opinion that clauses of this description did not extend to cases of destruction by fire or storm.

Agent for Appellant—L. M. Macara, W.S.

Agents for Respondent—Lindsay & Paterson, W.S.

Thursday, May 19.

FIRST DIVISION.

SPECIAL CASE—MOODIE *v.* YOUNG.

Succession—Intestacy—Lapsed Share—Intention. A testator having provided certain annuities for his wife and son, directed his trustees to realise his property, and hold the residue for the behoof of his younger children, equally among them, for the daughters in liferent, and their children in fee, and for the younger son in fee; the widow in both cases getting the interests of the provisions during her viduity. He further provided—"and failing such issue attaining the said age of 21 years, I direct and appoint that the share and interest of such of my younger children deceasing shall form part of my estate, and shall belong to my other younger children or their issue attaining said age, equally among them *per stirpes.*" *Held* that the shares of two of the younger children, who had died without issue, went under said second recited clause into the deceased's general estate, and were to be disposed of in the same manner as the residue of his property had been disposed of in the former recited clause, in respect that by the words "failing such issue attaining said age" the testator had meant to provide also for the case of the failure of any issue.

James Young of Scarlet Hall died on 8th September 1864, leaving a trust-disposition and settlement, by which he conveyed all his heritable and moveable estate to trustees in trust for certain purposes. In the first place, he provided annuities for his wife and eldest son. The 5th direction was as follows:—"That my trustees shall from time to time realise and convert into money my whole estates and effects, heritable and moveable, not hereby specially disposed of, and after providing for the annuities before written, shall hold and apply the prices and produce thereof, and whole residue and remainder of my estate, for the use and behoof of my younger children, the said Janet Edmonstone Young, Margaret Primrose Young, and John Primrose Young, and such other child or children as may be procreated of my body, equally among said children, share and share alike, under the burdens and conditions following, *videlicit*:—The share falling to the said Janet Edmonstone Young, my eldest daughter, shall be held by my trustees, or invested by them in their names for behoof of the said Janet Edmonstone Young in liferent during all the days and years of her life, and shall belong to her issue in fee, equally among such issue *per stripes* to the extent and on the condition after provided in the case of the shares of my whole younger children, it being hereby provided that the free interest or annual proceeds of the share of the said Janet Edmonstone Young shall be payable to her at each of the terms of Whitsunday and Martinmas occurring after my decease during all the days and years of her life: The share falling to the said Margaret Primrose Young, and to any other daughter or daughters to be procreated of my body, shall be held by my trustees, or invested by them in their names, for the use of such daughter or daughters in liferent, and shall belong absolutely and be paid or conveyed to the issue of such daughter or daughters equally among such issue *per stirpes* in fee, but that only as after provided in the case of the shares of my whole younger children. . . . And the share or shares falling to the said John Primrose Young, and to any other son or sons to be procreated of my body, shall be held or invested by my trustees in their names, for the liferent use of the said Margaret Marshall Primrose or Young, so long as she shall survive me and remain unmarried; and on her decease or second marriage, the said share or shares shall become vested interests in my said son or sons, and shall be payable to him or them on his or their respectively attaining the age of twenty-five years, till which time or times the free interest or annual proceeds thereof shall be administered for his or their behoof by my trustees. And I direct my trustees, in the event of the death of any of my younger children leaving lawful issue, and having at the time of such decease a share or interest in my estate, to pay or assign and convey such share or interest to and in favour of all the lawful children of such deceasing child who shall attain the age of twenty-one years, equally between or amongst them, share and share alike, if there shall be more than one; but if there shall be but one such child who shall attain the age of twenty-one years, then the whole share or interest of the deceasing parent to such one child, the same to be so paid or conveyed upon his, her, or their respectively attaining the said age; and until such child or children respectively shall attain the age of twenty-one years, I appoint my trustees to pay and apply the annual profits of the share or interest provided or intended for him, her, or them respectively, for his, her, or their maintenance and education respectively; it being hereby expressly declared that the share of any of my younger children so dying leaving lawful issue shall be divided equally among his or her issue attaining said age of twenty-one years, and failing such issue attaining the said age of twenty-one years, I direct and appoint that the share and interest of such of my younger children deceasing shall form part of my estate, and shall belong to my other younger children, or their issue, attaining said age, equally among them *per stirpes.*"

Mr Young was survived by Mrs Margaret Primrose or Young, his second wife; by his eldest son James Young, and his three younger children, viz., Janet Edmonstone Young, now Mrs Moodie, Margaret Primrose Young, and John Primrose Young.

John Primrose Young died in pupilarity on 29th October 1866. Mrs Young died on 29th August 1869, and Miss Margaret Young died on 22d January 1870, in minority and unmarried.

This Special Case was presented to the Court for their opinion and judgment as to the disposal of the two shares of the residue of Mr Young's estate which belonged to John Young and his sister Margaret.

The principal question was, whether or not the clause "failing such issue attaining the said age of twenty-one years complete, I direct that and appoint that the share and interest of such of my younger children deceasing shall form part of my estate,

and shall belong to my other younger children, or their issue attaining said age, equally among them *per stirpes*," applied to the case that had emerged, viz., the decease of two of the younger children without issue—

On the assumption that the words "failing such issue attaining the said age" meant failing any issue or failing any issue attaining said age,

M'Laren, for Mrs Moodie, the only surviving younger child, contended that the two shares fell into and became part of the residue of the trust-estate, and were accordingly to be invested by the trustees for her behoof in liferent, and her children in fee, as directed by the truster.

On the assumption that the clause did not apply to the case of "a younger child predeceasing without issue," a number of other parties contended that the two shares had fallen into intestacy, and must be regulated by the law of intestate succession.

Shand, for James Young, the testator's eldest son, claimed to have made over to him absolutely one-half of the said shares destined to the said John Primrose Young and Margaret Primrose Young, in respect that the same have lapsed and become undisposed of and intestate succession of the testator, to one-half of which he is entitled as one of his two surviving children and next of kin, and also claimed as heir-at-law such portion of the heritage of the said James Young, his father, as had become intestate and undisposed of.

Rutherford, for Alexander Primrose, as the sole executor and universal legatory of Mrs Margaret Marshall Primrose or Young, the testator's relict, claimed one-third of each of the said two shares in respect that the said shares had lapsed and must be dealt with as intestate succession of the testator as at the time of his death, to one-third of which his widow acquired right *jure relictæ*.

R. V. Campbell, for the trustees and executors of Margaret Primrose Young, claimed (1) both the shares in question—the share of John Primrose Young, as having vested in him, and having passed to Margaret Primrose Young, his only sister-german and next of kin, and the share of Margaret Primrose Young, as having vested in her; or (2) they claimed one-half of each of said shares, as being intestate succession of the late James Young, divisible among the four next of kin at his death, and the said Margaret Primrose Young having succeeded as next of kin foresaid to the two-fourths falling to the said John Primrose Young; or (3) they claimed one-half of the share intended for the said John Primrose Young, as having been destined over absolutely and in fee to the younger children surviving his death.

Maclean, for Mr Young's trustees, claimed to retain the said shares so far as they might be found not to have become undisposed of, and intestate succession of the testator, for the purpose of disposing of the same in terms of the trust-deed.

The following were the questions submitted for the opinion of the Court:—

"1. Whether, on a sound construction of James Young's trust-settlement and codicil, the beneficial interest in the share of the residue of his estate originally destined to his son, the now deceased John Primrose Young, is now vested absolutely in Mrs Moodie, or her husband as in her right, and the testamentary trustees of Margaret Primrose Young, in equal shares, in respect of Mrs Moodie and the said Margaret Primrose Young having been the only surviving younger children of the testator at the time of the death of the said John Primrose Young; or whether the same is vested in Mrs Moodie or her husband alone, in respect of Mrs Moodie being now the only survivor of the testator's younger children?

"2. Whether, on a sound construction of said trust-settlement and codicil, the share of residue originally destined to the now deceased Margaret Primrose Young vested in her, and is payable to her testamentary trustees, or whether the same is vested in Mrs Moodie, as the survivor of the testator's younger children, or Mr Moodie, as in her right?

"3. Whether, upon a sound construction of the said trust-settlement and codicil, the said shares fall into and become part of the residue of the trust-estate, to be administered and disposed of by the trustees in the manner provided with respect to Mrs Moodie's original share, and therefore to be invested by them in their own names for behoof of Mrs Moodie in liferent, exclusive of her husband's *jus mariti*, and of her children in fee?

"4. Whether, on a sound construction of the said trust-settlement and codicil, the shares of the residue of James Young's estate originally destined to John Primrose Young and Margaret Primrose Young, or either of said shares, have lapsed and become undisposed of and intestate succession of the testator?

"5. Whether, in the event of it being held that the said shares, or one or other of them, have so lapsed and become undisposed of or intestate succession of the testator, the claimants James Young, Mrs Moodie, Alexander Primrose as executor of Mrs Young and the testamentary trustees of Margaret Primrose Young, or any and which of them, have right to said shares, and to what proportions thereof they have right respectively?"

At advising—

The Lord President said—The two principal contentions here are, 1st, That the two lapsed shares of the residue of the estate of Mr Young are disposed of by a clause in his settlement; and 2d, that they are not disposed of in the circumstances that have occurred by any clause, and therefore fall into intestacy. The clause in question is ambiguous from the use of the words "failing such issue;" but I do not entertain the slightest doubt that the testator's meaning was "failing any issue," and "failing such issue attaining," &c.; and therefore I think that the clause applies to the circumstances which have occurred, viz., the death of two of his younger children without issue, and of course without any issue "attaining said age." It is needless to go over the other clauses to show that this was the manifest intention of the testator. The next question is, What is the effect of that clause as regulating the disposal of these two shares? He says, "the share or interest of such of my younger children deceasing shall form part of my estate, and shall belong to my other younger children, or their issue attaining said age, equally among them, *per stirpes*." His clear intention, in my opinion, was that such lapsed shares should form "part of his estate," and be disposed of under the fifth purpose of his deed. The conclusion to which I come is that on John's death his sisters Janet and Margaret were entitled to the liferent of his lapsed share, the fee being in their children, and that on Margaret's death Janet (now Mrs Moodie) became entitled to the liferent of both the shares, the fee being in their children. I am therefore for answering the third

query in the affirmative; and, of course, all the other queries in the negative.

The other Judges concurred.

Agents—Duncan, Dewar & Black, W.S.; D. B. Anderson, W.S.; Wm. Johnstone, S.S.C.; S. Greig, W.S.; Mackenzie, Innes & Logan, W.S.

Friday, May 20.

SECOND DIVISION.

MACINTOSH *v.* MACGILLIVRAY AND FRASER TYTLER.

Superior and Vassal—Reduction-Improbation—Non-Entry and Retour Duties—Wadset—Decree in Absence—Res inter alios acta. A proprietor of lands, in virtue of his superiority titles, brought an action of reduction-improbation and declarator of non-entry against A, the heir-male of the pursuer's last immediate vassal in the lands, and B, his sub-vassal, concluding for reduction of the defenders' titles. There were alternative conclusions for declarator of non-entry and payment of the retour duties up to the date of citation. A allowed decree in absence to go out against him, but B appeared and defended, and produced a progress of titles vesting him in the lands in question as sub-vassal of A. B also founded on a wadset right (which was unredeemed and had been made real by infeftment in his person) granted by a predecessor of the pursuer to one of B's ancestors. *Held* (affirming Lord Barcaple) (1) that the decree in absence obtained against A was *res inter alios acta* as against B, and could not prejudice his rights; (2) that the unredeemed wadset right, on which possession had followed, was a complete defence to the action in so far as it concluded for reduction of A's and B's titles, and for non-entry duties.

This was an action of reduction-improbation and declarator of non-entry brought by The Mackintosh of Mackintosh, as superior of the lands of Bochrubin, in the county of Inverness, against Mr MacGillivray of Dunmaglass, heir-male of the pursuer's last immediate vassal in the said lands, and Colonel Fraser Tytler of Aldourie, alleged sub-vassal of the said lands. The conclusions of the summons were in the usual form of such actions, concluding, in the first place, for reduction of the defender's titles as, forged and fabricated, so as to compel their production; and alternatively, for declarator of non-entry and payment of the retour duties up to the date of citation, and the full rents of the lands from that date till entry. The alternative, however, in the present case was so expressed as to make the conclusions for non-entry dependent upon the defender MacGillivray producing a good title to the lands.

The case coming into Court, decree in absence was allowed to pass against the defender MacGillivray, reducing his titles in terms of the reductive conclusions of the summons; but appearance was entered for Colonel Fraser Tytler, who produced a progress of titles vesting him in the lands in question as sub-vassal of MacGillivray, the immediate vassal. The defender Tytler also founded on a right of wadset granted by an ancestor of the pursuer to one of the defender's ancestors. In regard to that he made the following statement:—"After this purchase the said William Fraser, W.S., proposed to purchase the superiority of the said lands of Bochrubin and others from Æneas Mackintosh of Mackintosh, in whom the superiority had become vested. The Mackintosh agreed to sell the superiority to Mr Fraser, but only redeemably in the form of a wadset, and accordingly, by disposition and deed of wadset, dated 28th July 1768, the said Æneas Mackintosh of Mackintosh, on the narrative of the feu-contract of 1721, and sasine thereon, of the title made up by William MacGillivray in 1758, of the sale by William MacGillivray to the said William Fraser, W.S., by the disposition of 13th April 1768, and in consideration of the sum of one thousand merks Scots paid to the said Æneas Mackintosh by the said William Fraser, the said Æneas Mackintosh sold, wadsetted, and disponed to the said William Fraser and his heirs all and whole the said lands of Bochrubin and others, so far as respects the superiority thereof, with the feu-duty payable therefrom, and he assigned the feu-duty to the said William Fraser and his heirs, that the lands might be bruiked and enjoyed without any payment of feu-duty in time coming during the non-redemption. The right was specially declared redeemable by the said Æneas Mackintosh and his heirs-male succeeding, at any term of Whitsunday after the lapse of nineteen years from the term of Whitsunday 1768, by payment of the said sum of one thousand merks Scots after premonition of forty days as therein mentioned. The deed further bound the granter and his heirs to receive and enter the said William Fraser and his heirs gratis, in case they should wish to hold the *dominium utile* directly of The Mackintosh instead of blench of the said William MacGillivray. The deed of wadset is specially referred to. It was followed by possession. In virtue thereof the said William Fraser and his successors have ever since possessed the superiority of the said lands of Bochrubin and others, and have paid no feu-duty either to the pursuer and his predecessors, or to any one else. The defender has made up a title to this wadset by service and notarial instrument, and it constitutes a real right in his person." The question came to be—(1) whether the immediate vassal's titles having been set aside, the sub-vassal's did not fall along with them? and (2) whether in any view the defender Colonel Tytler was not liable to be decerned against under the alternative conclusions for non-entry?

A minute of admissions for both parties was put in in the following terms:—"(1) That the pursuer and his authors have stood infeft in the lands in question conform to the infeftments produced; (2) that the pursuer and his authors, apart from their infeftments, have never been, since the original feu-contract of 10th May 1721, by themselves or their tenants, in the actual possession of the lands; (3) that the pursuer's author received feu-duty from the date of the original feu-contract till 1768, when the wadset, No. 12 of process, was granted, but that no feu-duty had been paid since that date; (4) that, since 1768, the defender Colonel Fraser Tytler and his authors have been, by themselves and their tenants, in the actual possession of the lands; and (5) that the pursuer is the heir-male of Æneas Mackintosh of Mackintosh, the granter of the wadset of 1768; and *quoad ultra* both parties renounce probation."

The Lord Ordinary (BARCAPLE) pronounced the following interlocutor:—

"*Edinburgh*, 21*st December* 1869.—The Lord Or-