of the representatives of Robert. I think that the persons who are the beneficiaries are not entitled to the interest. It appears to me that this deed provides a definite sum of £6500, neither more nor less, to be dealt with in a particular way. That sum is to be apportioned among certain persons at a certain period. Then the deed provides what is to be done with the interest until the period of division. It did not omit to deal with it. It was destined to Robert Hill and was not left to follow the capital. Then it was contended that the interest was in fact residue, and a passage was read to us from the judgment of Lord Cottenham in the case of Turnbull, where his Lordship, speaking of certain decisions which had been cited, says—"They turn entirely upon this rule of equity in this country that where a residue is given upon a future contingency, the intermediate income goes with the principal, but that where land is given upon a future event the intermediate rents do not go, and for this most obvious of all reasons, which seems to have been lost sight of at the bar very much: a gift of land is a gift of a specific thing, and if that is only to commence at a future period there is nothing in a gift of land the interest in which is to commence *de futuro*, to show an intention to give the intermediate interest, and therefore it descends to the heir. But where you give the residue of personalty, then, from the comprehensive nature of the term 'residue,' the Court says, it is quite immaterial that the intermediate interests are not given; they are not given in terms as intermediate interests but they are given under the term 'residue,' aud therefore a gift of the residue of personalty *de futuro* carries with it all the intermediate income. But the gift of a specific sum of money does not, unless there is something showing an intention to give an intermediate interest in the meantime." Now in this deed there is a gift of a specific sum to be divided at a certain time. The word "residue" does not occur in it. If there was any room for saying that the interest was residue, it was disposed of in this way, that it was to be paid to Robert Hill. Therefore, I do not think these parties have any right here. Then in regard to the heirs *ab intestato*, I don't concur either in the view that this interest is to be taken up as intestacy. It is not residue, as I have said, or if it be, it was made over to Robert. But it appears to me that there is here a disposal of the interest. Robert is to pay all the debts, and he did so. Then he is to take over the lease, &c., and is to pay down £3500 therefor in six months. In respect of doing so he is to have the whole interest of £6000 until the youngest son of Andrew Hill shall attain majority. Robert survived the testator. He thus acquired full right to this bequest, which is obviously part of the arrangement by which the £6500 was raised. Moreover, I think that this was the intention of the truster himself. It is said that the interest only comes in from time to time. Well, that would be the case with the rents of an estate also. A more difficult question might arise as to what would become of the interest if all Andrew Hill's sons died before attaining majority. If the youngest died before doing so, then the age of the next youngest might vary the period during which the interest would be payable; but nothing of that kind has occurred here. I therefore think that the interlocutor of the Lord Ordinary is right.

Lord DEAS—It cannot be disputed that the whole of the truster's estate is given to the trustees, and it is not to be presumed that any part is undisposed of. I am of opinion that nothing is here undisposed of. What Andrew Hill's children are to get is a share of a sum at a certain time. If they get the interest they now claim, they will be getting more than the testator has given to them. The only way in which anything like plausibility is given to the view that this interest is residue, is by supposing that the testator had calculated what would remain, and that it is therefore to be called residue. But there is nothing on the face of the deed to show that he so calculated. He gave a specific sum. I cannot therefore see how the children of Andrew and James can maintain their claim. But I am not prepared to say that if they had made out their claim otherwise they would have been excluded by the principle that because the capital had not vested the interest could not. I am not clear that the capital has not already vested in the children as a class, notwithstanding the clause of survivance. That question, however, is not now before us. What I proceed upon is that the words of this deed are unambiguous. What is given to Robert is the interest of a certain sum up to a certain period, which we now know to be 1878. That is no more ambiguous than if the truster had bequeathed to him the £6000 itself. A man may bequeath to another a thing to arise *de futuro*, and if that is done, it is as much his, and goes to his heirs, as if it was already in existence. Unless it can be shown on the face of this deed that the words don't mean what they say, then the words must receive effect. But I see nothing of that kind here. On the contrary, as your Lordship has said, I see a great deal pointing the other way. I don't think it necessary to go on the onerosity of the bequest. It was onerous to a certain extent. Robert was to pay the truster's debts and a considerable sum of money, but it may very well be that he got an advantage by the transaction.

Lord Ardmillan concurred.

Lord Curriehill absent.

Agents for Robert Hill's Executor—Jardine, Stodart, & Frasers, W.S.

Agent for Andrew Hill's Children and Others—William Mitchell, S.S.C.

Agents for Truster's Heirs *ab intestato*—Hill, Reid, & Drummond, W.S.

SECOND DIVISION.

MALCOLM *v.* DICK.

Title to Sue—Executor. One of the next of kin of the deceased granter of a disposition *omnium bonorum* having raised a count and reckoning against the trustee without having obtained a *decree-dative*, held that he was not entitled to sue, and that the objection was not obviated by his subsequently obtaining and producing a *decree-dative* in his favour. Observations as to the rights of action of an heir apparent.

This was a note of suspension brought by John Malcolm, residing at Forrest Hill, in the county of Clackmannan, *v.* William Dick, labourer, residing at Fens, Dunblane, the eldest son and nearest and lawful heir of the deceased Robert Dick, sometime carrier in Dunblane, and sometime residing at Dollar Mains, and executor of the said Robert Dick, or otherwise representing him. Malcolm had been charged at the instance of William Dick to make payment of the sum of £250, alleged to be the balance due by him upon his intromissions as trustee for himself and his lawful creditors, under a disposition *omnium bonorum*, dated 21st December 1843, granted by Robert Dick in favour of the

suspender. This charge was given to Malcolm upon a decree obtained in absence against him, in an action of count, reckoning, and payment, at the instance of William Dick. In the summons, Dick designed himself "eldest son, and nearest and lawful heir of the deceased Robert Dick, sometime carrier in Dunblane, and sometime residing at Dollar Mains, and as executor of the said Robert Dick, or as otherwise representing him under one or other of the passive titles known in law"; but produced no title in either character. With the answers to the suspender's statement in the present process, however, Dick produced a writ bearing to be a precept of *clare constat* in his favour; and with his revised answers produced a document bearing to be a *decree-dative* in his favour by the Commissary of the county of Clackmannan, dated 22d February 1865. The suspender denied any liability on his part to the respondent, or to the representatives of the late Robert Dick, in the sum concluded for, and maintained that the decree ought to be suspended in respect the pursuer had no title to pursue the action in which it was obtained, and in respect no such title was produced. The Lord Ordinary (Jerviswoode) gave effect to this plea, and suspended the decree and the charge complained of. His Lordship added the following note to his interlocutor:—

"It appears to the Lord Ordinary that the suspender is entitled to the remedy here sought under the prayer of the note. It is clearly established that when the respondent raised the action in which the decree in absence complained of was obtained, he held no title whatever in his person as heir or executor of the deceased Robert Dick, such as to warrant him to pursue. It is true—and the Lord Ordinary does not understand the suspender to dispute the proposition—that to warrant a pursuer in the position of the present respondent to insist in an action such as that in which the decree complained of here was obtained, neither a completed title as heir, nor an actual confirmation as executor, is necessary. But it is maintained for the suspender, and, as the Lord Ordinary thinks, on sufficient grounds, that it was essential that evidence adequate to establish that the pursuer, in the original action, truly possessed the character in which he sued, must be produced. And while the recent statute of 21 and 22 Vict., cap. 56, simplifies and now regulates the procedure in the matter of the confirmation of executors, it operates no alteration of the law as it previously existed, under which it was requisite that one suing as an executor should produce, as his title to warrant him to sue, evidence of his right to that office, either through direct nomination to it, or by force of a decree-dative. Actual confirmation of the sum sued for, though necessary as a title to uplift and discharge, could not be demanded as requisite to support the title to sue."

The respondent reclaimed.

THOMS, for him, argued that the pursuer, being next of kin of the deceased granter of the disposition *omnium bonorum*, was, as such, vested in the moveable estate of the deceased, under the Act of 4th Geo. IV., cap. 98. The pursuer being thus already vested in the estate and entitled to the office of executor, the decree-dative was merely declaratory of his right to that office, and any objection to his title was obviated by the decree-dative made up and produced in the course of the proceedings, and as soon as the objection was stated. It was admitted that the claim pursued for in the action was moveable, and could not be insisted in by the pursuer in his character of heir.

A. R. CLARK and ORR PATERSON, for the suspender, were not called on to reply.

At advising,

The LORD JUSTICE-CLERK said that he understood the general rule to be that a party, before instituting an action, as heir, must complete his title, but there were several exceptions to this rule. An heir-apparent might institute an action of exhibition *ad deliberandum*, an action of reduction *ex capite lecti*, and an action of ranking and sale; but his Lordship was not aware that such an heir was entitled to pursue a petitory action for recovery of his ancestor's estate. But it was admitted here that the right was one in which the pursuer could insist only in the character of executor, and the Court had only to determine whether the pursuer, by merely setting out the title of executor, could sue without having obtained a decree-dative or other title in that character. It was conceded that there was no example of such a course being permitted, and, as a question of expediency, he could see no reason for permitting the pursuer to sue as executor before acquiring that title. Until that was done, it was premature to insist in that character.

The other Judges concurred.

Lord NEAVES, in concurring, observed that, in addition to the rights of action mentioned by the Lord Justice-Clerk as an apparent heir, there was the right to pursue a petitory action for the rents of the ancestor's estate accruing during apparency.

The Court adhered, with additional expenses.

Agent for Reclaimer—Wm. Officer, S.S.C.

Agents for Suspender—J. & A. Peddie, W.S.

Friday, Nov. 9.

WEIR OR WILSON *v.* MERRY AND CUNNINGHAM.

Reparation—Culpa—New Trial—Foreman—Collaborateur—Bill of Exceptions. A new trial granted where, in a conflict of evidence upon the question of fact put to the jury, there were facts and circumstances of real evidence in the case which showed that the view which the jury took as to the leading fact was not correct, and verdict set aside as contrary to evidence. Found unnecessary to dispose of a bill of exceptions, as not raising any abstract question of law, but having exclusive reference to the facts of the case as put in evidence.

The defenders are iron and coal masters in Glasgow, and the present action was brought against them by the mother of a miner who had lost his life, while engaged in one of their pits, through an explosion of firedamp. The damages were laid at £400. After a record had been made up, an issue was adjusted in the ordinary terms, putting the question whether the deceased was killed by an explosion of firedamp through the fault of the defenders.

The case which the pursuer made on record and put before the jury was shortly as follows:—The accident happened in a pit the shaft of which had been sunk to a depth of about ninety-five fathoms through four seams of coal—viz., the Ell, Pyotshaw, Main, and Splint. At the date of the accident the Ell seam, which was nearest the pit mouth, was being wrought out. Before any other seam was opened, the ventilation of the shaft was provided for by an air tight midwall, which reached to within a few feet of the bottom of the shaft, down