shop and took one shilling out of his pocket, which, however, he did not offer to the said Thomas Murray. The said Thomas Murray called to the appellant to return the oilcake, when the appellant, who had been drinking, became very violent and abusive to him, refused to pay for the oilcake or to return it, and repeatedly attempted to assault the said Thomas Murray. . . . He refused to give up the oilcake, and drove his cart away containing it. The said Thomas Murray, seeing the appellant would neither pay for the oilcake nor restore it, sent" for John Macaulay, police-sergeant of the Caithness-shire Constabulary Force, who along with David Shearer, police-constable, proceeded to the Commercial Hotel in Princes Street of Thurso, "where the said John Macaulay found the appellant and charged him with the theft of the oilcake. He became violent and assaulted the said John Macaulay, who after having charged the appellant with the theft of the oilcake, took possession of it out of his cart, which was standing on the street in front of the said hotel."

The question of law for the opinion of the High Court of Justiciary is—"Whether, in the circumstances stated, the appellant is guilty of the crime of theft?"

Argued for appellant—The Magistrates regarded as theft what was a misunderstanding between merchant and customer. Theft could not be committed without theftuous intent. There was none here.

Argued for respondent—Theft was the appropriation of property without the intention of paying. There was more than civil wrong here. The merchant distinctly said he would only deal on the footing of prepayment. There was nothing to show that the appellant meant to pay.

At advising—

Lord Young—I venture to think that the prosecutor ought to have hesitated to prosecute this case as one of theft, and that if he had done so he would have declined to proceed against the appellant. I do not think that theft is committed wherever a man takes the property of another. It may be a dangerous thing to do, but it may occur in many circumstances where it is not theft. The appellant here was tipsy on the occasion in question. That is his excuse. It is a miserable excuse. He acted in an unbecoming way, and insisted violently on taking credit for three shillings, having only one shilling in his possession. But I confess that I do not sympathise with the Magistrate who convicted him as a thief, and I propose that we should remove the stigma of that character from him by quashing the conviction. At the same time I suggest that we should express our disapprobation of his drunken condition and conduct by refusing him expenses.

Lord Craighill and Lord M'Laren concurred.

Conviction quashed without expenses.

Counsel for Appellant—M'Lennan. Agent—William Gunn, S.S.C.

Counsel for Respondent—J. A. Reid. Agents—Philip, Laing, & Trail, S.S.C.

COURT OF SESSION.

Friday, March 19.

FIRST DIVISION.

[Lord Trayner, Ordinary.

COWAN'S TRUSTEES *v.* COWAN AND OTHERS.

Succession—Heritable and Moveable—Conversion—Resulting Intestacy—Right of Heir.

A mere direction in a settlement to convert heritable property into money does not of itself oust the right of the heir-at-law. In order to do so the testator must go on to dispose of the proceeds of property when sold.

Succession — Conversion — Resulting Intestacy — Massing of Proceeds of Heritable and Moveable Estate for Purposes of Settlement—Heir and Executor.

A truster gave his whole heritable and moveable estate to trustees to pay debts and deliver over a specific legacy, and as soon after his death as possible to realise the remainder, and divide and pay over the nett proceeds in such manner as he should by subsequent writing direct. By subsequent writings he directed payment of an annuity and of sundry legacies. The trustees fulfilled all his directions without selling the heritage, which remained unsold after all the directions had been fulfilled and the moveable estate exhausted. In a competition as to the right to it—*held* that the truster had massed his whole estate, heritable and moveable, for the payment of the annuity and legacies, that the heritable property formed in the circumstances an undisposed-of residue of the entire estate, and fell to be divided as intestate succession between the testator's heir and his executor in proportion to the value of the heritable and moveable estates after the payment of the debts and the specific legacy.

Daniel Cowan, merchant, Broughty Ferry, died there on 19th December 1881. He left no children. He was survived by his widow Isabella Drummond or Cowan.

He left a trust-disposition and settlement dated 28th September 1880, whereby he conveyed to trustees the whole estate and effects, heritable and moveable, that should belong to him at his death, nominating his trustees to be the executors of his moveable estate. The purposes were—"I appoint my said trustees (*first*) to pay all my just and lawful debts, sickbed and funeral charges, including suitable mournings to my said spouse, should she survive me, and the expenses of carrying these presents into effect; (*second*) to deliver over to the said Mrs Isabella Drummond or Cowan, immediately after my death, in the event of her surviving me, my whole household furniture, personal and other effects whatsoever, within or about my dwelling-house at the time of my death; and (*lastly*), as soon after my death as possible, to realise the remainder of my said estate and effects, and divide and pay over the nett proceeds thereof in such way and manner, and to and amongst such parties as I may direct by any writing under my hand, though not holograph or tested, found lying by me, or in the custody of any other person for my be-

hoof, and which shall be construed with and form part hereof, notwithstanding it may be of an informal nature." The deed also gave the trustees full power to dispose of the truster's estate and effects either by public roup or private bargain.

Mr Cowan on 26th October 1880 executed this holograph testamentary writing — "I, Daniel Cowan, merchant in Broughty Ferry, and residing there, desire the trustees under my settlement to dispose of the nett proceeds of my estate and effects as follows:—To my widow, an annuity as long as she lives, of £70, payable quarterly in advance, beginning as on the day of my death, for the quarter then commencing, as witness my hand at Broughty Ferry, Oct. 26, 1880."

He left other nine separate holograph testamentary writings conferring legacies on various other persons. These legacies, which were all for £100 or £50, amounted to £700 in all. Three of them, amounting in all to £250, were to be paid at his own death, and the other six, amounting to £450, were to be paid at his widow's death.

The trustees accepted office, and entered on the management of the estate. The heritable estate consisted of a small heritable property at Broughty Ferry called Barnhill. A valuation obtained of it shortly before this process was raised showed it to be worth about £350.

The moveable estate was, conform to the inventory given up by the trustees as executors, worth £1626, 11s. 11d. in all, the total debts and funeral expenses (£539, 9s. 3d.) being deducted from it, which left the nett value of it about £1087.

Mrs Cowan survived the truster for a little more than two years, dying in May 1884, and during that period she received her annuity of £70.

The trustees administered the estate and paid the debts and legacies. It was never found necessary for the purposes of the settlement to sell the heritage, and it remained unsold at the date of this process. The rents of it were employed by the trustees for the purposes of the settlement.

The payment of the legacies and debts, and the expenses of the trust down to 23d April 1886, exhausted the moveable estate and the income of the heritage, and the accounts at that date showed a balance of £14, 16s. 2d. due to the trustees, the purposes of the settlement and codicils having been entirely fulfilled.

In these circumstances the trustees, in order to settle the rights of the truster's heir-at-law and next-of-kin in the undisposed of portion of the estate—the heritable property—raised this process of multiplepoinding and exoneration.

The next-of-kin of the truster (Henry Cowan and others) maintained that the heritable property was to be dealt with as moveable estate, that it should be sold, and that its value fell to be divided among the next-of-kin, share and share alike, as his heirs *in mobilibus*.

On the other hand, James Cowan, the truster's immediate younger brother and heir-at-law, maintained that it fell to be dealt with as heritage, and to be conveyed to him on his paying the trustees the £14, 16s. 2d. which the trust owed them, and the expenses of bringing the action into Court. He claimed it or its proceeds, and pleaded—"(1) On a just construction of the trust-disposition and settlement and codicils of the said Daniel Cowan, the heritable property thereby conveyed to his trustees is not converted, and *separatim*, the trustees' power to sell not having been exercised, the same remains heritable, and passes in the circumstances stated to the claimant as his heir-at-law. (2) The heritable estate remaining unsold, and the whole debts and legacies directed by the truster to be paid having been satisfied, the trustees, the real raisers, are bound to convey the said heritable estate to the truster's heir-at-law."

The Lord Ordinary (Trayner) on 9th November 1886 pronounced this interlocutor:—"Finds that the property in Broughty Ferry, which forms the fund *in medio* in the present process, is to be regarded and dealt with as moveable succession: Therefore repels the claim by James Cowan, as heir-at-law of the truster, and finds him liable in the expenses of process so far as incurred in the competition between him and the claimant Henry Cowan; and remits, &c.

"*Opinion.*—The late David Cowan by his trust-disposition and settlement conveyed the whole of his estate, heritable and moveable, to the pursuers as trustees. The estate so conveyed, with the exception of a small property at Broughty Ferry, was moveable. The purposes of the trust were as follows—The truster appointed his trustees—(1) To pay debts, including the expenses of the trust; (2) to deliver to his widow the household furniture and other effects in his dwelling-house; and (3) 'as soon after my death as possible to realise the remainder of my said estate and effects, and divide and pay over the nett proceeds thereof, in such way and manner and to and amongst such parties' as he might direct by any writing under his hand. By subsequent testamentary writings he directed payment to be made of the annuity to his widow and of the legacies mentioned in the summons.

"The trustees realised the estate, except the property in Broughty Ferry, and have paid the annuity (the annuitant is now dead) and the legacies as directed. The heritable property is still in their hands, and the present action is brought to determine to whom that property belongs. The claimant James Cowan, the heir-at-law of the truster, claims it on the ground that it has not been disposed of by the truster, and that being heritage it falls to him. The claimant Henry Cowan claims one-fourth of the fund *in medio* as one of the truster's next-of-kin, on the ground that the property in question must, *quoad* this succession, be regarded and dealt with as moveable. This he does on the ground—(1) That the truster directed the sale of the property, which operated conversion; or otherwise (2), that the truster gave a power of sale, and that the exercise of that power was necessary to the execution of the trust, which also operated conversion. The heir-at-law maintains, on the other hand, that there is no direction to sell, and that sale was not necessary to the execution of the trust.

"(1) I am of opinion that the trust-deed contains a direction to sell the heritage. After directing his trustees to deliver the household furniture to his widow, the truster directs (the word used is 'appoint,' but that means the same thing) his trustees 'as soon after my death as possible to realise the remainder of my said estate'—that is, everything conveyed to the trustees beyond the household furniture—'and to divide and pay over the nett proceeds thereof,' as he should subsequently direct. The word 'realise' in its ordinary and popular sense—in

which sense I think the truster must be held to have used it—is 'to convert into money.' I therefore come to the conclusion that when the truster directed his trustees to convert his estate into money, he expressly directed the sale of his heritage, as it could only be converted into money by a sale. The words 'divide and pay over' do not of themselves imply a direction to sell, because division and paying over may be accomplished by a conveyance to the beneficiaries *pro indiviso*. Yet when in addition to these words you have the others to be found in this deed, it becomes, I think, plain that what was to be divided and paid is money, and not the estate *in forma specifica*. The direction is to divide and pay over 'the nett proceeds' of the estate. Now, the proceeds of the estate is not the estate itself, but that which it has produced by the realisation on sale thereof after deducting the expenses of sale. I think, further, that the intention of the truster that his heritage should be sold appears further from the fact that the whole of the benefits conferred by him on the beneficiaries are payments of money. The whole purpose of his settlement (with the exception of that which has regard to the household furniture) is that his trustees shall pay money. They are to pay his debts, pay the widow's annuity, pay the legacies. They are not even directed to hold the heritage in security of the annuity. They are to get the whole estate into their hands in money, and therewith to pay the annuity and legacies at the time and to the persons as directed.

"It is said that the direction I have referred to cannot be so read, because the settlement in a later clause confers a power of sale, which is superfluous if a direction to sell had already been given. I think a mere power of sale after a direction to sell would have been superfluous; but *superflua non nocent*. Still, as a seeming contradiction or inconsistency, this subsequent power of sale deserves notice. The alleged inconsistency disappears, I think, when the clause is fairly read. It declares that the trustees, 'besides the powers' conferred by statute on gratuitous trustees, 'shall have full power to dispose of my said estate and effects, either by public roup or private bargain, in such lots and at such prices as my said trustees shall think proper.' I pass over the fact that this is one to a great extent merely of style. Being there, it must receive effect. But to my mind it only adds to the direction already given—a power to the trustees to sell, according to their discretion, by public roup or private bargain, at such prices and in such lots as they may think proper. In short, I read this clause not so much as conferring a power of sale as conferring a discretion on the trustees to carry out the sale already directed in such mode as they think best.

"If this view of the truster's settlement is sound, the direction to sell operated conversion, and the claim of the heir-at-law is excluded.

"(2) But assuming that there was no direction to sell, but merely a power of sale, I am of opinion that conversion was operated, because the exercise of the power was indispensable to the execution of the trust.

"The first purpose of the trust was to pay the truster's debts, &c., 'and the expenses of carrying these presents into effect.' After paying the annuity, the legacies, and the expenses of the trust management up to 23d April 1886, there was a debt due to the trustees to the extent of about £15, 'to which will fall to be added the expense of the present action, and of winding-up the trust.' This debt and these expenses fall to be provided out of the trust-estate, and to be paid out of that trust-estate by the trustees. The only part of the trust-estate still in the hands of the trustees is the property now in question. Accordingly, out of that property the trustees must provide the money to meet the debt and expenses I have mentioned. They can only do this by selling the property, for they have no power to borrow. Indeed, it is only because the trustees advanced funds of their own that they were able to fulfil the trust purposes up to 23d April last. If they had not so advanced their own funds, the property would of necessity have been sold before now to enable them to fulfil the trust purposes. The sale of the property is therefore indispensable to the execution of the trust.

"I do not take into account as of any moment the readiness of the heir-at-law to refund the trustees the amount of their advances, and to pay the expenses of the action. He is under no obligation to do so, and probably would not offer to do so, if he was not thereby, by a payment of £50 or £60, to secure to himself a property worth £350. But the trustees are not directed to take a donation from the heir-at-law, nor if they did can they thereby affect the legal rights of the next-of-kin.

"On both the grounds stated I am of opinion that the property which forms the fund *in medio* must be regarded and dealt with as moveable."

James Cowan reclaimed, and argued—The question was as to the disposal of a part of the testator's property, heritable in character, which he had not given away, but which remained undisposed of. The Lord Ordinary's opinion implied that in respect of a mere direction to sell, unaccompanied by a disposal, the next-of-kin had right to succeed, which the heir was endeavouring to affect. His Lordship had treated the case as if it had been one arising in the succession of a beneficiary, but that whole class of cases was quite inapplicable to a question arising as to the succession of the truster himself. When it was a question of what right a beneficiary had the question was, Did the testator intend him to take land or money? But here the question was in the succession of the truster, and related to an interest which did not need to be converted for the purposes of the settlement. Now (1) the heir's estate could not be taken from him unless it was given to someone else, even though the form in which it was to be taken was changed, and he might have to take it in money instead of in land—a thing quite immaterial to the question of right. A skeleton trust directing a sale, and then not filled up by a declaration of purposes in the same or a subsequent deed, would leave the respective rights of heir and next-of-kin unaltered—*Kers* v. *Wauchope*, 1 Ross' L.C. (Land Rights) 432 (Lord President Campbell). (2) A direction to convert heritage for purposes declared or to be declared is understood on the same reasoning to be a direction to convert it for the purposes of the settlement, but not to extend beyond what was necessary for those purposes.

The truster in such a case preferred his legatee to his heir, but there was no ground for thinking that he preferred his next-of-kin to his heir. The whole subject, and the distinctions above taken under both heads, was considered by Lord Curriehill in *Gardiner* v. *Ogilvie*, 20 D. 110, and by Lord Neaves (Ordinary) in *Neilson* v. *Stewart*, 22 D. 646 (see also opinion of Lord President Colonsay). In neither case were these opinions necessary for the judgment, and Lord Deas doubtless declined to adopt the distinction between the question arising in the beneficiary's succession and that in the truster's own, but his opinion on that point stood alone. *Dicta* favourable to the reclaimer were also found in *Thomas* v. *Tennent's Trustees*, 7 Macph. 117 (Lord Barcaple, Lord Justice-Clerk Patton, and Lord Neaves). *Finnie* v. *Commissioners of the Treasury*, 15 S. 169, showed the opinion of Lord Corehouse on the point. *Dick* v. *Gillies*, *infra*, cited on the other side, had been overruled on another point, and the question in it was really about a beneficiary's succession—See M'Laren on Wills and Succession, i. sec. 416, and ii. sec. 1575. The English law on the point was exactly that contended for by the heir—Jarman, i. 619. II. The result was that, in any view, the various parts of the truster's estate must bear their own natural burdens. The heir might have to pay the annuity or so much of it as the testator, by deferring payment of legacies till the widow died, had not laid upon these legacies, but by the application of the rents to the annuity that burden was in part borne already. That was because the annuity was properly a heritable debt. But, on the other hand, the debts and legacies were the normal burdens of the moveable estate, and it must pay them—*Douglas*, January 10, 1868, 6 Macph. 223 (Lord President). There was no sufficient indication in the deed to shift any of the burdens from the party who should ordinarily bear them. III. It might be that the truster had massed his whole estate for the payment of legacies, laying the burden of them both on heritage and on moveables. If so they must bear it *pro rata* of their value only—M'Laren, ii. 2310; *Young* v. *Martin*, February 6, 1868, 40 Jur. 181. There was considerable discussion in the law of England on that point, but it had not been hitherto applied to Scotland. In *Bowie* (Hume, 765) a view favourable to the reclaimer was assumed, and in *Young* v. *Martin*, *supra*, the Court had repelled a plea founded on the doctrine, holding it, in any view, inapplicable.

Argued for next-of-kin—On the first point the Lord Ordinary was right. The opinion of Lord Deas in *Gardiner's* case was sound, and consistent with *Dick* v. *Gillies*, 6 S. 1065. That case only apparently related to the succession of a beneficiary. It truly involved the quality of the truster's own succession. It had never been overruled in any case. Its authority was recognised by Lord Corehouse in *Finnie*, *supra*. There was no decision in favour of the reclaimer. He relied only on *dicta* in cases on other points. II. The annuity must be borne by the heir, being heritable—*Hill* v *Maxwell* (1663), M. 5473; *Crawford's Trustees*, January 11, 1867, 5 Macph. 275; *Mackintosh*, March 2, 1870, 8 Macph. 627. This was the case even where an annuity was purely a testamentary provision—*Breadalbane's Trustees* v. *Jamieson*, 11 Macph. 912.

At advising—

Lord President—The late Daniel Cowan upon the 29th September 1880 executed a trust-disposition and deed of settlement, whereby he made over his whole estate to certain trustees named in the deed, whom he also appointed his executors, and appointed them—"(*First*) To pay all my just and lawful debts, sickbed and funeral charges, including suitable mournings to my said spouse should she survive me, and the expenses of carrying these presents into effect; (*second*) to deliver over to the said Mrs Isabella Drummond or Cowan, immediately after my death, in the event of her surviving me, my whole household furniture, personal and other effects whatsoever, within or about my dwelling-house at the time of my death; and (*lastly*) as soon after my death as possible, to realise the remainder of my said estate and effects, and divide and pay over the nett proceeds thereof in such way and manner, and to and amongst such parties as I may direct by any writing under my hand, though not holograph or tested, found lying by me, or in the custody of any other person for my behoof, and which shall be construed with and form part hereof, notwithstanding it may be of an informal nature."

Now, let us consider first of all what would have been the effect of this deed if Mr Cowan had died shortly after its execution, or supposing he had never executed any such writing as he contemplates in the clause which I have just read. In such a state of matters I do not think it doubtful what the effect would be. There is no doubt he directs his trustees to realise and pay over the residue as he shall direct. In the view of the Lord Ordinary, as I understand it, the effect of such a direction would be to operate conversion of the heritable into moveable estate, and in the event of the heritage remaining unsold, it, as well as the moveables, would be given to the executors instead of the heir-at-law. I cannot concur in that view. I think that if this deed had stood alone, it could not possibly have had the effect of disinheriting the heir-at-law, and just as little could it interfere with the rights of the heirs *in mobilibus*. The rule of law is, in short, clearly established that in order to disinherit the heir or defeat the executor it is necessary not merely to deal with the estate by means of a direction which implies conversion, but to bestow it on someone else. If, then, this deed had stood alone it would have been effectual as a direction to pay the testator's debts, and give his widow a specific legacy, and the legatees their respective legacies, but it would have had no further effect in the way of disinheriting the heir or altering the right of the next-of-kin. Upon this matter I entirely concur in the opinions expressed by Lord Curriehill in the case of *Gardiner* v. *Ogilvie*, 20 D. 105 and Lord Neaves and Lord Colonsay in the case of *Neilson* v. *Stewart*, 22 D. 646. But the testator did not leave it as the sole expression of his intentions, for he executed various codicils by which he provided to his widow an annuity, as well as the amounts of the various legacies which he directed his trustees to pay over. Had the provisions in these various writings been sufficient to exhaust the estate the present question would not have arisen, but it appears

that after all the directions of the testator have been complied with there is still a balance left over. As regards this balance the testator has died intestate, and the question which we have now to determine is, How is this balance to be disposed of? I may remark in passing that the amount of the balance is not an element of any importance in the present inquiry. If Mr Cowan had left only one small legacy, and so the bulk of the estate had been undisposed of, the question would have been the same. What has to be considered is rather the principle which is to be applied in the division of the balance. Of course, so far as the intentions of the testator can be discovered, they are bound to receive effect. Those directions are clear enough. The trustees are to realise, divide, and pay over the remainder of the truster's estate, and they are to mass the proceeds together. The words "realise, divide, and pay over" are important. They plainly mean that the realisation is to be for the purpose of division. The only object of realisation is that the proceeds may be more easily divisible. It is of no consequence that a portion of the estate—being the heritable estate—has not as yet been realised, for as Mr Cowan has given directions to his trustees, as he was entitled to do, to realise and mass the estates together, we must, according to a well-known rule of trust law, hold that to have been done which he directed to be done. In these circumstances the undisposed of residue is that part of the estate in which, in consequence of the non-disposal of it, those parties are interested in it who would have been interested in it if the entire estate had been undisposed of—that is to say, the heir and the executors. It seems to me that, except in so far as the realisation of the heritable estate was necessary in the carrying out of the testator's intention for payment of legacies, the right of the heir is not ousted; in like manner, so far as the executor's right is not ousted for the purpose of paying legacies, it subsists. The right of the heir would, if the estate had been altogether undisposed of, have corresponded to the respective value of the two estates. As it happens, the moveable estate was the more valuable, and therefore the interest of the heir in the case of total intestacy would have been smaller than that of the executor, and it appears to me that the way in which the balance falls to be divided is to be ascertained by taking into account the comparative value of the two kinds of estate before they were disposed of, or held to be disposed of, for the purposes of the trust, and therefore the proportions in which the balance is to divided between the heir and the executor must correspond to the proportionate value of the two estates. I therefore propose that we make findings to that effect, and remit to the Lord Ordinary to give effect to them.

Lord Mure—The circumstances of this case are peculiar, and it cannot be disposed of according to the general rules applicable to the conversion of heritable into moveable estate. The main deed is blank as to the disposal of any of the truster's property except the furniture, and therefore if there had been no codicils the whole would have gone to the various heirs entitled at law. I agree with your Lordship as to the cases of *Gardiner* and *Neilson*. I agree also that the direction is to realise the whole estate, and mass it for payment of legacies and the annuity. When I first applied my mind to it I thought it gave occasion for applying the doctrine of *Ritchie* v. *Wallace*, July 7, 1846, 8 D. 1038, and so holding the annuity, as heritable, to be charged on the heritage, and the legacies, as being in nature moveable, charged on the moveable estate. If that rule were applied I rather think it would leave the heir and executor in much the same position as they are under your Lordship's judgment. I concur in the proposal made by your Lordship.

Lord Shand—I not only concur in the result, but in everything said in your Lordship's opinion. The truster has directed that all his estate shall be realised and massed together for the purpose of paying legacies and the annuity to his widow. That must be done. The legacies are paid, and the annuitant being now dead, it appears that there is a balance for division. Now, so far as the proceeds of the massed estate have not already been disposed of, they fall into intestacy. As the heir is not displaced, so far as the balance is the proceeds of heritage he is entitled to get it, and so far as it is the proceeds of moveables the next-of-kin get it.

Lord Adam—The balance of the estate which is not disposed of belongs to the heir in heritage and the heirs in moveables respectively. As to proportions in which the balance is to be divided, that is a question of intention. The intention is that the whole estate be realised and massed together, and that out of the massed funds the legacies be paid without distinction. The testator did not, I think, mean that what naturally fell as a burden on heritage should be paid out of heritage, and what naturally fell on moveables should be paid out of moveables, but that the legacies and annuity should be paid indiscriminately out of the whole massed fund. The result is, that as there is a balance undisposed of we must ascertain to what extent the whole fund has been contributed to by the heritage and to what extent by the moveables, and then there will be division according to the proportion in which the two funds contribute to the whole.

The Court pronounced this interlocutor:—

"The Lords having considered the reclaiming-note for James Cowan against Lord Trayner's interlocutor of date 9th November 1886, and heard counsel for the parties, Recal the said interlocutor reclaimed against: Find that under the trust-disposition, settlement, and codicils of Daniel Cowan the trustees were entitled and bound to realise the whole estate, heritable and moveable, for the purpose of division among the legatees and annuitants named in the codicil: Find that although the heritable estate has not in fact been converted into money, it must, for the purposes of the present competition, be held to have been so converted: Find that there is residue of the entire estate, heritable and moveable, undisposed of, and that *quoad* said residue the testator died intestate: Find that the undisposed of residue falls to be divided between the competitors, the heir and executor of the testator, in proportion to the value of the heritable and moveable estates respectively left by the testator at the date of his

death after fulfilling the two first purposes of the trust, and decern." . . . .

Counsel for Trustees — Salvesen. Agent — J. Smith Clark, S.S.C.

Counsel for James Cowan (Heir-at-Law) — D.-F. Mackintosh, Q.C. — Sym. Agent — D. Milne, S.S.C.

Counsel for Henry Cowan and Others (Next-of-Kin)—Pearson—Hay. Agents—Reid & Guild, W.S.

Saturday, March 19.

SECOND DIVISION.

THE MAGISTRATES OF EDINBURGH *v.* COWAN.

Property—Building Restriction — Superior and Vassal—Prohibition—Obligation—Feu-Charter.

A feu-charter provided that the vassal and his heirs and assignees should be bound to erect upon the feu within a certain time buildings of a specified character and of a specified value. The obligation as regarded value having been fulfilled, the vassal proposed to erect upon part of the feu still unoccupied buildings which were not of the specified character. *Held* that he was entitled to do so, as the terms of the feu-charter could not be construed to express a prohibition against erecting buildings not of the specified character after buildings of the specified value had been duly erected.

By a feu-charter dated 31st March and 4th April, and recorded 12th July 1876, the Magistrates and Town Council of Edinburgh, as governors and administrators of Trinity Hospital, disponed to William Beattie, and his heirs and assignees whomsoever, a piece of ground adjoining the Easter Road and lying between the proposed continuation of Albert Street and the Granton branch of the North British Railway, as delineated on a plan relative thereto, but always under certain conditions, declarations, and irritant and resolutive clauses, and, *inter alia*, (1) that Beattie and his foresaids should, within eighteen months from the term of entry, "erect and constantly maintain on the said piece of ground buildings of the value of £6000 at least, and within the further period of another eighteen months additional buildings of the value of another £6000, making in all buildings of the value of £12,000 at least, which buildings shall consist of a range of four-storey tenements similar to those already built in Albert Street, on the frontage along the continuation of Albert Street and Easter Road, and of workshops or public works on the remainder of the said piece of ground not occupied by said tenements, or shall consist of tenements fronting Albert Street and Easter Road as above, and the space behind may be occupied by similar tenements having a frontage to cross streets running southwards from Albert Street, which tenements or workshops or public works, and all other buildings at any time to be erected on the said piece of ground, shall be built according to a plan and elevation, and such cross streets laid out according to a plan to be submitted to and approved of by the said Lord Provost, Magistrates, and Council, and their successors in office, governors and administrators foresaid." Then followed a clause declaring that the charter and all that had followed on it should be null in the event of failure to erect "buildings as stipulated for as aforesaid." The third clause contained, *inter alia*, this other condition—"The said William Beattie and his foresaids shall also be bound to form and constantly maintain a foot-pavement and water-channel, with proper gratings and connections to drains where necessary, in front of the houses to be built on the said piece of ground facing the continuation of Albert Street, Easter Road, and other streets of the same description as those already formed in Albert Street, to the satisfaction of the City Superintendent for the time being, the foot-pavement towards Easter Road being formed within the area of the said piece of ground hereby disponed to the extent of 8 feet."

In April 1877 Beattie by feu-charter disponed to James Cowan part of the ground acquired from the Magistrates with and under, *inter alia*, the conditions specified in the feu-charter by the Magistrates to Beattie. The obligation on Beattie to erect buildings of the value of £12,000 was by the feu-charter to Cowan imposed upon him to the extent of £4000. Cowan built a row of four-storey tenements on his ground fronting Albert Street, and partly fronting Easter Road, with a pavement and water-channel in front of them, and he erected stabling behind them. These buildings were of the stipulated value of £4000, and it was not disputed in this process that both Cowan and Beattie had fulfilled their respective obligations to erect buildings of the specified value.

The question in this case related to buildings which Cowan proposed to erect on the remainder of his ground fronting Easter Road, the erection of the buildings above mentioned not having occupied all his ground. This remaining ground was separated from Easter Road by a high wall. Behind this high wall he proposed to erect on his remaining ground buildings of one-storey in height, of brick, with slated roofs, and to be used as stables.

The Magistrates, as superiors, opposed the application on the ground that the proposed buildings would be a contravention of the conditions contained in the original feu-charter to Beattie, and would injure the neighbouring property. They maintained that Cowan was "restricted to build a range of four-storey tenements similar to those already built on the frontage along the continuation of Albert Street and Easter Road," and was bound to leave 8 feet of his property fronting Easter Road for a foot-pavement. They also averred "that the reference in the feu-charter granted by the respondents as to the minimum value of the buildings to be erected on the ground feued did not affect the character of the buildings which were to be erected along the continuation of Albert Street and Easter Road, all of which were to consist of a range of four-storey tenements."

On 9th December 1886 the Dean of Guild pronounced an interlocutor finding that the operations were confined to the petitioner's own property, and could be executed with-