the testator's probable intention. I regard the meaning rather to establish a sort of legal relation, taking the mother as a "stirps" in place of the father.

On the whole, I concur in Lord Benholme's view; and although I am by no means clear that we have discovered the testator's meaning, yet this appears the most probable interpretation of the clause.

LORD JUSTICE CLERK—On the whole I am inclined to agree with the result at which Lord Benholme has arrived. I feel quite clear that the testator did not by reason of uncertainty die intestate; and then the question alone remains, whether the succession is to go as a *universitas*, or whether the heritable and moveable parts thereof divide? All throughout the settlement the distinction is maintained between heritage and moveables very clearly, and therefore, but without expressing a confident opinion, I concur with Lord Benholme.

The Court pronounced the following interlocutor:—

"Refuse said note, and adhere to the interlocutor complained of: Find no expenses due to either party, and decern."

Counsel for Reclaimer and for Thomas Waddell —Millar, Q.C. and Guthrie Smith. Agents—W.P. Anderson, S.S.C.

Counsel for Pursuers and Real Raisers and for Mrs Agnes Waddell or White and Husband—Solicitor-General (Clark), Q.C. and W. A. O. Paterson. Agents—Keegan & Welsh, S.S.C.

Counsel for George Archibald—Watson & Millie. Agents—Watt & Anderson, S.S.C.

Saturday, December 14.

SECOND DIVISION.

[Sheriff of Edinburgh.

CLARK *v.* STEWART.

Lease—Breach of Contract—Sale.

A let to B certain premises by written lease, and further, by it undertook to supply a certain amount of steam-power.—*Held*, in a question between the parties as to the steam-power, that the action must be deemed one for breach of contract. *Observed* that the bargain was rather one of sale than of lease.

This case came up on appeal from the Sheriff. Certain premises at Silvermills were let on a five years' lease by the pursuer Clark to the defender Stewart; the pursuer further, in another clause of the lease, "lets to the said John Stewart junior a portion to the extent of eleven horse-power of the steam-power of the engine to be erected by the said Martin Clark upon the said subjects; and, until the said new engine is erected, he binds himself to furnish the said John Stewart junior with power to the extent of five horse from the present engine for the use of the works to be carried on by the said John Stewart junior, and obliges himself to supply the said steam-power to the said John Stewart junior and his foresaids during the currency of this tack, each week-day for the usual working time of ten hours, except Saturdays, when the same shall be supplied for six ordinary working hours, and except at such times as it may be necessary to repair the said engine, and the said Martin Clark shall supply and put up the main shaft and driving pulley in connection with the said engine, and shall keep the said engine and shaft and pulley in good working order during the currency of this lease at his own expense." The defender got access to the premises in March 1870, and commenced business on April 20. but he asserted that Clark was unable to supply him with steam-power, as he was bound under the contract to do, and, in consequence, before Whitsunday he took down his machinery. The pursuer averred that he had fulfilled his contract, and had the larger engine ready, and sent notice of the fact to the defender on July 26th 1870. The claim made was in all for £26, 4s. as the rent due for the steam till November 11th 1870, with a reservation of any claims for future payments under the lease. The Sheriff-Substitute (CAMPBELL) allowed joint probation, and thereafter, on consideration of the closed record, proof, and productions, and whole process, and having heard counsel for the parties, appointed the case to be put to the roll, adding in his note—"The Sheriff-Substitute would desire to hear the parties as to whether the pursuer is entitled to sue on the contract just as if he had been allowed by the defender to fulfil it by supplying the power. Or whether he is only entitled to sue the defender for the damage he has sustained by the defender's refusal to take the power. It might also be well to consider whether, if the pursuer is entitled to sue for the contract price of the power which the defender refused to receive, and which was consequently not manufactured by the pursuer, the defender is not entitled to insist that the cost of producing or manufacturing such steam ought to be deducted from the price or rent charged for it. A remit to a man of skill might settle the question as to the cost of production of the steam power. Would not such cost, if deducted from the price or rent charged, furnish something like an approximation to the sum to which the pursuer is entitled?"

On 28th July 1871 the Sheriff-Substitute pronounced an interlocutor finding for the pursuer, and remitting to Mr Slight, an engineer, to inspect and report on the minimum cost of the production of the steam-power which by the contract was to be furnished. The finding on the point was as follows:—"Finds that the pursuer is further entitled to payment for 5-horse steam-power at the said rate, from 20th May to 26th July, both inclusive, and for 11-horse steam-power at the said rate, from 27th July down to 11th November 1870. but subject to deduction of the minimum cost which he would have been compelled to incur had he produced or manufactured the steam power charged for, and which he would have required to supply had the defender received the same as he bound himself to do under his agreement in the lease aforesaid." And in the note appended it is added—

"*Note.*—After a careful consideration of the authorities, the Sheriff-Substitute has come to be of opinion that the present case falls under the principle upon which the case of *Calterns* v. *Tennent* was decided in the House of Lords. Where there are contained in the same instrument a lease of premises at one rent, and an undertaking to supply steam power at another and separate rent or price, these are to be regarded as distinct obligations, the first a proper lease, the second a mere

ordinary contract. Whether this contract is to be regarded as a contract of sale or of location seems to be rather a matter of metaphysical speculation than of practical importance. It may be said that steam power is as much an article of manufacture as beer or broadcloth, and that the contract here was truly a contract to sell and deliver so much steam power. On the other hand, it may be argued that this contract is analogous to the hiring of the labour of one's horses or servants for a given time. But whether it be a contract of sale or location, it is at all events not a lease, but a mere personal contract, to be enforced in the ordinary method, and protected by the ordinary sanctions.

"On the proof, in spite of some contradictory evidence, the Sheriff-Substitute is satisfied that the pursuer did, during the first nineteen days of May, furnish, and the defender did receive, the five-horse steam power charged for, and the defender has judicially admitted this in his minute of defence; and for payment of the steam-power so let or sold and delivered there can be no doubt that the pursuer is entitled to decree; and for that the defender has been found liable accordingly. But what is the extent and nature of the pursuer's remedy in so far as relates to the time during which the defender has refused or failed to receive the steam-power in terms of the agreement between the parties? Looking to the mode of enforcing such agreement, the Sheriff-Substitute thinks that the pursuer is entitled to the *maximum* of profit which he could have realised by the execution of the contract; and, in order to determine what that amounts to in this case, he has made the foregoing remit, with the view of ascertaining the *minimum* cost at which the pursuer could have produced the steam-power had the defender received the same as it was his duty to do; and this cost being deducted from the rent or price charged for the steam-power under the agreement, will give the amount of profit which the pursuer would have realised had the agreement been fully carried out. This seems to be the principle given effect to in the case of *Downie, Bell, & Mitchell* v. *The Edinburgh and Leith Shipping Co.*, March 6, 1834, 12 Shaw, 528. See also *Boswell* v. *Kelborne & Morrell*, Moore's Privy Council Reports, vol. xv., p. 309; and *Morrison* v. *Boswell*, March 4, 1806, F.C. and Paton's Appeal Cases, vol. v., p. 649. The same principle appears to be recognised in the cases of *Emmons* v. *Elderton*, Clarke's House of Lords Reports, vol. i., p. 645; and *Beckham* v. *Drake, ibidem*, vol. ii., p. 606.

"On these authorities, as well as on general principle, as indicated in the Note to his previous interlocutor of 30th June 1871, the Sheriff-Substitute is of opinion that, while the pursuer is entitled to be indemnified for all loss he can possibly sustain by the defender's breach of the contract between the parties, the pursuer is not entitled to make profit by such breach, so as to draw payment for the price or hire of steam-power which he has never had occasion to produce, owing to the defender's declinature to receive it."

Mr Slight, the engineer, reported, and subsequently decree in terms of his report for £13, 18s. 4d. was given against the defender, and certain objections to the report were repelled.

The Sheriff-Principal (Davidson) dismissed the appeal taken to him.

The Court of Session allowed before answer a proof of the minimum cost at which the steam-power could have been produced by the pursuer at the time. This proof was taken on 4th November.

For the appellant it was argued, that steam has a certain commercial value, and this is usually put at £10 per each horse-power. That an "indicator" is invaluable in showing what is the actual horse-power, and, indeed, is the only means of arriving at it. Without such an arrangement the nominal horse-power can be ascertained only by a calculation based on the size of the boiler. That the evidence of various owners of steam-mills of different power supported this view of the matter.

The pursuer argued, on the other hand, that all such questions are matters of circumstances. A man may know as to his own mills, but it does not follow therefore that he knows equally well as to those of others. The importance of an "indicator' had been greatly magnified. The pursuer from his trade of a wood turner could provide a much cheaper fuel than coal, a fuel now being used in place of coal, and this production of steam-power was an advantage to him, of which he was entitled to reap the benefit.

At advising—

Lord Justice-Clerk—I think this litigation is one much to be deplored, as it is about a very trifling matter. The summons concludes for £26, 4s., as the rent due for steam-power for a certain time. The defender says he was at that time ready to pay for three weeks' supply, but that the pursuer failed in his portion of the agreement. The two parties were conterminous proprietors, and the steam-power had been let by the one to the other. The pursuer avers that, save for a week or two, no steam-power had been furnished at all. The lease was for 5 years, and the substantial question is as to the fact of the fulfillment of the contract. The Sheriff excluded, and in my opinion rightly, the question as to furnishing the steam itself. He also came to the conclusion that this was a bargain truly of sale, not of lease, and that it was necessary for the pursuer to prove the amount of his loss. Therefore he remitted to a man of skill to report on the minimum cost of producing this steam-power, and decerned accordingly. I think it most unfortunate that the case did not end at this stage; but an appeal was taken, and the question as to a lease or a sale was again raised. We are of opinion that this must be held to be an action for breach of contract. A proof before answer was allowed, but at least three-quarters of this proof, which was led at great length and expense, had no real bearing on the question. I do not see my way to find any specific sum due. I think your Lordships should rather give a nominal sum of damages, say £5, that we should leave the expenses in the Sheriff-court as they stand, and that in this appeal none should be allowed to either party.

Lord Cowan—I think the interlocutor of the Sheriff-Substitute in this case is exhaustive. It is full of legal learning, and I fully agree with the conclusions at which he has arrived. Truly, the question comes to be, what is the amount of damage? The pursuer had, in the production of steam-power, undoubtedly great facilities over those possessed by mill-owners in ordinary. I concur with your Lordship, and think £5 damages, without expenses to either side, will meet the exigencies of this case.

Lord Benholme—The real question is, at what price could this man produce steam-power? There is not here merely the evidence of scientific witnesses required; we must also take into consideration what the peculiar circumstances of the case enabled the pursuer to do. To these peculiar circumstances I think scarcely sufficient weight has been given. To both parties in this cause the results have been most disastrous, and I deplore a litigation which should have ceased after the report by the man of skill.

Lord Neaves—Your Lordships did not regard a mere inspection by a man of skill as sufficient, and therefore a proof before further answer was allowed. This proof has not in any way been a fortunate business for either party. If anything, the indulgence to the defender we have shown may have been too great, but, on the whole, I concur with your Lordship's views, as in the circumstances best calculated to dispose of the question at issue.

The following interlocutor was then pronounced:—

"Find it is established that the defender entered into the agreement libelled, and that he failed to implement the same: Find that the pursuer has failed to establish any sum as the minimum cost of producing the steam power which he undertook to furnish, Therefore recall the judgment in so far as the merits are concerned: Find that the appellant is liable to the respondent in the sum of £5, in respect of his having violated the agreement libelled: Find no expenses due in this Court: Adhere to the judgment complained of in so far as it decides the question of expenses in the Court below, and decern."

Counsel for Pursuer and Respondent—J. P. B. Robertson. Agents—Gillespie & Paterson, W.S.

Counsel for Defender and Appellant—Millar, Q.C., and Smith. Agents—J. B. Douglas & Smith, W.S.

Wednesday, December 18.

FIRST DIVISION.

LANG *v.* ERSKINE

Process—Appeal—50 Geo. III. c. 112, ⸹ 36—16 *and* 17 *Vict. c.* 80, ⸹ 24.

The 36 section of the Act 50 Geo. III, c. 112, provides, *inter alia*, that Bills of Advocation from the Sheriffs and other inferior judges shall be allowed in respect to an *interim* decree for a partial payment, provided leave is given by the inferior judge.

The 24th section of the Act 16 & 17 Vict. c. 80, provides, *inter alia*, that it shall be competent to take to review of the Court of Session any interlocutor of a Sheriff giving *interim* decree for payment of money; and the enactments of 50 Geo. III. c. 112, are, so far as inconsistent with this enactment, repealed.

Held (after consultation with the Second Division) that it is competent to appeal against an interlocutor of the Sheriff giving *interim* decree for payment of money, without leave from the Sheriff.

Act. Balfour. Agents—Muir & Fleming S.S.C. *Alt.* Gloag. Agents—Ronald, Ritchie & Ellis, W.S.

Friday, December 20.

FIRST DIVISION.

SPECIAL CASE—ALLAN AND DAVID HUTCHISON.

(Heard before Seven Judges.)

Vesting—Service—Heir of Line—Heir of Conquest—Substitute—Conditional Institute—Disponee.

A party disponed the fee of his heritable estate to the heirs of his own body equally, share and share alike, whom failing, to his brothers A, B, C, D equally, and died without heirs of his body. A service was expede in their favour, but B died before it was carried through, without issue and intestate. *Held* that his share of the property went to the heir of conquest.

The question in this case was whether a certain property went to the heir of line or the heir of conquest. The facts will be found stated in the opinion of the Lord President, who delivered the judgment of the Court.

Argued for David Hutchison, that a right vested in Robert Hutchison before his death. There was no conveyance of a fee, constructive or otherwise, to the granter of the deed himself, and it operated as a divestiture of him because he did not convey to himself as institute, and he continued to hold in spite of, not in consequence of, it. The deed, as soon as it came into operation by the death of the granter, acted as a direct disposition to the disponees, and no service was necessary: the beneficiaries under it took as disponees, not as heirs. If there be a *nominatim* disponee, who dies before the granter, the next substitute takes as direct disponee; a conveyance to non-existing persons, and a conveyance to predeceasing persons, have equally little influence in controlling the destination. It has been suggested that a conveyance to heirs of the body must be held by implication to be a conveyance to the father himself, in order to get rid of the difficulty of the fee being *in pendente* during the non-existence of those heirs, but there is no necessity for such a construction here.

Argued for Allan Hutchison, that no right had vested in Robert Hutchison at the time of his death; the granter of the deed was himself the institute as fiar, the others being merely substitutes.

Authorities—*Colquhoun* v. *Colquhoun*, July 8, 1831, 9 S. 911, Lord Craigie's opinion; *Fogo* v. *Fogo*, Aug. 18, 1843, 4 D. 1063, 2 Bell, 195; Ross' Leading Cases, ii, 36; *Gordon of Carlton* v. *His Creditors*, M. 14,366-14,368; *Mackenzie* v. *Mackenzie*, Session Papers, F.C., 1818-19, No. 190; *Peacock* v. *Glen*, June 22, 1826, 4 S. 742; Bell's Principles, 1834-39; Menzies, p. 795; Montgomery Bell's Lect. p. 1022; *Anderson* v. *Anderson*, June 22, 1832, 10 S. 696, note p. 701; Bell's Illustr., ii, 425-8.

At advising—

Lord President—The facts of this case admit of being very shortly stated. John Gilmour by *mortis causa* deed disponed the fee of his heritable estate to "the heirs of my own body, equally among them, share and share alike; whom failing, to and in favour of David Hutchison, Robert Hutchison, Allan Hutchison, and James Hutchison, my brothers uterine, equally among them, share and share alike, and their respective heirs"