

his bargain. Unfortunately there is no way of curing the error, for it occurs in the articles of roup under which the subjects were exposed to sale by a bond holder, but no purchaser having come forward the subjects were adjudged to the bond holder by the Sheriff under the Heritable Securities Act 1894. The question is then, as I have said, whether there is such a misdescription of the deed referred to as to invalidate the sale. My opinion is that there is not. I think that there is merely such a misdescription as falls under the category of *falsa demonstratio*, and the deed referred to for the purposes of description is sufficiently identified by the family name of the disponent, the full name of the donee, and the date of recording. In all the circumstances of the case I think that the judgment of the Lord Ordinary is well founded. There is no possibility of a competing title, and I think the contract of sale can be executed by a conveyance substantially in terms of the articles of roup.

The LORD PRESIDENT and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Pursuer and Respondent—
Craigie. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defender and Reclaimer—
J. R. Christie. Agent—W. B. Rainnie,
S.S.C.

Tuesday, February 24.

FIRST DIVISION.

ROBERTS' TRUSTEES v. ROBERTS.

Succession—Legacy—Accretion.

A trust-disposition contained the following direction:—"I direct my trustees upon the youngest of my sons now born or that may be born to me reaching the age of twenty-one years to convey and make over to them, equally among them" certain specified property. The trustor was survived by three sons, of whom the youngest died before attaining twenty-one. Held that his share accreted to the other two.

Paxton's Trustees v. Cowie, July 16, 1886, 13 R. 1191, 23 S.L.R. 830, distinguished.

Henry Roberts, manufacturer in Galashiels, died on 23rd May 1891, leaving a trust-disposition and settlement, with relative codicils, by which he conveyed his whole estate to his wife Mrs Marion Alison Lucas or Roberts, and others, as trustees. He was survived by his wife, six daughters, and three sons, William John Roberts, Henry Lucas Roberts, and Hugh Sanderson Roberts.

By his second codicil he made the following provision:—"I direct my trustees upon the youngest of my sons now born or that may be born to me reaching the age of

twenty-one years, to convey and make over to them, equally among them, all mill property and machinery and all house or other heritable property in Galashiels (with the exception of my dwelling-house there) belonging to me at the time of my death, but should any one or more of my said sons wish to have their shares of said property in cash, then they may have the same at a moderate valuation, my sons who get said property conveyed to them paying their brothers the equivalent." The third codicil contained the following clause:—"With regard to the second codicil to said settlement, I hereby declare that my son William John shall, at the first term of Whitsunday or Martinmas that shall happen after he reaches the age of twenty-five years, be entitled to his third share of the rents of the mill property and machinery and all house or other heritable property in Galashiels, with the exception of my dwelling-house there."

On 13th March 1900 the youngest of the trustor's sons, Hugh Sanderson Roberts, died, unmarried and a minor.

Questions having arisen as to whether the share provided to Hugh Sanderson Roberts in the second codicil quoted above accreted to the two remaining sons or fell into residue, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were, *inter alios*, (1) Mr Roberts's trustees, (3) the testator's married daughters, (4) William John Roberts, (5) Henry Lucas Roberts, and (6) the testator's unmarried daughters.

There were other questions arising under the trust-deed which were dealt with in the special case, but which it is unnecessary to report.

The first question of law was—"Are the fourth and fifth parties now jointly entitled to (a) the mill and other property specified in the second codicil, or (b) only to two third shares thereof?"

On this question it was argued for the third and sixth parties, being the residuary legatees other than the sons, that the case fell under the general rule laid down in *Paxton's Trustees v. Cowie*, July 16, 1886, 13 R. 1191, 23 S.L.R. 830, that when a legacy is given to a plurality of persons sufficiently described for identification, equally among them, there is no accretion on the failure of one of these persons. It was equivalent to a legacy of one-third of the total sum to each. This view was strengthened in this particular case by the words of the third codicil (quoted *supra*) where the share of the eldest son was spoken of as his "third." *Graham's Trustees v. Graham*, November 30, 1899, 2 F. 232, 37 S.L.R. 163, was also an authority for this view.

For the surviving sons it was argued that the provision in the second codicil was a gift to sons as a class, and therefore that the share of the son who died accreted to the survivors—*Menzies' Factor v. Menzies*, November 25, 1898, 1 F. 128, 36 S.L.R. 116.

At advising—

LORD KINNEAR—The questions in this case arise on the construction of the trust-disposition and settlement of the late Henry Roberts, a manufacturer in Galashiels, who died on the 23rd of May 1891. The special case concludes with a number of specific questions, but the parties are agreed that all of these depend upon the way in which three main questions may be determined. The first of these three principal questions turns upon the meaning and effect of the second codicil. By this codicil, which is dated 29th August 1887, the testator directs his trustees, upon the youngest of the sons born or that might be born to him reaching the age of twenty-one years, to convey and make over to them, equally among them, all mill property and machinery and all house or other heritable property in Galashiels (with the exception of his dwelling-house there) belonging to him at the time of his death, with certain directions to provide for the event of one or more of the sons desiring to have their shares in cash. This direction is modified in one respect by the third codicil, by which the testator declares "with regard to the second codicil," that his "son William shall at the first term of Whitsunday or Martinmas that shall happen after he reaches the age of twenty-five years be entitled to his third share of the rents of the mill property and machinery and all house or other heritable property in Galashiels, with the exception of the dwelling-house there." The testator had three sons—William John, Henry Lucas, and Hugh Sanderson, and the effect of the two codicils taken together is that the property is to be conveyed to them equally upon the youngest attaining twenty-one, but that William, the eldest, is to have his third share of the rents when he reaches twenty-five, irrespective of the minority of his younger brothers at that time. If the three brothers, who all of them survived the testator, had all of them lived to attain the age of twenty-one, there would probably have been no difficulty in carrying out this direction. But the youngest, Hugh Sanderson, died in minority on the 13th March 1900; and the question in dispute is whether in consequence of his death the two surviving sons are entitled to the whole property carried by the codicils, or whether the third share originally destined to him falls into residue. Nobody suggests that any right in this share has vested in Hugh Roberts. But it is maintained, on the authority of *Paxton's Trustees v. Cowie*, that there can be no accretion as among the sons, and therefore that the share which has lapsed by the predecease of one of them must either fall into residue or pass to the testator's next-of-kin as intestate succession. That decision illustrates an important but limited principle that "when a legacy is given to a plurality of persons named or sufficiently described for identification equally among them," or "in equal shares," or "share and share alike," or in any language of the same import, each is entitled to his own share and no more, and there is no room for accretion in the event of the pre-

decease of one or more of the legatees. I rather think that in stating the condition that the persons favoured must be named or sufficiently described for identification, the Lord President meant individually named or identified. For he cannot have intended merely the condition common to all legacies and indispensable for their validity, that the legatees must be capable of identification; and, on the other hand, the purpose of his statement was to distinguish between legacies of shares to individuals and a legacy of a common fund to a class. But however that may be, the rule is, in my opinion, applicable only to cases where the testator's intention is to give a separate legacy, payable out of a certain fund, to each of a plurality of persons. The doctrine is very clearly explained by Lord M'Laren in *Menzies v. Menzies*, where he says—"If a testator gives £5000 to five persons by name, adding the words 'share and share alike,' according to the ordinary use of language it is the same thing as if he said—'I give £1000 to A and £1000 to B' and so on, the only difference being that in the case supposed the testator begins by using words descriptive of the entire sum which he means to bequeath, and then adds words explaining that he does not intend a joint bequest but a series of separate bequests." His Lordship adds that the rule may be displaced by plain indications that the testator meant a joint bequest, in which case, of course, the survivor will take the whole by accretion; and he gives as a familiar example the case of a legacy to a family, the individuals not being named, in which case the words "equally" or "share and share alike" are superfluous. I think it clear that the legacy now in question is of the character thus distinguished by Lord M'Laren from those to which the rule in *Paxton v. Cowie* is applicable. It is manifest that the testator did not intend a series of separate legacies but a joint legacy to a class, because he assumes that the persons who may ultimately turn out to form the class are not yet ascertained at the date when he makes his bequest. It is a bequest in favour of the sons born or that may be born to him, and it is to be carried into effect by a conveyance which the trustees are directed to make to them equally among them at a specified date, to wit, when the youngest son attains the age of twenty-one. That is, in my opinion, a bequest to a class as it may be constituted at the date of distribution. It makes no difference that the conveyance is directed to be made to them "equally among them," because that expression does not necessarily import a separation into specific shares. If a legacy is given to a family jointly without naming or enumerating individuals, it must either be given equally or in specific proportions, and if it be clear, as in this case it certainly is, that the testator had no definite proportions in his mind, because he did not know how many persons might participate, it is of no consequence whether an equal division is expressed in terms or not. Nor is it, in my opinion, of any importance

that in the third codicil the testator describes his eldest son's share of rents as his "third," because the purpose of that codicil is not to alter the destination of the legacy, but merely to advance the date at which the eldest son is to receive the produce of the property which is ultimately to be conveyed to him. The reference to William's "third" therefore is merely demonstrative, and for that purpose it is a perfectly natural expression, because there were three sons alive at the date when the third codicil was written. But for the true amount of William's share in the event that has happened we must go back to the actual bequest as it is destined in the second codicil. I am therefore of opinion that the two surviving sons are entitled jointly to the whole of the property in question, as being all the sons in life at the time when the conveyance fell to be made.

The LORD PRESIDENT and LORD M'LAREN concurred.

LORD ADAM was absent.

The Court answered the first question in accordance with Lord Kinnear's opinion.

Counsel for the First Parties—Cullen. Agents—Kinmont & Maxwell, W.S.

Counsel for the Third Parties—Craigie. Agents—Kinmont & Maxwell, W.S.

Counsel for the Fourth and Fifth Parties—H. Johnston, K.C.—D. Anderson. Agents—J. L. Hill & Company, Solicitors.

Counsel for the Sixth Parties—Campbell, K.C.—Sandeman. Agents—Kinmont & Maxwell, W.S.

Tuesday, February 24.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.

CUMMINGS v. DARGAVIL COAL COMPANY.

Reparation—Duty to Public—Children—Unfenced Machinery on Waste Ground—Children Playing on Waste Ground near Public Road.

In an action of damages against the owners of certain collieries for personal injuries sustained by a child of eight, the pursuer, the child's father, averred that for the purpose of hauling waggons in connection with one of their pits the defenders used a horizontal wheel, which turned upon a post at a height of about 18 inches from the ground, carrying a wire rope; that the wheel was generally stationary, and when made use of it was put in motion, without any warning, by means of a drum at the pithead, which was distant about 70 yards from the wheel; that the wheel was not fenced; that it was situated on waste ground, and was 18½ yards from a

public road which adjoined a terrace in which he lived; that the waste ground was not fenced off from the road; that the waste ground was used by children as a playground, with the sanction and approval of the defenders; that his child was playing on the waste ground beside the wheel, and that without warning the wheel was set in motion, and the child's leg was caught between the rope and the wheel and injured; and that the accident was due to the fault of the defenders in not taking precautions by fencing the wheel and seeing that it was not set in motion without warning, although they were aware that children were in the habit of playing on and about it, and that it was a source of danger to them. *Held* (rev. judgment of Lord Stormonth Darling) that the pursuer had not set forth a relevant case.

Devlin v. Jeffrey's Trustees, November 18, 1902, 40 S.L.R. 92, followed.

Innes v. Fife Coal Company, January 10, 1901, 3 F. 335, 38 S.L.R. 230, distinguished.

This was an action at the instance of Matthew Cummings, contractor, formerly residing at Swinhill Terrace, near Larkhall, against the Dargavil Coal Company, Limited, owners of Swinhill collieries, in which the pursuer sought to recover damages in respect of personal injuries sustained by his pupil son Robert Shearer Cummings.

The pursuer averred—“(Cond. 2) For the purpose of hauling waggons in connection with the work at Swinhill collieries the defenders use a horizontal wheel. This wheel is about 3½ feet in diameter, and turns upon a post at a height of about 18 inches from the ground. Round its circumference there is a groove into which is fitted the wire rope made use of in the haulage operations. The wheel is generally not in motion, but is made use of for short periods on an average five times a day. It is set in motion by means of a drum at the foresaid pit-head, from which it is distant about 70 yards, and without any warning being given. No guard or protection was over the said wheel. The said wheel and rope belong to defenders. (Cond. 3) The said wheel is in waste ground, on two sides of which is a public road immediately adjoining Swinhill Terrace. The distance between the foresaid wheel and this public road is 18½ yards, and its distance from Swinhill Terrace is 50 yards. The ground in which said wheel is placed is not separated from the public road by a wall or fence, but here and there are the remains of a hedge with large gaps between, said gaps extending in some cases to 23 feet. There are cart tracks through said gaps, and the gaps are used among others by the miners at Swinhill Terrace going to and from their work at the defenders' colliery, and by children and others, who have for years used the said ground as a playground, and that with the sanction and approval of the defenders. (Cond. 4) On 7th August 1901 the pursuer's said son Robert, who