with the result that the whole gearing fell into the hold and struck the pursuer, who was then in the act of ascending the ladder to the deck, inflicting serious injuries. *Held*—*reversing* the judgment of the Sheriff (GUTHRIE SMITH), and *reverting* to that of the Sheriff-Substitute (COMBIE THOMSON)—that in respect it was not shown that there had been any unusual or abnormal strain on the tackle, and no satisfactory explanation was forthcoming of how it came to give way, the fact of the accident occurring raised a *prima facie* presumption, which the defender's evidence had not displaced, that the tackle was insufficient and defective, and that the pursuer was entitled to damages.

Counsel for Pursuer (Appellant)—Rhind—Young. Agents—Begg & Murray, Solicitors.

Counsel for Defender (Respondent)—Mackintosh—Shaw. Agent—R. C. Gray, S.S.C.

Thursday, June 15.

FIRST DIVISION.

(Before Lord President Inglis, Lords Mure and Shand.)

SPECIAL CASE—PATON & OTHERS (ARCHIBALD'S TRUSTEES) AND ARCHIBALD & OTHERS.

Succession — Vesting — Period of Payment of Residue — Where Residue has Vested under a Will, and there is no Reason for Deferring Payment except that Payment is to be made "not sooner" than the Expiry of a Certain Period.

A testator directed his trustees, with regard to the residue of his estate and effects, including any accumulation thereof remaining after payment and satisfaction of certain legacies, to pay and convey such residue to certain persons named as residuary legatees on the expiry of a tack in his favour, "in or about the year 1892, as I think, but whenever that may be, but not sooner." No reason for thus postponing the period of payment was apparent, and the result of postponing payment till the year 1892, at which date the tack did expire, would have been that the trustees would have had to hold a sum of £11,000 for no other purpose than to secure the expenses of administering the trust while the beneficiaries were in narrow circumstances. *Held* that the residue having vested in the beneficiaries, and there being no reason in the circumstances for postponement of the period of payment, the trustees were entitled to make a division of residue, reserving only so much as would be sufficient for the expense of carrying on the trust till the expiry of the lease, and for keeping the trustees protected from any personal responsibility.

Andrew Archibald, manufacturer in Alloa, died on 1st June 1880. He was unmarried. His estate consisted of—First, a tack of mills and machinery, with ground appertaining thereto, at Strude of Alva, known as the Strude Mills, and to which he had acquired right, and which tack was to expire at Martinmas 1892. These subjects were of the value of £3500 or thereby, and at the time of the truster's death they were set by him under a sub-tack, which also expired in 1892, and yielded a rental of £281, 15s. 6d. Secondly, the estate also consisted of a sum of £10,963, 14s. 6d., a part of which was contained in a bond and disposition in security, while the remainder was almost entirely in the form of deposit-receipts for large sums in various banks. Mr Archibald left a trust-disposition and settlement by which he bequeathed a number of legacies to various persons, including his nephews and nieces. The sixth purpose of this deed, on which the present questions turned, was as follows:—*In the sixth place*, with regard to the residue of my estate and effects above conveyed, including any accumulation thereof remaining after payment and satisfaction of the provisions above written, my said trustees shall, on the expiry of the lease or tack by James Johnstone Esquire of Alva, in my favour, of the Strude Mill, Alva, *in or about the year Eighteen hundred and ninety-two, as I think, or whenever that may be, but not sooner*, pay and convey the same as follows, viz., to the saids William Archibald, my nephew, Mary Archibald or Wilson, Margaret Archibald or Simpson, and Bella Glen Archibald or Simpson, my nieces, and their heirs, equally among them, share and share alike, one third thereof: *Item*, to the said John Archibald, my brother, Carry Archibald and Sabina Archibald, my nieces, and their heirs, equally among them, share and share alike, one third thereof: and *Item*, to the said Mrs Graham Haig Lambert or Thomson Paton, Margaret Fraser Lambert, and Mary Ann Archibald Lambert, my nieces, and their heirs, equally among them, share and share alike, the remaining one third thereof."

The truster's brother and his nephews and nieces mentioned in this purpose of the settlement survived him. Some of them, and particularly the truster's brother, and his niece Mrs Mary Archibald or Wilson, were in necessitous circumstances at the date of this Special Case, and they were desirous of having payment of their shares of residue, which they maintained to be vested in them without awaiting the expiry of the lease of Strude Mill in 1892.

In these circumstances the trustees, as first parties, and the brother, nephews, and nieces of the truster, being the persons to whom the residue was bequeathed under the sixth purpose of the deed, as second parties, presented this Case for the opinion of the Court.

The questions of law were—"(1) Did the residue of the trust-estate vest in the residuary legatees at the death of the testator? (2) Are the first parties bound to retain the portion of the residue of the trust-estate other than the said Strude Mills and machinery, and to accumulate the income thereof until the expiry of the foresaid tack and sub-tack? (3) Assuming the second query is answered in the negative, are the first parties entitled to make a division of the said portion of the residue of the trust-estate among the residuary legatees, parties hereto, according to their respective rights and interests? (4) Are the first parties bound to retain the rents of the said Strude Mills and machinery, and to accumulate the said rents until the expiry of the said tack and sub-tack? (5) Assuming the fourth query answered in the negative, are the first

parties entitled to divide the free rents of the foresaid mills and machinery among the residuary legatees, parties hereto, according to their respective rights and interests? (6) Are the first parties entitled to advance from time to time to such of the residuary legatees as in the opinion of the first parties may require advances, such sums to account of their respective shares of the residue of the trust estate as the first parties may think proper or the Court shall approve of?"

Argued for the second parties—The fund had vested in the beneficiaries, and they were entitled to take their rights into the market and raise money on it. It was better, however, that this should be done by the trustees under authority of the Court.

Authorities—*Clark* v. *Hardie*, December 5, 1857; *Marchbanks* v. *Brockie*, February 18, 1836, 14 Sh. 521; *Hood's Executors*, May 20, 1869, 7 Macph. 774; *Alves' Trustees* v. *Grant*, June 3, 1874, 1 R. 969.

Argued for first parties—(1) The terms of the deed as a whole made it doubtful whether the provisions had yet vested in the beneficiaries. These special legacies were left to the residuary legatees. (2) The trustees had no power to make advances: on the contrary, the deed contemplated accumulation by the trustees. The parties favoured were not children of the truster whom he was liable to aliment, and the case did not come within the rule of such cases as *Lucas*, February 18, 1881, 8 R. 502; see also *Latta*, June 5, 1880, 7 R. 881; M'Laren on Wills and Succession, ii., 258. The words "and not sooner" were a clear indication of the truster's intention—*Elder's Trustees*, March 10, 1881, 8 R. 593.

At advising—

Lord President—The residue of this testator's estate is appointed to be divided into three parts. One part is to be paid to a nephew and two nieces named, and their heirs, equally among them; another third is payable to a brother of the testator and two other nieces, and their heirs, equally among them; and the remaining third is to go another set of nieces, and their heirs, equally among them; and of course if there had been nothing else in the deed the principle of vesting *a morte testatoris* would have been the rule for the administration of the residue of this trust-estate. But in regard to the division of the residue the testator has expressed himself in a very peculiar way, for he says that his "trustees shall on the expiry of the lease or tack by James Johnstone Esquire of Alva in my favour, of the Strude Mill, Alva, in or about the year 1892, as I think, or whenever that may be, but not sooner, pay and convey" the residue in the manner I have just mentioned. Now, it has been observed in the course of the argument, and quite truly, that the motives which induced the testator to thus postpone the period of payment or vesting are quite inscrutable. It is impossible to discover any reason for doing so. No doubt that is not quite conclusive. The testator's will is clearly expressed, but if he had merely directed that payment should be made on the expiry of the lease, and there had been no reason to doubt that vesting took place *a morte testatoris*, and no reason could be suggested from the circumstances of the trust why payment should not be made before the expiry of the lease, then I do not see that there could be any obstacle to prevent payment being made at the earlier date. The only difficulty arises from the use of the words "but not sooner," which certainly seem at first sight to point to a postponement of the period of payment. But on full consideration I am not disposed to attach much weight to these words, when in the particular circumstances of this case the result of giving full effect to them would be to oblige these trustees to continue to hold a sum of about £11,000 for no purpose whatever except to enable them to have sufficient funds to secure themselves in the administration of the trust. I am not disposed to say that I see any reason for holding that property which has undoubtedly vested in the residuary legatees ought not to be paid to them at once. I am therefore for answering the first three questions in favour of the second parties.

It is only necessary to add, that if the sum in question—£11,000—includes the rents of the mill in so far as already paid, then these rents just form part of the residue, and I do not see why they should not be distributed along with the rest. Nor is it easy to see why the future rents which have still to be paid should not be treated in a similar way and divided among the residuary legatees—not perhaps every half-year as they are paid, but at suitable periods. Of course the money locked up in the mill cannot be distributed, for the mill cannot be disposed of till the end of the lease, and the interlocutor must also be qualified in this other way—that the trustees must retain a sufficient sum in their hands to meet the expenses of administering and winding up the trust.

Lord Mure—I am of the same opinion. The only difficulty arises from the insertion of the words "but not sooner" in the residuary clause. But the whole scope of the deed seems to me to convey the impression that this gentleman wished his estate to be distributed as soon after his death as it conveniently could be. In the second purpose the trustees are directed to pay certain legacies "immediately after my decease." In the third purpose it is "shall immediately or as soon thereafter as conveniently may be." In the fourth purpose it is "as soon as practicable after my death." In the fifth place it is "six months after my death." Then when he comes to the sixth place he directs that the residue of his estate should be paid on the expiry of the lease or tack of the Strude Mill, and it is quite plain that the mill itself could not be divided before that time; but then he adds the expression "but not sooner," with reference not only to to the mill but to the residue generally. I think however, that those legacies vested *a morte testatoris*, and no reason has been suggested to show that the estate ought not to be distributed now. I therefore agree with your Lordship that the words "but not sooner" cannot be held to prevent the gift from taking effect at once.

Lord Shand—I am clearly of opinion that the sound construction of this deed is to hold that the residue vested at the death of the testator. There is no liferent, nor any destination-over—no contingency, in short, sufficient to prevent vesting. The only thing founded on as showing an intention to suspend vesting is that after the names of

the several legatees the words "and their heirs" are always added. But that addition comes to be of no consequence when we look at the deed as a whole, for throughout all the special legacies bequeathed by the earlier purposes, whether of furniture or of plate, or even in the case of pecuniary legacies, there occurs almost without exception a destination to "his" or "her heirs." The object of these words therefore appears clearly to prevent a lapse of the legacy, and not to postpone vesting. That makes the present case clear as regards the question of vesting, and I have only to add that as a general rule I think the addition of the words "his" or "her heirs" effects no more than a legacy in favour of a party named without mention of his heirs, except of course that it creates a destination-over should the legatee happen to predecease the truster.

That being so, the legatees are entitled to assign their rights so as to make them available as a means of raising money. It is therefore difficult to see why the trustees should not be entitled to pay the residue over in terms of the trust-deed. Had the words simply been "on the expiry of the lease," there would, I think, have been no difficulty. In the absence of any reason for postponing payment. the Court would at once have authorised an immediate division of the estate. The only difficulty arises from the addition of the words on the expiry of the lease "but not sooner." If it could be shown that there was any possible interest in favour of any party, then I should hesitate to disregard these words, but I can find no such interest of any kind—there is no reason to be discovered for postponing the period of distribution. That the money invested in the mill should not be divided until the expiry of the lease is of course perfectly intelligible, and I rather think that the truster overlooked the fact that a large sum beyond what was invested in the mill might form the remaining part of the residue, and has thus appeared to direct a postponement of the period of division for which no intelligible reason can be discovered. On the whole matter I am therefore of opinion that the estate may be divided, subject of course to the qualifications which your Lordship has mentioned.

Lord Deas was absent.

This interlocutor was pronounced:—

"Find and declare that the residue of the trust-estate vested in the residuary legatees at the death of the testator: Find and declare that the first parties are not bound to retain the portion of the residue of the trust-estate other than the Strude Mills and machinery, and to accumulate the income thereof until the expiry of the tack and sub-tack of the said mills: Find and declare that the first parties are entitled to make a division of the said portion of the residue of the trust-estate among the residuary legatees according to their respective rights and interests: Find and declare that the first parties are not bound to retain the rents of the said Strude Mills and machinery, and to accumulate the said rents, until the expiry of the said tack and sub-tack: Find and declare that the first parties are entitled to divide the free rents of the foresaid mills and machinery among the residuary legatees according to their respective rights and interests; but declaring that the trustees are entitled and bound to retain so much of the trust-funds till the expiry of the said tack and sub-tack as will be necessary for carrying on the trust administration and to keep the trustees protected from all personal responsibility: And finding it unnecessary to answer the sixth question."

Counsel for the First Parties—M'Kechnie. Agent—Thomas Carmichael, S.S.C.

Counsel for the Second Parties—J. G. Smith. Agents—Duncan, Archibald, & Cunningham, W.S.

Friday, June 16.

SECOND DIVISION.

(Before Lord Justice-Clerk Moncreiff, Lords Young and Rutherfurd Clark.)

[Sheriff of Berwickshire.

HOGARTH *v.* BROOMFIELD (SMART'S TRUSTEE).

Sale—Conditional Delivery—Possession—Title—"Hire and Purchase."

A farmer engaged a mill-wright to erect on his farm a thrashing-mill and steam-engine, &c., on a verbal agreement, afterwards supplemented by letter, that the price was not to be demandable on delivery, but was to be paid by instalments (for which no definite times were fixed), along with a reasonable yearly sum for use till the price was paid, but that until the price was fully paid the mill, &c., was to remain the property of the maker. More than a year after the mill was erected, and after one payment of a small sum for the past year's use, but before any part of the price was paid, the farmer became insolvent, and granted a voluntary trust-deed for behoof of his creditors. *Held* that there was no completed contract of sale, and that the condition in the agreement suspended the passing of the property in the mill till the price was paid, and this condition not having been purified the maker was entitled to vindicate his right to the mill against the trustee.

Trust for Behoof of Creditors—Title of Trustees under Voluntary Trust-deed.

A trustee under a voluntary trust for behoof of creditors, to which the creditors have not acceded, has no right independent of his author, and in that respect differs from a trustee in bankruptcy, who has separate and independent rights *vi statuti*.

Reputed Ownership.

Where a person possesses upon a definite title short of that of property there is no room for the doctrine of reputed ownership.

William Smart was tenant of the farm of Lauderhaugh from Whitsunday 1878. In June 1879, Smart, who was then in pecuniary embarrassment, applied to the pursuer Andrew Hogarth, engineer and mill-wright in Kelso, to erect for him on his farm a thrashing-mill with a steam-engine and appurtenances. According to the pursuer's allegation at the time when the mill and steam-engine were erected, "a distinct verbal agreement was