to the great danger of its health and life, and did so deal with and dispose of it that its said mother has not been able to recover it, and that it has not since been seen or heard of, notwithstanding the most diligent search and inquiries."

SHAW, for the panel, objected to the relevancy of the minor propositions of the libel, in respect that (1) the description of the *locus delicti* was not sufficiently specific, and gave the prosecutor too great latitude; (2) in particular, some one portion of the hill of Startup ought to have been libelled; (3) the description of the *modus* was too vague; (4) that "to deal with and dispose of a child so that its mother has not been able to recover it," is not a criminal act.

Authorities — *Michie*, Oct. 10, 1845, 2 Brown 514; *M'Que*, Feb. 20, 1860, 3 Irv. 552.

DARLING, for the prosecution, answered that it was true the prosecutor must specify as far as in his power, but that where from the occult nature of the crime he was unable to specify he had fulfilled his duty in giving all the information which he possessed as to the *locus* and *modus* of the offence. In the case of *Michie* the injured person was not dead, and might reasonably be expected to remember on what part of the hill of Balnabroich the assault had been committed; while in *M'Que's* case the body of the child was recovered and bore the marks of the injuries received. Here the body of the child was amissing notwithstanding the most diligent search; and if the prosecutor were not allowed some latitude it would be impossible to frame an indictment against such a crime. Moreover, the Court had allowed such latitude in the case of *Crosbie*, May 17, 1841, 2 Swint. 550, and Baron Hume specially remarks that in cases of child murder it may often be necessary to allow the prosecutor a greater latitude in the statement of both the *modus* and *locus delicti* than is warranted in ordinary cases—Hume ii, 192 and 217.

Objections repelled.

Counsel for the Crown—Darling.

Counsel for the Panel—Shaw.

COURT OF SESSION.

Thursday, December 16.

FIRST DIVISION.

[Lord Craighill.

ANDERSON *v.* GARSON.

Process—Reclaiming Note—Reponing—Decree by Default.

A defender prayed to be reponed against a decree by default. *Held* that the granting or refusing such a prayer is matter for the discretion of the Court, and in the circumstances remit made to the Lord Ordinary to repone upon payment of previous expenses.

Garson was a member of the Imperial Building Association, and one of the defenders in an action brought against the Association by Anderson, another member, for payment of £420, the amount of a bill which he, as one of the trustees for and specially authorised by the Association, had accepted on their behalf, and which he had himself paid under threat of immediate personal diligence, the Association having failed to meet it. Defences in the action were lodged for Garson and another, and decree in absence was pronounced against the latter. When the case was called in the procedure roll, Garson at that time being the only defender, no appearance was made for him, and decree was given against him by default.

Against this decree he now prayed to be reponed, on the ground that he had not observed the case in the rolls. Garson acted as his own agent.

The following authorities were quoted—*Arthur* v. *Bell*, 16th June 1861, 4 Macph. 841; *Wilson* v. *Stark*, Feb. 17, 1844, 6 D. 692; *Young* v. *Mackenzie*, July 19, 1859, 21 D. 1358; *Boak* v. *Watson*, July 14, 1860, 22 D. 1468; *Gordon* v. *Fraser*, June 7, 1831, 9 S. 690; *Maclaren* v. *Robertson*, May 29, 1857, 19 D. 769.

At advising—

LORD PRESIDENT—This is a decree by default, and not a decree in absence, against which the defender desires to be reponed, and I am not disposed to depart from what I said in the case of *Arthur* v. *Bell*, 4 Macph. 841. I think it is a matter in the discretion of the Court whether the party against whom a decree has gone out is, in the first place, to be reponed at all, and, in the second, if so, upon what conditions. The Court has had occasion to see and know that many decrees go out against parties in circumstances which show fault and negligence on their part and that of their agents, and we must take care that they are not reponed against these decrees on conditions that are too light. I think that the defender ought in the circumstances to be reponed, but he must pay the previous expenses which have been incurred in this case.

The other Judges concurred.

The following interlocutor was pronounced:—

"Remit to the Lord Ordinary to repone the said defender on payment by him of the expenses incurred by the pursuer in the cause up to this date."

Counsel for the Pursuer—Trayner. Agents—A. & G. V. Mann, S.S.C.

Counsel for the Defender—Mackintosh. Agent—Party.

Friday, December 17.

FIRST DIVISION.

SPECIAL CASE—STEWART ROBERTSON AND OTHERS.

Entail—Clause of Devolution.

A truster directed his trustees to hold his property for ten years, and then to execute an entail in favour of the heirs whomsoever of his own body, whom failing in favour of A and the heirs male of his body, and he directed a certain yearly allowance to be made during the subsistence of the trust to the person who would be the first to take under the entail. He also directed the trustees to insert a clause excluding from the succession the heir of entail in possession of a certain other estate. A succeeded to the latter estate during the subsistence of the trust. *Held* that he was not entitled to the annual allowance.

The late Mr Hepburn of Colquhalzie left a trust-disposition and settlement by which he directed his trustees to hold his estate for a specified time, and then to execute an entail in favour of a certain series of heirs. By the sixth purpose of the trust he directed payment of the whole free income of the trust-estate to his wife in the event of her surviving him. The seventh and eighth purposes of the trust were as follows:—"*Seventh*, That my trustees shall continue the trust hereby created during the life of my said wife, and for at least ten years after my death, although her death may occur within that time, and shall have power thereafter to continue the same for such longer period as in their own discretion they may deem expedient, and after the decease of my said wife they shall pay such legacies as she may bequeath by a writing under her hand, so far as the personal estate left by her may be sufficient for that purpose, but the payment thereof from my estate not to exceed in all £1000: *Eighth*, After the death of my said wife, and while the said trust hereby created shall continue to subsist, my trustees shall apply the free rents of my lands of Colquhalzie, and, if necessary, a part of the annual produce of the other trust-estate, towards the education, maintenance, and upbringing of the heir who would then be entitled to succeed to my said lands under the destination after contained, if in minority, it being my wish that the education of such heir shall include a professional education if required, and shall be conducted upon the most liberal scale consistent with the circumstances of the trust; but providing always that the sum to be allowed for the foresaid purposes shall not, in the case of a male heir, exceed £200 per annum, and in the case of a female heir £150 per annum; but declaring that in the case of a male heir my trustees shall also advance such sum or sums as may be required for payment of apprentice fee, for purchasing commissions in the army, or otherwise fitting him out in the world; and in the event of the heir who at the death of my said wife would be entitled to succeed to the said lands under the designation before referred to being major, or on the heir then in minority as aforesaid attaining majority, such heir, or any other heir who during the subsistence of the said trust shall for the time being be the heir entitled to succeed as aforesaid, and shall be of full age, shall be entitled to be paid by my trustees, while the said trust continues, at the rate of £200, or £250, or £300 per annum, according to their own discretion and their judgment of his or her capacity for prudent management, or in the event of his or her being married, with the approbation of his or her parents and my trustees; but providing always that there shall be reserved a surplus of at least £200 per annum of the revenue of the trust-estate, to be accumulated during the subsistence of the trust, and to be expended at the final close thereof in manner directed in article tenth of the purposes hereof, or disposed of in terms of the second branch of the last article of said purposes, all as hereafter written; and I also give power to my trustees, if satisfied of the prudence of such heir, to allow him or her the produce of the said lands of Colquhalzie, and the actual possession of the mansion-house, offices, garden and orchard, and such other parts of the said lands of Colquhalzie then unlet as he or she may choose to take into his or her own occupation."

The trust-deed contained a power of revocation, and by a codicil Mr Hepburn changed the series of heirs specified in the trust-deed, and directed the trustees to execute the entail "to and in favour of the following series of heirs, viz., to the heirs whomsoever of my body; whom failing, to James Stewart Robertson of Edradynate, my second paternal cousin, and the heirs-male of his body; whom failing, to the heirs whatsoever of his body; whom failing, to the other heirs and substitutes therein specified."

The codicil also contains the following provision:—"Further, considering that the said James Stewart Robertson is heir of entail presumptive to the lands of Cluny and others, now in possession of Mrs Helen Stewart Hepburn, my wife, in virtue of a deed of entail executed by Adam Stewart of Cluny, her father, under which the heir of entail in possession thereof bears the name and title of Stewart of Cluny, and that it is my intention that the foresaid estate of Colquhalzie and others shall be held by a series of heirs different from those succeeding to the said estate of Cluny, and with the name and title of Stewart Hepburn of Colquhalzie—therefore I direct my trustees to insert in the said deed of entail to be executed by them a condition in such terms as shall in their opinion effectually provide and secure that in the event of the succession to my said lands and others opening to an heir who shall be at the time proprietor or heir of entail in possession of the said lands of Cluny and others, or of the succession to the said lands of Cluny and others opening to an heir who shall at the time be proprietor or heir of entail in possession of my said lands and others, in virtue of the said deed of entail to be executed by my trustees, the right of such heir under the said last-mentioned deed of entail to succession to or possession of my said lands and others shall lapse or cease and determine to the same effect as if such heir were naturally dead, and that if such heir shall be in possession of my said lands and others, he shall be bound forthwith to denude himself thereof in favour of the heir who, in accordance with the destination before specified, would be entitled to succeed thereto, as if the heir so bound to denude were then dead."

At the time when this Special Case was presented, Mr Stewart Robertson had already succeeded, by the death of Mr Hepburn in 1874, to the estate of Cluny, and a question arose whether the annual allowance above mentioned was to be paid to him or to his son, in whose favour the entail would eventually be executed.

This Special Case was therefore brought by Mr Stewart Robertson and his son, and Mr Hepburn's trustees, and the following questions were submitted to the Court:—"(1) Whether the said James Stewart Robertson is, during the subsistence of the trust and his survivance, entitled to the provisions and benefits conferred by the eighth purpose of the trust-disposition and settlement of 16th August 1865? (2) Or whether the said James Stewart Robertson junior is at present entitled to the provisions and benefits conferred by the eighth purpose of the said trust-disposition and settlement and codicil?"

Argued for Mr Stewart Robertson senior—The clause of devolution was not intended to affect the intermediate provisions of the trust-disposition; it was not in fact yet made, and it was not