accordingly did so, and the bond was handed by the servant to Mrs Spier. The bond was never returned by Mrs Spier to the pursuer. She died in February 1870, and it was not found among her papers. As the annuity continued to be regularly paid, and as the bond was a recorded deed, the pursuer did not press Mrs Spier to return the deed to him. It has been stated that through some mistake or misapprehension Mrs Spier had put the bond in the fire. Notwithstanding the most diligent search among Mrs Spier's papers, and every exertion and inquiry on the part of the pursuer, the said bond has not been found. An extract from the record is herewith produced."

TRAYNER for the pursuer.

There was no appearance for the defenders.

A proof before answer as to the sufficiency of the adminicles and the *casus amissionis* was allowed. The proof instructed the averments of the pursuer. It did not, however, appear in evidence whether Mrs Spier had destroyed the bond intentionally or through inadvertence.

When the case came up on the proof, the Lord President intimated his doubt whether, looking to the terms of the Act 1617, c. 16, the pursuer had sufficient interest to entitle him to resort to a proving of the tenor, and suggested to counsel the propriety of considering the effect of an extract from the Register of Sasines when the conveyance itself is registered.

At advising—

LORD PRESIDENT—I thought it my duty to suggest the difficulty, because the extreme remedy of proving the tenor should only be resorted to where it is necessary. But it appears to be matter of so much uncertainty, to say the least, whether the pursuer does not require the remedy to make his right secure, that I am not disposed to urge the objection further. It is, at least, doubtful whether he would be in as good a position with the extract as with the deed itself, and I am therefore for giving him decree.

LORD DEAS—The tenor is satisfactorily proved. The only question is, Has the party shewn a sufficient interest to get a decree? It appears to me that very little interest will do. It is a strong thing to come to the conclusion that there can be no possible interest. My impression is, that wherever the registration is of such a kind that the principal deed is not retained in the register, but given back, the party is entitled, on the loss of the principal deed, to bring a proving of the tenor. Admittedly, the extract will not stand in one case. It may be useful to have this deed restored, and I do not see how it can prejudice anyone.

LORD ARDMILLAN—The action of proving the tenor is not one to be lightly considered by the Court. It is their duty to look with some jealousy on a proving of the tenor, where any doubt is suggested as to the sufficiency of the proof of tenor, or the relevancy of the *casus amissionis*. It is obvious that a party may get a great advantage, who has had a deed in his possession. But here the main points are made out, and there is nothing but the question of sufficient interest. It is enough to say that it is not clear that the pursuer has no interest. On this question I would give the pursuer the benefit of the doubt, though I would not do so in other branches of the case.

LORD KINLOCH concurred.

TRAYNER moved for expenses, on the ground that the proving of the tenor was rendered necessary by Mrs Spier's own act in destroying the bond. The question, on whom the expenses should fall, was one between the beneficiaries under the bond and the general estate of the testatrix. It was stated that she had left the bulk of her property, which was considerable, to found an hospital; also that intimation had been made to the trustees that an application would be made for expenses, and that they had expressed their resolution not to oppose the motion, but to leave the question in the hands of the Court.

The Court decerned in the proving, with expenses.

Agents for Pursuer—M'Ewen & Carment, W.S.

Wednesday, January 24.

JOHN JAMIESON *v.* JOHN CLARK AND ANOTHER.

Testament—Executor—Negative Prescription.

A testator left a settlement dated 1787, and two holograph undated testamentary deeds, executed shortly before his death in 1823. By both the latter, though not formally recalling the previous settlement, he appointed one of his nieces, Mrs C., executrix and "universal intromitter" with his moveable estate, under the burden of certain specific legacies. Mrs C. at once assumed that the moveable succession of the deceased was to be regulated entirely by the two undated holograph deeds, which were a practical revocation of that of 1787, so far as moveables were concerned, and at once took up the position of executrix and universal legatory, administered the estate, paid debts and legacies, and herself appropriated the residue under the character which she assumed, in an open manner known to all the relatives of the deceased interested in his succession, for whose benefit all the deeds had been put on record. No challenge of her proceedings was made at the time or for forty years after.

Held that the terms of the later undated holograph deeds effectually vested Mrs C. with the character of executor and universal legatory, which she had assumed, and operated a revocation of the prior deed of 1787. But that, independently of this, any claim against her as executrix, founded on the assumption that she held the position of executrix merely, and not of universal legatory also, was cut off by the negative prescription.

This action of count, reckoning, and payment was brought by a descendant of one of the nephews of the deceased William Gilmour, who was also a legatee under his will, against the representatives of his executrix.

The said William Gilmour, who died in 1823 without children, had executed along with his wife, who predeceased him in 1819, a mutual disposition and settlement disposing of their whole means and estate, heritable and moveable. This deed was dated 1787. In that part of it which bore reference to William Gilmour's own property, the most important clause was as follows:—"And as I have at present sixteen nephews and nieces all equally near of kin, and whether these shall be

fewer or more at the time of my death, I hereby bequeath to them the remainder of my effects, to each an equal share, to be equally intromitted with, and uplifted by them as soon as they can after my death. And if any of these nephews or nieces are then dead, but have a child or children then alive, that child or children shall draw their deceased parent's share; and said nephews and nieces may appoint a factor for uplifting the money due to me, for paying my debts, and for giving to each nephew and niece their share, and the factor's fee to be paid as parties can agree. And if parties think fit, he may be one of said nephews." Several codicils were added to this deed by both the parties to it, the latest of which was dated in 1813.

After his wife's death, in 1819, William Gilmour executed a fresh settlement of his heritage, by a deed dated 1st June 1821, in which he divided all his heritable property, including that which had come to him from his wife, to Agnes Gilmour, his niece, and to Robert and William Armour, his nephews.

There was also found in his repositories after his death two holograph but undated deeds, of a testamentary nature, which, from internal evidence, must both have been executed between his wife's death and his own, and subsequently to the deed of 1821, making a new disposition of heritage. They carried his moveable property only. The following are the terms of one of these deeds:—"I, William Gilmour, of Dovecastle, taking into consideration the uncertainty of life, have thought fit to make the following testament; and I hereby appoint Agnes Gilmour of Newhouse, spouse of Mr Robert Clark, to be executor; and she, by the assistance of her husband, will do the business very correctly, universal intromitter with my goods and money, except what is otherwise mentioned afterwards, and that under the following burdens, to pay my debts and the following legacies:—I hereby bequeath to three nieces, Janet, Agnes, and Christian Armours, three hundred and sixty pounds, to be divided equally among them, share and share alike, these three being daughters of the deceased John Armour and Helen Gilmour, my sister-german; and to John Armour, their brother, late a soldier, also one hundred and twenty pounds; to the eight children of the deceased Andrew Armour, my nephew, four hundred pounds, to be divided equally among them; and if any of these children dies before majority, the shares of the deceased shall be divided equally among the survivors, and to the children, Matthew Armour, Robert and Helen Armour, fifty pounds to each of them; to the children of the deceased Matthew Armour, Robert and Helen Armours, fifty pounds to each of them: and to the children of the deceased Barbara Armour, John and Robert Pumphrays, fifty pounds to each of them; and to blind William Pumphray seventy pounds, and the children of the deceased Helen Pumphray, when they arrive at majority, fifty pounds, divide between her two children; and to Jean Brown, my grandnephew, spouse of John Henderson, and to Helen Brown, her sister, seventy pounds; to Helen Brown seventy pounds; and to said Jean Brown, her sister, fifty pounds; and to Lilias Marshall sixty pounds; and to William Sym of Flatt, the same relation to my mother, fifty pounds; and to William Armour twenty pounds, to assist him in entering with the superior of Priestgill—these all sterling money, and payable at the first term of Whitsunday or Martinmas that shall be six months after my death.

"1, 1, 1, 5, John Steven.

"William Lindsay, 1, 1, 1, 30, John Steven, 200. These last named sums due by John Steven and William Gilmour to be paid to the executor, that they may divided to the legatees as well as the rest, being part of the sums which are to be given to the other legatees.

"(Signed) WILL. GILMOUR."

The other deed was in much the same terms, though the legacies left by it were fewer in number. It was as follows:—"I, William Gilmour of Dovecastle, taking into consideration the shortness of human life, I hereby appoint Agnes Gilmour, spouse of Mr Robert Clark, to be executor of this my testament, who, with the assistance of her husband, will do the business very correctly; and I appoint her to be universal intromitter with the whole good and gear except what shall be otherways appointed, and that under the following burdens; and I hereby bequeath to my four nephews and nieces Four hundred and four pounds, their names being Janet, Agnes, Christian, and John Armours, children of John Armour and Helen Gilmour, my sister, share and share alike. To the eight children of Andrew Armour, deceased, Four hundred pounds, to be divided among them, share and share alike, and if any of them dies before payment, the dead's part to be divided as the rest. And to the deceased children of said Matthew Armour deceased, to wit, Robert and Helen Armours, Fifty pounds to each of them; and to the deceased Barbara Armour's children, John and Robert Pumphrays, fifty pounds to each of them; and to William Pumphray, blind, ninety pounds; and to Jean Brown, spouse to John Henderson, my niece, fifty pounds; and to Helen Brown, her sister, seventy pounds; and to William Armour twenty pounds sterling, to assist him in his entry with the superior of Priestgill. To Elizabeth Yuil, my servant, five pounds. All these sums sterling money, and payable at the first term that shall be six months after my death; and as some of the legatees have given bills for sums which they have received, these may be turned in payment of the legacies so far as they go. As to my cloths, books, and plenishing, harrow, spade, ax, and other tools, to be divided among the friends; if they cannot do this business themselves, they may chuse a man to do it. (Signed) WILL. GILMOUR.

"Poor people, when they get a legacy or any gift, are often in a great hast to get it ended, tho they have often much reason to regret their hast."

On 28th March 1823, shortly after his death, the repositories of Mr Gilmour were opened in presence of his relatives, and the deeds above mentioned found. The minute of meeting, which was formally drawn out, bears as follows;—"Besides the foregoing writings, no other settlement, latter will, or other deed of a testamentary nature was found. The foregoing writings were delivered over to Mr Clark (the husband of Agnes Gilmour, the testator's niece, who had been named executrix by the undated testaments) in order that he might put the same on record for preservation, and which he engages to do. But it is understood and declared that the right of all parties concerned are reserved entire, and noways prejudged or injured by the recording of said writings. The other papers found in the repositories were replaced, and the repositories were

afterwards sealed up by the said William Dykes, as judge, in presence of parties interested.

"The parties interested agree to adjourn further examination of the repositories till Monday next at eleven o'clock forenoon."

Another meeting of the relatives and parties interested in Mr Gilmour's settlement was held on the 9th April following, in which Mr Clark and his wife Mrs Agnes Gilmour or Clark took up the position that the moveable succession of the deceased William Gilmour was to be regulated by one or other of the two undated holograph deeds, which appointed Mrs Gilmour or Clark executrix and universal legatory, after satisfying the special legacies therein bequeathed. But wishing to behave liberally by the relatives of Mr Gilmour, they intimated that they had determined to give effect to both of these holograph undated deeds, so far as to omit no person to whom a legacy had been given in either, and to give each a choice which deed he would take under. The minute of this meeting bore that all the deeds were read over and explained to the meeting, particularly to that effect that the two first-mentioned testaments so far differ as that one of them omits the names of some relations mentioned in the other as legatees, while the other deed, omitting these names, appoints a division of the books and plenishing. "And Mr Clark stated, that although it was optional by law to Mrs Clark to select which of these two undated testaments she thought proper, yet it was her intention to act liberally towards the relatives, and that while she would include the names of said omitted relatives as entitled to their legacies, she would be also disposed, after selecting some particular articles, which in point of fact Mr Gilmour had gifted to her before his death, to make a reasonable division of other effects as recommended by the other testament, or pay an equivalent sum corresponding to the apprised value."

Upon this footing Mrs Clark entered upon her office of executrix. She was regularly confirmed executrix, and gave in an inventory amounting to £8749. She paid the different legacies bequeathed by both of the undated holograph deeds, and in 1826, having realised all the estate, she gave in an account of residue amounting to £7424, "being the amount of the said residue and monies which I am entitled and intend to retain to my own use as executrix and residuary legatee of the deceased, being descendant of a brother of the deceased." Upon this residue she paid duty at the usual rate.

Mrs Clark died in 1845, and at the date of this action was represented by the defenders, John Clark, her son, and George Espie, her grandson, the son of her deceased daughter Jane Clark.

Among the legacies which Mrs Clark paid in 1823 was one of £50 to Helen Armour or Jamieson, the pursuer's mother, a daughter of Andrew Armour, one of the sixteen nephews and nieces of the testator. This legacy was duly discharged by Mrs Armour or Jamieson and her husband.

The pursuer in the present action was John Jamieson, a son of this Helen Armour or Jamieson, and executor *qua* next of kin confirmed to his said mother. He brought this action of count, reckoning, and payment against the defenders Mrs Clark's representatives, on the footing that Mrs Clark was executrix merely and not residuary legatee, and that the two undated holograph deeds were only codicils to the original settlement of 1787, and did not annul it; that she was therefore bound to account for the whole residue, and he accordingly claimed the share which he was entitled to as his mother's executor under the said deed of 1787.

The summons was signeted 4th November 1870.

The pursuer pleaded—"(1) The foresaid disposition and settlement and relative codicils by the said William Gilmour were not recalled by either of the said undated testamentary writings, and the moveable estate left by him fell to be disposed of at his death under and in terms of the whole of the said settlements and testamentary writings executed by him. (2) The said Andrew Armour had right, as one of the nephews and next of kin of the testator, to a 1-13th share of the free residue of the estate of the said William Gilmour under the said settlements, and also to 1-208th of said residue, being 1-12th of 3-4ths of the share originally destined to the said Lillias Marshall or Steel; and the pursuer has now right, as the executor-dative of the said Mrs Helen Armour or Jamieson, to 1-7th of the said Andrew Armour's share of the said residue. (3) the defenders, as the representatives and next of kin and intromitters with the estate and effects of the said Mrs Agnes Clark, the executor-nominate under the said testamentary writings, and the said Robert Clark, her husband, are bound to account to the pursuer for the intromissions of the said Robert Clark and Mrs Agnes Clark with the estate and effects of the said William Gilmour, and to make payment of the share of the residue of the said estate to which he has right as aforesaid."

In defence against this action the defenders pleaded—"(1) The pursuer's mother having received payment of her whole interest in the succession of the said William Gilmour, the pursuer has no title to sue this action. (2) The averments of the pursuer are irrelevant, and insufficient to support the conclusions of the libel. (3) In the circumstances stated, and upon a sound construction of the foresaid two undated testamentary writings, the moveable succession of the deceased was exclusively regulated by the said two writings, or one or other of them. (5) The said claims were discharged by the pursuer's mother, and the same are now barred by said discharge, and by *mora* and taciturnity."

But the plea ultimately sustained was—"(4) The claims of the pursuer have, in any view, been extinguished by the negative prescription."

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

27*th July* 1871.—The Lord Ordinary, having heard parties' procurators, and considered the closed record, proof adduced, and productions, with the joint minute of admissions,—finds that the right of the pursuer to enforce the claim made under the present action is cut off by the negative prescription; therefore, and to that extent, sustains the defences, and assoilzies the defenders from the conclusions of the action, and decerns."

After narrating the circumstances already detailed, his Lordship proceeded in his Note as follows:—"It is in these circumstances that the present action has been brought, forty years after the date when the executry accounts were settled, and the estate realised, and the balance of the residue, after payment of the legacies appropriated, as alleged by the pursuer, by the executrix to her own uses and purposes. To this demand various defences have been stated, but the two mainly insisted in before the Lord Ordinary were—1st, that the claim was excluded by the negative prescription; and 2d, even if that were not so,

that upon a sound construction of the undated testamentary writings the moveable succession of the deceased fell to be regulated by them, as the heritable estate did by the deed of 1821, inasmuch as these three deeds, taken together, operated as a recal or revocation of the deed of 1787, by disposing of the *universitas* of the estate; and it was further pleaded that the pursuer's claims were barred by the discharge granted by his mother, and by her *mora* and taciturnity.

"1*st*, With reference to the last of these defences, and assuming the claim not to be met by the negative prescription, the Lord Ordinary, as at present advised, does not think that there are in the circumstances of the case materials to warrant him in giving effect to it. Because there is no evidence to show when the pursuer's mother died, or that she ever was aware that there was any other will than that under which her legacy was paid. Neither does it appear at what precise time the pursuer himself became aware of the existence of the deed of 1787; all that is proved is, that it was known to some of the family about 1839, when the pursuer was not of age, that such a deed had been executed; but it does not appear that he himself was then made aware of its existence. And in the absence of any distinct proof on this point, the Lord Ordinary is disposed to hold that the plea of *mora* and taciturnity cannot be maintained.

"2*d*, But upon considering the authorities, he has come to the conclusion that the plea of prescription constitutes a good defence against the present claim. The statutes by which the negative prescription was introduced, and under which it has been regulated, have for long been construed to apply to almost every species of claim or ground of action which has been allowed to lie over without being insisted in for forty years.—Stair, II. 12, 11, and 12, and More's Notes; Bankton, II. 12, 18; Erskine, III. 7, 8. In particular, they have from an early date been held to apply to the case of a claim under a testament, *Lindsay*, June 19, 1627, M. 10,718, 'albeit,' as the report bears, 'the Acts mentions only prescription of obligations, and this title was a testament whereto the pursuer alleged these Acts could not extend.' And in the more recent case of *Briggs*, Jan. 24, 1854, although the interlocutor of the Lord Ordinary finding the claim against the executor prescribed, was altered on the ground that the prescription had been interrupted, no doubt seems to have been thrown on the general doctrine that a claim against executors or general representatives might in the ordinary case be cut off by the negative prescription.

"The Lord Ordinary has carefully examined the case of *Burns*, March 5, 1857, relied on by the pursuers, but he has been unable to find that it in any respect derogates from the weight of these and other authorities. The case of *Lindsay* is, on the contrary, distinctly recognised as an authority in disposing of the case of *Burns;* while the later case of *Kinloch*, 27th May 1800 (M. App. 'Prescription,' No. 4 and 7), is referred to and adopted by the Lord President as deciding in regard to trust-funds 'which had been recovered or possessed beyond the forty years that the obligation to compel the application of them to trust-purposes had been lost.' Now, the decision in the case of *Kinloch* appears to the Lord Ordinary to have a direct bearing upon the present case. For it was there ruled that when a disponee in trust, who had been directed to invest funds in the purchase of land to be entailed, had realised those funds beyond the forty years, but neglected so to apply them, and mixed them up with his general estate, his representatives could not, after the lapse of forty years, be called on to account for them; and substituting the misapplication of residue for the misapplication of trust-funds, the cases appear to the Lord Ordinary to be in principle substantially the same, inasmuch as what is here complained of is the failure to divide among residuary legatees funds realised by the defender's predecessors upwards of forty years ago, which might have been made the subject of action by any of the numerous beneficiaries alleged to be injured by that transaction at any time since the year 1823.

"3*d*, The question whether the undated testaments operates a revocation of the deed of 1787 in regard to moveables, depends, in the view the Lord Ordinary takes of it, upon whether these testaments, or either of them, can be held to constitute Mrs Clark 'universal legatory' or 'residuary legatee' of the deceased?—Erskine, iii, 9, 6; Menzies' Lectures, p. 465. If they do, they are then quite inconsistent with the provisions of the deed of 1787 relative to the disposal of residue, and the case would then fall within the rules applied in *Sibbald's Trustees*, 13th Jan. 1871. The usual style of a will, where a testator leases his moveable estate to one executor, under burden of debts and legacies, is to nominate the party 'sole executor and universal legatory,' with power to intromit with the estate; Styles, ii, p. 433, 3d ed. Now, although the expressions here used are somewhat different, they rather appear to the Lord Ordinary to amount substantially to such a nomination, and to indicate an intention on the part of the testator to bequeath his whole moveable estate to his niece Mrs Clark, under burden of the legacies mentioned, which is just another way of making provision for the residuary legatees of the deed of 1787; and if that be so, there was no misappropriation of the funds. But, as upon the assumption that there was misapplication as alleged, the Lord Ordinary is of opinion that the negative prescription applies, he has disposed of the case upon that prejudicial ground."

Against this interlocutor the pursuer reclaimed.

WATSON and MAITLAND for him.

SOLICITOR-GENERAL and MACKINTOSH for the respondents.

At advising—

LORD PRESIDENT — The Lord Ordinary has found that the right of the pursuer to enforce the claim made under the present action is cut off by the negative prescription, and on that ground he assoilzies the defenders. In order to determine whether he has rightly sustained this plea of prescription in defence against the action, we must distinctly understand what the claim is. It arises out of the succession of Mr William Gilmour, who died in 1823, leaving a variety of deeds of a testamentary nature, which were found in his repositories after his death, as we see by the minute of 28th March 1823, printed in the joint print of documents in the case. He left two holograph testaments, both of them undated, but ascertained by circumstantial evidence to bear dates subsequent to 1819, and probably to 1821. But besides these two deeds, there was found a formal tested deed of settlement by Mr Gilmour and his wife, dated 26th June 1787, and also a settlement of heritage alone, made by Mr Gilmour after his wife's death, and dated 1st June 1821. The whole of these deeds so

found were delivered over to Mr Clark for the purpose of being recorded for preservation. The said minute, written at the opening of Mr Gilmour's repositories, farther bears that the rights of all parties were to be reserved entire, and to be no way prejudged by the recording of the deeds in this manner. Mr Clark, in conformity with his engagement, did record the deeds the very next day in the Sheriff-Court books of Ayr, and there they at present stand registered.

The deceased Mr William Gilmour had a great many relations of the same degree of propinquity. All his brothers and sisters predeceased him, but at one time he had sixteen nephews and nieces alive, and at the time of executing the two undated holograph testaments, as also at the time of his own death, his nearest relatives were his nephews and nieces and the children of the predeceasers. These parties were all interested to know what claims they had upon his estate. For the benefit of all concerned, Mr Clark placed the deeds upon the register, as already narrated. Another meeting of the relatives of Mr Gilmour was held on 9th April, about a fortnight after the opening of his repositories. At this meeting a good deal of discussion took place abou the way in which the settlement was to be carried out, and Mr Clark, on behalf of his wife Mrs Agnes Gilmour or Clark, claimed the position of executrix and universal legatee. He may not have done so in words, perhaps, but he undoubtedly did so in fact. The position taken up by Mrs Clark was thus made known to the rest of the relatives at that meeting. We cannot doubt therefore that the claim which she made on her own behalf, and the position she assumed, were distinctly made known to all the relatives.

Now, there were two questions which might have been raised at this time, first, whether, under the two holograph undated testaments, Mrs Clark was entitled to the character, not only of executrix, but also of universal legatory. The chief ground on which it is now said that she was not so entitled is that the residue of the estate was disposed of by the previous deed of 1787, and that that deed was not revoked by the subsequent ones. But there was also another ground, independent of the subsistence of the previous deed, namely, that while the deed under which she claimed gave her the character of executrix, it did not give her the character of universal legatory, but left the undisposed of residue to go in the ordinary way to the next of kin. Both these questions might have been raised at the time by the several parties interested in doing so, whether residuary legatees under the former deed or next of kin. But neither one or other of them was raised, and Mrs Clark having openly assumed the character of executrix and universal legatory, proceeded to administer the estate. She collected all the assets, amounting to nearly £9000. She paid the debts of the testator, and special legacies provided by the two undated holograph writings, and there remained a residue of something like £7400. This residue she took to herself, and declared distinctly in her stamp office account that she intended to retain it to her own use as executrix and residuary legatee of the deceased, and offered to pay duty thereon at the rate of 3 per cent., as "being a descendant of a brother of the deceased." Now, this account was not wound up, this declaration made, and the residue duty paid, until February 1826. It seems to have taken three years, therefore, to realise and pay off the claims upon the estate. In the meantime Mrs Ellen Armour or Jamieson, the mother of the pursuer, obtained payment of a legacy of £50 under one of the undated holograph testaments—the same which appointed Mrs Clark executrix. It is impossible that, dealing with Mrs Clark under these circumstances, she could not know that she claimed to herself the entire residue. And the question now arises, Whether the pursuer is prevented by lapse of forty years from now maintaining his claim, on the footing that Mrs Clark was not entitled to that residue, but that it fell to be divided in accordance with the provisions of the previous deed. Now, in determining this question it is necessary, among other things, to fix a terminus from which prescription can be held to run. The true terminus here is, I think, the point of time at which, all other things being settled, Mrs Clark took to herself the residue of the estate—that is, in the year 1826. Now, it has been said and argued with great ability that the negative prescription does not apply to cases of this kind; that an executor is nothing else than a trustee, and that so long as a trustee has trust funds in his hands not disposed of he is liable to account notwithstanding the lapse of forty years. But this is not sound. An executor is not trustee in the sense of depository. A trustee is a party directed to hold an estate or fund, which an executor is not entitled or intended to do. An executor's duty is to realise and divide—not only to hold. Moreover, an executor is bound to pay as soon as he can after the lapse of six months from the death of the testator. He would be liable in interest if he did not. An executor is, in relation to the deceased's representatives and legatees, merely a debtor, with limited liability certainly, but still just a debtor to the extent of the amount of the executry estate. All who claim against him claim as creditors. And this, I think, solves the question before us at once, for it cannot be disputed that every claim of debt is liable to be cut off by the negative prescription. And when you get the time at which the debt is demandable, you then get the time from which the prescription is to be reckoned. Now, can anyone doubt that, at 1826 at any rate, the claim of the pursuer's mother might have been made and insisted in if it was good. It was a claim of this nature;—"You, Mrs Clark, are, as Mr Gilmour's executrix, due to me, as one of his residuary legatees, a certain share of the residue of £7400." If this claim were well founded, this was just the very time at which it should have been made. It was not made then. Nor has it been heard of for more than forty years, and therefore it is now cut off by the negative prescription.

Lord Deas—There were two questions argued before us. The first, as to what was the character conferred on Agnes Gilmour by the will or wills of the deceased William Gilmour, and the second as to whether any claim which might otherwise have been made against her has not been cut off by the negative prescription. Mr Watson, in his argument, admitted that if this lady's character under the will of the deceased were that of universal legatee, the case would be at an end, and no question of negative prescription would arise. Now, it rather appears to me that in a case of this kind the first thing to ascertain is what was the character conferred on this lady by the testator. If she was made trustee or executor simply, then we must inquire what are the rights and duties involved in the assumption of that character. If she was uni-

versal legatee, we have of course nothing to do with any question of negative prescription. If there is any doubt about the first question, we may indeed have farther to consider the point of negative prescription, but if we are satisfied under that first question to answer that she was universal legatee, then we are quite relieved from any necessary consideration of the second question about prescription.

Now, my opinion is that Mrs Gilmour or Clark was appointed universal legatee. The testator did not call her so in so many words, but he used terms which clearly had that meaning. The documents which are to be held as constituting this gentleman's will are, I think, without doubt, one or both of those undated holograph deeds. These are plainly subsequent to the other deeds executed by him, and it is clear that one or both of them superseded what went before so far as dealing with moveable estate—the heritable estate being dealt with separately. I do not at all go upon the ground that these writings commence with the usual introduction to a last will and settlement, and that this is conclusive that they were intended to supersede all that had gone before. Before you can hold that, you must read on and consider the whole deed. I quite recognise the doctrine laid down in *Stodart's* case. In that case it was plain on the face of the deeds that, in spite of their narrative at commencing, they did not supersede the previous ones, for they did not dispose of nearly the whole property left by the previous deeds. What I go on here is, that besides this introductory narrative, it is clear *ex facie* of the deeds that they were, one or both of them, intended to supersede the earlier writings—and I do not think it matters much which of the two is held the last executed, or whether we hold them both together as composing this gentleman's last will. The only material question on these deeds is whether they constitute his niece Mrs Clark his universal legatory, under burden of his debts and certain specific legacies to his other relations. There seems to me no doubt that he did so appoint her. He says "I hereby appoint Agnes Gilmour to be executor;" that is all he says about executor; but then he goes on to add, "universal intromitter with my goods and money, except what is otherwise mentioned afterwards." This he explains by the subsequent words—"and that under the following burdens, to pay my debts and the following legacies." He then provides certain specific sums of money for his different nephews and nieces. Now, it is one thing which makes it clear to me that these deeds, one or both of them, superseded the previous settlements of moveable estate, that these very nephews and nieces who were to receive these specific legacies were just the very persons, or rather the survivors of the persons, who in the previous deeds were made residuary legatees. Now the words "universal intromitter," as applied to Mrs Clark, is just as good as "universal legatory," if it is quite clear from the deed that they are used in this sense. I am of opinion that on the face of these deeds Mrs Clark was made universal legatory, and for forty years and more these deeds have been so construed by the parties most interested in them.

With reference to the knowledge of all this on the part of the pursuer's mother, far the most important circumstance is that these deeds were registered together in 1823 as probative writs, and that in her own receipt, dated in the same year, she acknowledges Mrs Clark as executrix nominate, and takes payment from her of a "pecuniary legacy of fifty pounds," in her own character, as "descendant of a sister of the deceased." It is altogether impossible that a party who signed that receipt should now say that she did not know the terms of these testamentary writings, and it places it beyond all doubt that she claimed nothing more than her legacy of £50. We have therefore enough to show that the pursuer's mother herself so construed these deeds as to acknowledge Mrs Clark to be universal legatory. This, to me, is conclusive of the whole case before us. But it equally bears upon the point of prescription. If Mrs Clark possessed the character of universal legatee, the question of prescription cannot arise, but if that be doubtful the question of prescription does come in. And if it must be considered, I have little hesitation in saying that the whole difficulty here in holding prescription applicable lies in the question, whether there is a sufficient terminus established. If a party hold a properly fiduciary position, I do not mean to suggest that a claim against him in that character will be cut off by the negative prescription. But if a party hold also for himself as well as in a kind of fiduciary character, the circumstances are different. If a specific claim exists against that party, as at the instance of a special legatee, and is not insisted in, then I have no doubt that the negative prescription does run against that claim. The difficulty here is to find a term of payment. If it can be held that there was a specific time at which this claim ought to have been paid over, then there is no difficulty in determining whether the years of prescription have run or not. I do not differ from your Lordship in thinking that there is enough to fix a term of payment, and that prescription has run against the claim.

Lord Ardmillan—The Lord Ordinary has sustained the plea of negative prescription. The case is one in which the claim was made more than forty years after it emerged, and at first sight negative prescription seems appropriate. The pursuer says, however, that Mrs Clark had, by the deeds under which she acted, a character imposed upon her of the nature of trust or fiduciary mandate, and he argued that in such a case the plea of negative prescription cannot be maintained.

I propose to begin with the pursuer's allegation, and to ask, did Mrs Clark hold the position attributed to her? I have carefully considered the deeds, and I do not think it material which of these undated deeds we hold to have been first executed. Whichever of them we hold to be the first — and I do not know that we have the means of deciding between them—I am quite of the opinion expressed by Lord Deas, that one or other of them supersedes the older deed of 1787. In both of these undated deeds Mrs Clark is named executor, but they do not stop there, they go on to make her universal intromitter with the whole funds and moveable estate of the deceased, subject to certain debts and legacies specially enumerated. This is, to my mind, only intelligible as a burden or deduction upon the residue, which, as universal intromitter, she would otherwise take.—That is to say, if we can hold universal intromitter as equivalent to universal legatory. I think that there is little doubt that we must do so. We have the word intromit used technically by the testator in the previous deed of 1787. By its use there he clearly

intends to give it the character of beneficial enjoyment. To the same word used in the undated deed I am of opinion the testator meant the same meaning to apply. Now, if it be the case that Mrs Agnes Gilmour or Clark was universal legatee, there can be no room for the plea of negative prescription here.

But I think we must go farther, and consider whether, apart from this, even assuming that Mrs Clark was not universal legatory, but only executrix, the plea of negative prescription can be maintained. I do not wish to touch the question as to what might be the law were the attempt made to plead negative prescription by an executor acting in a really fiduciary character in relation to the residue of an estate, and who wrongfully appropriated that residue to his own use. No such case as that is before us. Here, in every view of the case, it is a question whether Mrs Clark was residuary legatee or only executrix. It was a fair question to raise, and might have been raised at the time. Mrs Clark made her claim to the character she assumed openly and unreservedly. I can see no possible ground for throwing any doubt upon the uprightness of her conduct and intentions, and I think that the exclusion of this action at the present date by the operation of the negative prescription is one of the very best uses to which that exception of our law can be put. Though I hold that Mrs Clark was clearly under the deeds universal or residuary legatee, still I should have no doubt that, on the other view, the plea of negative prescription would be properly sustained.

Lord Kinloch concurred.

Agents for Pursuer—A. & A. Campbell, W.S.
Agents for Defenders—Campbell & Espie, W.S.

Wednesday, January 24.

SECOND DIVISION.

M'MARTIN *v.* HANNAH.

Reparation—Negligence—Property.

A girl of seven years of age who had been calling on an errand at a house in a common stair, fell through a gap in the railings at the outside of the house and was killed.—*Held* that it was the duty of the proprietor of the house to repair the railing, and not having done so, he was liable in damages to the father of the girl.

This was an action of damages in the Sheriff-Court of Lanarkshire by Peter M'Martin against A. Hannah, for the death of his child. The Sheriff-Substitute (Murray) found for the petitioner, and gave £20 as solatium. The Sheriff (Bell) adhered, and added the following Note to his interlocutor, from which the facts and questions of law sufficiently appear:—"The first question to be disposed of in this case is whether the child Christina M'Martin met her death by accidentally falling through the gap in the stair railing, occasioned by the absence of one of the bannisters. Although no one actually saw the occurrence, the circumstantial coincidence, including the facts of some of her hair being found on the gas bracket immediately adjoining the gap, and of her being physically incapable of climbing over the cope of the railing, is such as to leave no rational doubt that the above question must be answered in the affirmative. The next is, whether there was such culpable or undue negligence on the part of the defender in permitting the existence of so dangerous a state of disrepair in his property as to subject him in damages? This question must also be answered in the affirmative, in respect it is proved that the state of disrepair had continued for at least six months; that the gap was quite large enough to admit of a child falling through; that the stone of the step in which the bannister had been fixed was itself worn away, which would the more readily lead to a child missing its foot; that the defender's factor and overseer had been warned of the state of matters, and that nothing was done till the fatal occurrence took place. It is true that if either a child or a grown person wilfully or carelessly expose themselves to danger, and injury ensues, no claim for compensation will lie against a party making a lawful use of his property, as was found in the recent case of *Grant*, Dec. 10, 1870, referred to by the defender. But, on the other hand, the law requires an owner to keep his property in an ordinarily safe condition; and if he does not, and some one suffers in consequence, carelessness is not to be presumed on the part of the sufferer, the fault of the proprietor being apparent. The last consideration in the case is, what is the fair sum of 'damages and solatium' to be awarded to the pursuer. He did not suffer any pecuniary loss by the death of his child, she being, on the contrary, a burden on him, and likely to have continued so, as she was weakly and decrepit. A father, however, may in certain circumstances be entitled to large compensation for the distress of mind occasioned to him by such a death. But in the present instance it is proved that the pursuer deserted his wife before the deceased was born; and although he afterwards contributed to the support of his family, and occasionally came to see them, he did not live with them in the ordinary domestic relationship, and cannot therefore be supposed to have felt the ties of parental affection very strongly. On the whole, therefore, the Sheriff is of opinion that the sum fixed on by the Sheriff-Substitute is sufficient in name of solatium."

The defender appealed.

R. V. Campbell for him.

Mackintosh for the respondent.

The following authorities were referred to—*Begbie* v. *Fraser*, 20 D. 81; Allison on Torts, 582; *Robertson* v. *Adamson*, 24 D. 1231.

At advising—

Lord Cowan—There is some nicety in the case, and at first sight it appeared to me hard that the landlord, who was not personally a delinquent, and who, as soon as he knew the defective state of the railing, got it put in order, should be found liable in damages. But on examining into the grounds of the Sheriffs' judgments, I am satisfied that the result at which they have arrived is consistent with the facts and legal principles applicable to the facts. The defender is proprietor of a tenement of houses occupied by twelve different families. It may be that the tenants undertook to repair the insides of these houses, and so may have taken any risk arising from defects there. But the accident arose from the defect in the stair railing outside, which it was the landlord's duty to repair, and he cannot shake himself free from the responsibility—(*His Lordship here read the first part of the Sheriff's note quoted above*). I think these facts have been established. Although the proprietor himself was not aware of the state of the railing, the person who acted for him was.