust-estate consisted of (1) moveable property left by the truster, which at his death was of the value of £2000 or thereby, but which through increment in the value of shares held by the truster, and with the revenue of the moveable estate and the surplus rents of the heritable properties accumulated since the truster's death, as at November 1898 amounted to about £6000; (2) The estate of Easter Beltie, in the parish of Kincardine O'Neil, which the truster purchased in 1874 at the price of £14,556. The principal farm on this estate had for long been tenanted by the Adam family, and the truster was born on it; and (3) The proceeds arising from the sale by the trustees of the farm of Westown of Ranna. The truster succeeded to this property in 1873. It had been purchased by his predecessor in 1868 at the price of £4500. At the

date of the truster's death the two heritable properties above mentioned were together burdened with two bonds and dispositions in security granted by the truster, the one for £12,000, and the other for £2000—together £14,000.

The amount required to meet the legacies mentioned in the trust-disposition and settlement, at the amounts therein stated, was £629, 16s.,—which left a residue, subject to residue-duty and expenses, of £5370, 4s. or thereby. Between the date of the truster's death and the date of the sale of Westown of Ranna there had accumulated out of the rents of Westown of Ranna, after charging against the rents of that property a proportional part of the interest on the debt of £14,000, a surplus amounting to £263, 17s. 5d. This surplus was included in the sum of £6000 above mentioned.

The trustees named in the trust-disposition and settlement itself, viz., Andrew Wilson, Andrew Davie, and Andrew Douglas above mentioned, all survived the testator and accepted office as trustees. Andrew Davie and Andrew Douglas both predeceased Alexander Adam, but Andrew Wilson survived him.

In these circumstances various questions arose in connection with the trust, and accordingly this special case was presented for the opinion and judgment of the Court.

The parties to the special case were :—(1) The trustees; (2) The persons in whose favour the first parties were directed to convey and entail the estate of Easter Beltie; (3) Certain of the surviving legatees and representatives of deceased legatees, being the persons in right of the legacies above mentioned other than the legacies bequeathed to the trustees; (4) The representatives of the trustees to whom legacies were bequeathed in the trust-disposition and settlement itself; (5) The person called first and *nominatim* under the destination contained in the eighth purpose of the settlement; (6) The other persons *nominatim* called under said destination.

The third and fourth parties included the whole parties interested in the residue.

The second parties maintained that, as in a question with the third and fourth parties, they were entitled to have the debt on Easter Beltie reduced to £10,000 by the application for that purpose of so much of the trust funds as might be necessary. In the event of its being held that only the price of Westown of Ranna was applicable under the settlement to the reduction of the debt on Easter Beltie, the second parties maintained that the whole price, under deduction of the sellers' share of the expense of the disposition to the purchaser, was so applicable, and that the expenses of exposure and sale and of the application to the Court were payable out of the residue of the testator's estate. They also maintained that the surplus rents of Westown of Ranna should be applied along with the price of the estate in reducing the debt on Easter Beltie. The third and fourth parties on the other hand maintained that as between the second parties and the residuary legatees only the free proceeds of the estate of Westown of Ranna, after deducting the expenses of exposure and sale and of the application for authority to sell, were applicable to the reduction of the heritable debt on the estate of Easter Beltie.

The fourth parties maintained that, as representing Andrew Wilson, Andrew Davie, and Andrew Douglas, who were nominated as trustees by the settlement, and who survived the testator and accepted office, they were entitled to a share of residue corresponding to the legacies of £19, 19s. each bequeathed to their authors by the truster.

The third parties on the other hand maintained that they alone were entitled to the residue.

Under reservation of any right which the first parties (the trustees) might have or acquire to retain possession of the portrait, French clock, and other articles referred to in the fourth purpose of the settlement, until the debts of the deceased had been fully paid or provided for, the parties desired to have the rights of the legatees to these articles determined. The fifth party maintained that he was entitled under the fourth purpose of the settlement to the unconditional delivery of these articles. The sixth parties, on the other hand, maintained that the fifth party was entitled to obtain delivery of said articles only in the event of his taking the entailed estate, and in that case only on the footing and condition of holding the same in trust for succeeding heirs of entail.

The questions of law for the opinion and judgment of the Court were as follows:—"(1) Are the second parties entitled, in a question with the third and fourth parties, to have the debt on the estate of Easter Beltie reduced to £10,000 by the application for that purpose of so much of the residue as may be necessary along with the price of Westown of Ranna? or (2) Is the price of Westown of Ranna alone applicable towards reduction of the debt? or (3) Are the surplus rents of Westown of Ranna applicable along with the price towards reduction of the debt? (4) If the second question is answered in the affirmative, are the expenses of exposure and sale, and of the application for authority to sell Westown of Ranna payable out of the price, or out of the residue of the trust estate? (5) Are the fourth parties entitled to a share of the residue in proportion to the amount of the legacies bequeathed to their authors? (6) As in a question between the fifth and sixth parties—(*a*) Is the fifth party entitled unconditionally to the portrait and other articles mentioned in the fourth purpose of the testator's settlement? or (*b*) Is the person taking the entailed estate of Easter Beltie entitled to delivery of the said portrait and other articles? and (*c*) If the preceding question is answered in the affirmative—(1) Is the person taking the entailed estate entitled unconditionally to said articles? or (2) To said articles only upon condition that he holds them for succeeding heirs of entail?"

Argued for the third parties—(1) The rule

was that where a testator gave a sum of money to a legatee, and merely desired or indicated that it should be paid out of a particular fund, his whole estate was liable if the fund referred to proved insufficient; but, on the other hand, if the testator gave to the legatee a certain sum of money out of a fund named, then the mention of the fund was not merely demonstrative but taxative, and if the fund named was insufficient the legacy must suffer abatement, and the legatee was not entitled to have the deficiency made up from residue—*Douglas' Executors*, February 5, 1869, 7 Macph. 504; *Wauchop* v. *Wilson*, July 3, 1724, M. 8063; *Duncan* v. *Duncan* (1859), 27 Beavan, 386. Here there was not an absolute gift of £4000, and the mention of the fund from which that sum was to come was not merely demonstrative but taxative. The heirs of Easter Beltie, and not the residuary legatees, must bear the loss. (2) As regards the surplus rents, the general rule was that accumulations of rents fell into residue, and there was nothing here to justify this case being treated as an exception to that rule—M'Laren on Wills, vol. i. 585 (3rd ed.); *Pursell* v. *Elder*, June 13, 1865, 3 Macph. (H.L.) 59; *Sturgis* v. *Meiklam's Trustees*, June 13, 1865, 3 Macph. (H.L.) 70. (3) All the expenses incident to the sale of Westown of Ranna and occasioned by it should come out of the price of that estate aud not out of the residue. (4) The legacies to the trustees were personal to them, and given to them in consideration of their acting as trustees. Their representatives were not entitled to any share of the residue. It was not intended that the trustees should have any share of the residue. In the codicil a legacy of the same amount was given to a subsequently appointed trustee upon condition of his agreeing to act as a trustee, but no proportionate share of the residue was given to him.

Argued for the second parties—(1) The leading purpose of the testator's settlement was to create an entail of the estate of Easter Beltie, and to give that estate to the series of heirs mentioned, burdened with debt to the extent of £10,000 only. It was clear that if the lands were to continue to be held as an entailed estate, which was obviously the testator's intention, it was necessary that the debt should be reduced at least to the extent of £4000, and the testator plainly intended this to be done as essential to the main purpose of his settlement. It was also clear that he wished to favour the heirs of Easter Beltie rather than his residuary legatees. If the residuary legatees' contention were upheld they would derive the chief benefit from the will, and it was doubtful whether the succession to Easter Beltie would be anything better than a *damnosa hæreditas*. There was nothing in the words used by the testator to express his intention which necessitated an interpretation which would defeat his purpose in this way. The indication of the fund out of which the £4000 was to come was merely demonstrative and not taxative. The deficiency should therefore be made up out of residue. The case of *Douglas' Executors*, *cit.*, was an authority in the second parties' favour. (2) At least the surplus rents of Westown of Ranna should be applied in reducing the debt on Easter Beltie. They should be treated as a *surrogatum* for interest on the price. (3) In any view, the whole of the price, less only the seller's half of the expense of the disposition, should be applied in reducing the debt, so that as large a sum as possible should be devoted to that purpose in accordance with the testator's wishes, and all incidental expenses should come out of residue.

Argued for the fifth party—An entail of moveables was not allowed by our law. Apparently this was what the testator desired to effect with regard to the portrait and other articles mentioned. He had not provided any trust for their protection. All that could be done therefore was to hand them over to the fifth party.

Argued for the fourth parties—These parties were entitled to a share of residue. Their legacies were just in the same position as the others. They were named, and they were designed not merely as trustees but as individuals by reference to the designations given in the earlier part of the deed where they were first mentioned.

The argument for the sixth parties sufficiently appears from their contention, *supra*.

Lord Trayner—The late Mr Adam, the truster, died possessed of the heritable properties Easter Beltie and Westown of Ranna, the former being burdened with a debt of £14,000. Mr Adam by his trust settlement directed his trustees, as soon as they could conveniently do so after his death, to sell Westown of Ranna "and apply £4000 sterling of the price thereof in part payment" of the debt affecting Easter Beltie. He also directed his trustees to entail the latter estate (burdened with £10,000 of debt) on a certain series of heirs. In fulfilment of the truster's directions the trustees exposed the lands of Westown of Ranna for sale on several occasions (commencing with an upset price of £4500, which was afterwards reduced), but could find no purchaser. At last, under the authority of the Court, it was exposed at an upset price of £2000, and after a competition was sold for £2455. It became therefore impossible for the trustees as directed by the truster to pay out of the price of Westown of Ranna the sum of £4000 towards reduction of the debt secured over Easter Beltie. In these circumstances the parties interested have asked us to determine whether the persons nominated as institute and substitutes of entail of Easter Beltie are entitled to have the estate disencumbered of £4000 by the application for that purpose of so much of the truster's residue as may be necessary along with the price of Westown of Ranna. I am of opinion that the question should be answered in the negative. No doubt the truster wished the estate of Easter Beltie to descend to the heirs of entail burdened

only to the extent of £10,000. But he also said how this was to be done. Anticipating that Westown of Ranna would realise on sale a larger sum than £4000, he directed that amount to be taken out of the price of Westown of Ranna and applied to the relief of the other lands. He did not direct his trustees to take any other part of his estate for this purpose, and indeed has disposed of the rest of his estate in a different way. The whole of his estate is disposed of, and what the second parties wish now to be done could only be done at the expense of other beneficiaries, and to that extent in violation of the truster's directions. It is impossible, of course, to say what the truster might have preferred to do had he known that Westown of Ranna would realise on sale so small a sum as it has brought. But as the facts stand, and having regard to the terms of the trust settlement, I am of opinion that no part of the residue can be applied in reduction of the debt on Easter Beltie, and that the price of Westown of Ranna alone can be so applied. The surplus rents of Westown of Ranna appear to me to fall within the residue. They are clearly not part of its price.

In fixing what is the amount of the price of Westown of Ranna to be applied in manner above mentioned, I think there must be deducted from the sum realised by sale the expense of exposure and sale. It is only on such deduction being made that the price, which came into the hands of the trustees can be ascertained, and that is the sum which they have authority to apply towards extinction of the debt on Easter Beltie. The expense attending the application to the Court for authority to sell portions of Westown of Ranna for such price as could be obtained therefor, stands in a different position. That was an application made by the trustees in the course of their administration and for their own protection, and may fairly therefore be considered as part of the expenses of executing the trust. The expenses in my opinion are chargeable against the residue.

The fifth question put to us must, I think, be answered in the affirmative. It may be doubted whether the truster intended to include his trustees (to each of whom he left a small legacy "as a mark of his regard") among the legatees who were to take his residue in proportion to the amount of their legacies. But the words of the trust-settlement are unambiguous, and directed that "after paying the afore-mentioned legacies" the trustees should divide and pay the residue "to my said legatees in proportion to the amount of the legacies left to them respectively." The legacies to the trustees are among the "above-mentioned legacies," and the trustees are certainly legatees. They therefore, in the plain meaning of the trust-settlement, are among the persons who are to receive a proportionate share of the residue.

The sixth and last question is divided into four heads. In answer to this question I am of opinion that the person taking the entailed estate of Beltie as institute under the entail is entitled to delivery of the several articles referred to, but that he takes them under any conditions validly imposed thereon by the trust-settlement. If he violates these conditions, such proceedings may be open to challenge by others having interest to do so. But what would be a violation of the conditions of the trust-settlement in reference to the article referred to, or who would be entitled to challenge any violation of the conditions, are questions that cannot now be answered.

Lord Moncreiff and Lord Young concurred.

The Lord Justice-Clerk was absent.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties to the special case, Answer the first and third questions therein stated in the negative, and the second and fifth questions therein stated in the affirmative: Find, in answer to the fourth question, that the expenses of the exposure and sale of Westown of Ranna are payable out of the proceeds of that estate, but that the expenses of the application for authority to sell Westown of Ranna are payable out of the residue of the deceased William Adam's estate: Find, in answer to the sixth question, that the person taking the entailed estate of Easter Beltie is entitled to delivery of the portrait and other articles mentioned in the fourth purpose of the deceased William Adam's trust-disposition and settlement, but that only under the conditions of the gift as set forth in the said trust-disposition and settlement: Find and declare accordingly, and decern: Find the whole parties to the special case entitled to their expenses, as the same may be taxed, out of the residue of the estate of the said deceased William Adam."

Counsel for the First and Third Parties—W. Campbell, Q.C.—John Wilson. Agents—Skene, Edwards, & Garson, W.S.

Counsel for the Second and Fifth Parties—James Reid—A. Duncan Smith. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Fourth and Sixth Parties—Glegg. Agent—James Ayton, S.S.C.

Wednesday, June 28.

SECOND DIVISION.

[Sheriff of Lanarkshire.

REID & COMPANY, LIMITED *v.* EMPLOYERS ACCIDENT AND LIVE STOCK INSURANCE COMPANY, LIMITED.

Insurance—Accident—Misrepresentation—Construction of Provisions in Proposal and Policy.

In the proposal for a policy of insurance against claims by third parties for damages in respect of accidents caused by the assured's vehicles and horses, the assured, in answer to the query "Have any claims been made upon you during the last twelve months in respect of injury or damage to persons or property of third parties?" gave the reply, "3 small claims about 9s. or 10s. each." In fact there had been at least nine claims made upon the assured during that period, in connection with some of which larger sums than 10s. had been paid. By the declaration appended to the proposal and signed by the assured, he declared the statements made therein to be true, and agreed that the proposal and declaration should be the basis of the policy. The proposal and declaration were not incorporated by reference in the policy.

By the policy it was provided that "any fraudulent misdescription in the particulars furnished by the insured shall render this policy void."

Held (*diss.* Lord Moncreiff) that the warranty in the proposal was not qualified by the provision in the policy so as to limit the grounds of forfeiture to fraudulent misstatements, and that it was not necessary to avoid the policy to prove that the misstatement in question was wilfully false.

Insurance—Accident—Misrepresentations—Misrepresentations Induced by Insurer's Agent—Personal Bar.

A proposal for an insurance written out by the agent of the insurers and signed by the assured, guaranteed the statements therein contained as true in fact, and provided that they should be the basis of the contract. One of these statements was admittedly inaccurate.

Question—Whether it was competent for the assured to avoid the forfeiture of the policy by proving that he had been induced to sign the proposal (without knowing the facts) by the representation of the insurer's agent that the signing of the proposal was a mere matter of form, and that the agent knew that he was not in a position to give accurate information on the matter in question.

This was an action brought in the Sheriff Court at Glasgow by Reid & Company, Limited, bakers and confectioners, Crossmyloof, Glasgow, against The Employers Accident and Live Stock Insurance Company, Limited, in which the pursuers prayed the Court to nominate and appoint an arbiter who should, along with the arbitrator named by the pursuers, determine the sum payable by the defenders to the pursuers in respect of claims under a policy of insurance issued by the defenders in the pursuers' favour.

In defence to this action the defender averred that the statement made by the pursuers in answer to the second query contained in the proposal and declaration which formed the basis of the policy founded upon was false and fraudulent.

This proposal and declaration was dated 11th November 1896, and the part of it which was specially material to this case ran as follows:—"2. Have any claims been made upon you during the last twelve months in respect of injury or damage to property of third parties?—[*Ans.*] 3 small claims about 9s. or 10s. each. . . . I, the undersigned, being desirous of effecting an insurance with the above company, against my liability in respect of my drivers causing personal injury or damage to property of third parties in the street or road, do hereby declare that the above particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between myself and the company; and if the risk is accepted, I undertake to pay the premium when called upon to do so. (Signature) Reid & Co., Ltd., *per* A. Reid jr."

The proposal also contained a description of "vehicles proposed for insurance," a statement as to how many horses the vehicles were drawn by, and a statement as to the number of drivers employed.

The defenders alleged that eleven claims had been made upon the pursuers during the period referred to instead of three as stated by them.

The pursuers, in answer to this defence, averred that they had been insured with another company before they contracted with the defenders, and that any claims made upon them were never inquired into by the pursuers but were forwarded to the insurance company to be dealt with by them, that the pursuers were ignorant of how these claims were disposed of, and that this was stated to the defenders' representative, on whose suggestion and direction the proposal was filled up, and that the statement in question was accordingly not false and fraudulent. They maintained that the policy by its terms was only rendered void by a fraudulent statement in the particulars furnished, and that consequently, even if the statement in question was incorrect, the policy was still binding upon the defenders.

Under the policy founded on by the pursuers the defenders agreed, in consideration of a premium of £7 paid to them by the pursuers, to indemnify the insured to the extent of £200 "so far as regards claims made against the insured for personal injury or injury to property" during the period of twelve months from 11th Novem-