The parties interested in the question were the farmers and their families who lived at Dogton and Pitlochie farms respectively, and their people. I do not know that the proprietors had any knowledge or took any interest in the matter. Well, the people upon Pitlochie allowed their neighbours upon Dogton farm to come to this celebrated well for water when they needed to do so from exceptional circumstances such as a dry summer or the like. What would have been thought of them, if the two families were upon friendly terms with each other, if they had refused this permission to the Dogton people? I put this question to Mr Asher during the debate. Suppose the attention of the proprietor of the estate of Pitlochie had been called to the matter, and he was desirous that this intercourse and good neighbourhood between his farm and the next one should continue, but was also desirous of preventing a servitude being established over his lands, what should he have done? The answer was that he should either have put in writing his objection to a servitude being acquired and sent it to his next neighbour, or he should have insisted on getting a writing from him repudiating the idea of creating a servitude by the use made of the lands. That is a different view from mine of what is the true condition of the parties to each other, I think if one person desires to create a servitude over the lands of a neighbouring proprietor he ought to go to that proprietor and ask for it—ask for a grant of what he desires—and that it is not for the neighbouring proprietor to guard himself from being supposed to grant what he never intended to grant. I think that the one course is reasonable and that the other is not reasonable. I find nothing in this case except that the one party upon whose farm this well was situated was reasonably accommodating to the other party, and I think there is no evidence here that would lead us to subject the one farm to the burden of having a servitude for taking water from this well created over it in favour of the neighbouring farm upon another estate.

LORD RUTHERFURD CLARK concurred.

LORD LEE—The proposition in point of law which the defenders had to put forward in supporting the Lord Ordinary's interlocutor was this. All that was necessary for the constitution of the servitude of drawing water from this well over the lands of Pitlochie was that the people of Dogton should have drawn water from this well as their needs made it requisite for a period of 40 years. I do not think that that is a sound proposition in law.

The question of fact involved in the case was whether the use which had been made of this well was to be ascribed to tolerance or to the existence of a right. I think that the facts as they appear in the evidence in the case show that the use was to be ascribed to tolerance, and that the question of right was never raised.

The Court recalled the Lord Ordinary's interlocutor and granted the interdict craved.

Counsel for the Appellant—Sir C. Pearson—Guthrie. Agents—Tait & Johnston, S.S.C.

Counsel for the Respondents—Asher, Q.C. —Dundas. Agents—Dundas & Wilson, C.S.

Thursday, January 30.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

RUSSELL AND ANOTHER (SCOTT'S TRUSTEES) *v.* BOGIE AND OTHERS (METHVEN'S TRUSTEES) AND OTHERS.

Succession—Legacy—Residue—"Executors and Representatives whomsoever."

A testatrix bequeathed the residue of her estate to her executor Robert Methven and his two co-executors "equally between and among them, share and share alike, . . . and failing all or any of them by their predeceasing me to their several and respective executors and representatives whomsoever, whom I do hereby appoint to be my residuary legatees." Robert Methven predeceased the testatrix, leaving a trust-disposition and settlement, whereby he appointed his trustees his executors and intromitters with his moveable means and estate.

In a competition between his only brother and next-of-kin and his trustees, *held* that the latter were entitled to be ranked and preferred to the one-third share of the residue as the "executors and representatives whomsoever" of Robert Methven.

Miss Jessie Scott of Ferniebank, Newton of Panbride, died on 20th July 1888 leaving a trust-disposition and settlement dated 2nd September 1882, by which she appointed Robt. Methven, of Hilton, Robert Russell, and James Russell to be her only executors and intromitters with her whole moveable means and estate. This settlement provided, *inter alia*—"And lastly, with regard to the free residue of my whole moveable means and estate of every description which may remain at the period of my death after fulfilment of all my debts and the foresaid legacy, I leave and bequeath the same to the said Robert Methven, Robert Russell, and James Russell, equally between and amongst them, share and share alike, for their own use and behoof, and failing all or any of them by their predeceasing me, to their several and respective executors and representatives whomsoever, whom I do hereby appoint to be my residuary legatees."

Miss Scott was predeceased by Robert Methven, who died on 3rd April 1887, and was survived by Robert Russell and James Russell, who accepted the office of executors. The one-third share of the residue of

her estate bequeathed to Robert Methven, and failing him to his executors and representatives whomsoever, amounted to £5200, and formed the fund *in medio* of this action.

Robert Methven left a trust-disposition and settlement and codicil thereto, dated 21st January 1885 and 4th October 1886, whereby he assigned and conveyed his whole estate, heritable and moveable, to William Bogie and others named therein as trustees. He also "nominated and appointed his above-named trustees, and the acceptors or acceptor, survivors and survivor as his executors and intromitters with his moveable means and estate." After providing for various annuities and legacies he directed his trustees to invest the residue of his estate for the liferent use of his brother Cathcart Lambert Methven, with the exception of £100 which he left him absolutely at his own disposal.

Upon the death of Miss Scott her trustees raised this action of multiplepoinding in consequence of the competing claims of Russell's trustees and Alexander Brakenridge, Cathcart Lambert Methven's factor, to the one-third share of the residue.

Upon 7th June 1889 the Lord Ordinary (KINNEAR) pronounced this judgment—"Repels the claim for Alexander Brakenridge: Sustains the claim for William Bogie and Others, and ranks and prefers them on the fund *in medio* in terms of their said claim, and decerns: Finds both claimants entitled to expenses out of the fund *in medio*.

"*Opinion.*—The words to be construed have a perfectly clear and well-established legal meaning, and they must receive effect according to that meaning irrespective of any conjecture as to what the testatrix might have done if she had anticipated the event which has happened when the will was written. This sort of conjecture from what it is supposed to be probable that a testator would desire is inadmissible in any case, but in the present case it is altogether irrelevant, because the will speaks from the death of the testatrix, and the event which was at first contingent had then become certain by the previous death of one of the residuary legatees.

"In the event of the legatee predeceasing the testatrix she gives his share of the residue to his "executors and representatives whomsoever." That these words will include executors-designate as well as next-of-kin appears to me to be beyond all question. They are sufficiently general, as the testatrix uses them, to embrace all classes of persons who by any possibility may stand in the position of executors and representatives to the legatee. They become specific when the death of the legatee has fixed the character of executor and representative upon one and not another of the various persons who might possibly have stood in that relation towards him.

"Now, the only persons who possess the character of executors and representatives of the deceased legatee are the claimants Bogie and others. His brother is his next-of-kin, and he might have been his executor if he had not been excluded from that position by the will of the deceased. But he is not in fact the executor, and the testamentary trustees are both executors and representatives. It is impossible to sustain the claim of the brother, because that would be to give the bequest to a person who does not answer the description in the will to the exclusion of persons who answer it exactly.

"Of the cases cited, that of *Manson* v. *Hutcheon* seems to me to be one most valuable. But it is not directly in point, because the words to be construed are different. The difficulty in that case arose from the generality or ambiguity of the word "representatives." That is a word, as the Lord President points out, which may be used in many senses, but the particular sense in which it is used in the present case is made perfectly clear by its being coupled with the word executors. For the same reason the case of *Stewart* v. *Stewart* has in my opinion no bearing. The words are different. Nobody can take under the bequest now to be construed who is not the executor of the deceased legatee. The brother is not his executor, and his testamentary trustees are his executors and his representatives.

"It is said that this is giving to a will the effect of carrying a fund which had not vested in the testator. But it is not by force of the legatee's will, but by force of the will of the testatrix that the executors of the former are to take. A legacy to the executors or to the residuary legatees of a deceased person may be perfectly effectual although such deceased had no right or interest whatever in the legacy during his life."

Brakenridge (Methven's factor) reclaimed.

Authorities quoted—*Stewart* v. *Stewart*, May 21, 1862, M. App., "Clause," 4; *Graham* v. *Hope*, Feb. 17, 1807, M. App., "Legacy," 3; *Bell* v. *Cheape*, May 21, 1845, 7 D. 614; *Nimmo* v. *Murray's Trustees*, June 3, 1864, 2 Macph. 1144; *Maxwell* v. *Maxwell*, December 24, 1864, 3 Macph. 318; *Manson* v. *Hutcheon*, January 16, 1874, 1 R. 371; *in re Crawford's Trust*, March 21, 1854, 2 Drewry's Rep. 230; Williams on Executors, 1130; M'Laren on Wills, sec. 1346.

At advising—

LORD JUSTICE-CLERK — The claimants William Bogie and others, as trustees and executors of the late Thomas Methven, claim, as representing him, one-third of the residue of the moveable estate of Miss Jessie Scott under her settlement. This claim is made on the ground that by her will, if any of the persons to whom the residue was bequeathed should predecease her, the share of the person so predeceasing should go to such person's "executors and representatives whomsoever." These words are very general, and it is difficult to see how the legatee could have executors and representatives of any class or description who would not fall within these words. But in this case the legatee by his own will has appointed the claimants to be his "executors and intromitters with his moveable

means and estate." The sole question therefore is, whether on the death of Miss Scott they, as such executors, became entitled to the sum bequeathed by her to Thomas Methven in respect of the terms of her will as above? It appears to me that the answer to be given to the question is clear. As between the two claimants—the brother of Thomas Methven and the executors of Thomas Methven—I can have no doubt how the sum in Miss Scott's bequest must go, and that the Lord Ordinary has decided the case rightly. The brother might have answered the description in Miss Scott's will, but in point of fact he does not. Thomas' will had distinctly shut him out from representing his brother. He is ousted from a position in which he might have stood by operation of law, and he is in no sense Thomas' executor or representative. On the other hand, the claimants Bogie and others directly answer the description. They are the sole executors of Thomas. As such they undoubtedly represent him. Now, who is it that can take under Miss Scott's will if Thomas predeceases her. No one but the executor, whoever he may be, of Thomas. Therefore I hold, without any doubt whatever, that these claimants being Thomas' executors take his share of Miss Scott's moveable estate.

I do not think that any of the cases cited in argument have a real bearing on the point in dispute. As to those which turned on the interpretation to be put upon the word "assignees," they cannot possibly rule this case. It is quite true that difficulty has arisen in some cases in interpreting the word "representatives." But the words in this case are different from those used in any of the cases. They are altogether free from ambiguity, and are broad and all-embracing.

The argument to the effect that the judgment of the Lord Ordinary will carry a fund under Thomas' will, which had never vested in Thomas during life, scarcely requires notice. It is quite clear that it is by force of Miss Scott's will that the fund so passes. It is not by virtue of any legacy by Thomas that it goes to the claimants Bogie and others. It is because they are his executors, nominated by him, and therefore fall under Miss Scott's description of "executors and representatives whomsoever." It is not under any part of his deed disposing of his estate, but under his appointment of executors, that they take under Miss Scott's bequest.

LORD LEE—I concur in thinking the Lord Ordinary's judgment right, and on the grounds stated in his opinion, which we have now had an opportunity of seeing.

The case of *Stewart*, M. App., Clause, No. 4, *Graham* v. *Hope*, M. App., Legacy, No. 3, and *Bell* v. *Cheape*, 7 D. 614, were all of them cases in which vesting was contemplated. It was therefore held that a destination to heirs and assignees meant after vesting, and that the heirs-at-law must be preferred to an assignee or executor-nominate. But here the destination contemplates expressly the case of the primary legatee "predeceasing me," and the destination in that case is to his "executors and representatives whomsoever." In such a case I think that the decision in *Manson's Trustees*, 1 R. 371, is an important authority on the meaning of the destination. The expression is distinguished from heirs-at-law or "heirs *in mobilibus*." It has no reference to propinquity. It includes executors whomsoever. I therefore concur that the interlocutor of the Lord Ordinary ought to be adhered to.

LORD KYLLACHY—The question in this multiplepoinding is as to the construction of the residuary clause in the settlement of the late Miss Jessie Scott, who died in July 1888. By that settlement, which was dated in 1882, Miss Scott appointed three executors, one of whom was the late Mr Robert Methven, and after directing payment of various legacies, she left and bequeathed the residue of her estate to the said Robert Methven and his two co-executors, equally between and among them, share and share alike, "and failing all or any of them by death by their predeceasing me, to their several and respective executors and representatives whomsoever, whom I do hereby appoint to be my residuary legatees." Robert Methven predeceased the testatrix, leaving a general settlement (dated in October 1885) in favour of trustees; and the question now is, whether his share of the residue goes to those trustees for the purposes of his settlement, or goes, on the other hand, to the claimant Cathcart Lambert Methven, who is his only brother and next-of-kin? It is obvious that this question turns on the meaning to be given to the words "executors and representatives whomsoever" as used in the passage above quoted.

Apart from authority, I see no sufficient reason for denying to those words their full generality, or for limiting them so as to exclude executors-nominate or assignees, general or special. There is no reason in point of principle why a right not yet vested or even a *spes successionis* may not be assigned by anticipation. Neither is there, so far as I know, any reason why a testator should not, if he is so minded, make a conditional institution in favour of the testamentary assignees or heirs-designate of a particular individual. The question only is whether an intention to this effect is sufficiently clear; and, apart from authority, I repeat that the expression "executors and representatives whomsoever" appears to me to be wide enough to cover every description of representatives or, in other words, to include every title, general or special, by which property is capable of being transmitted.

It was, however, maintained on behalf of the claimant and the next-of-kin that this matter is concluded by authority, and reference was made in particular (1) to the cases of *Graham*, M, App., Legacy, No. 3, *Bell* v. *Cheape*, 7 D. 614, and *Maxwell*, 3 Macph. 318, and also (2) to the cases of *Stewart*, M. App., Clause, No. 4, and

Manson, 1 R. 371. Reference was also made to the law of England as explained in M'Laren on Wills, i. 714, and the English authorities there cited.

It does not appear to me that the first class of cases—I mean those of which *Bell* v. *Cheape* is the best example—are at all in point. What those cases settled was, I understand, this, that if a legacy or bequest is given to a person and his heirs and assignees, the "assignees" favoured are presumably assignees after vesting, so that, *e.g.*, if the legatee dies before the testator nothing passes to his assignees or executors-nominate. That principle of construction has, I think, distinctly no bearing upon the present case, where the bequest to "representatives whomsoever" is expressly directed to take effect before vesting—that is to say, is expressly applicable to the event of the legatee predeceasing the testator.

Neither do I think that the case of *Stewart* taken by itself, or as explained in the recent case of *Manson*, goes the length which the next-of-kin contends. The expression there construed was "personal representatives," and while that expression was, in the deed there under construction, held to mean representatives *ab intestato*, I see no reason to hold that that case laid down any general principle, or that a similar construction would have been applied to the different and broader language of the deed which your Lordships have now to construe. The same observation applies to the English authorities, as to which it is enough to say that none of them appear to deal with a bequest expressed in the words of the bequest here.

On the whole, therefore, I am of opinion that the Lord Ordinary's interlocutor is right, and should be affirmed.

The Court pronounced this interlocutor—

"Refuse the reclaiming-note, and adhere to the interlocutor reclaimed against: Find the said claimant and the claimants William Bogie and others, trustees and executors of Robert Methven, entitled to the expense incurred by them since the date of the said interlocutor," &c.

Counsel for the Reclaimer—Jameson—Baxter. Agent—W. J. Lewis, S.S.C.

Counsel for the Respondent—Lorimer—M'Kechnie. Agent—William Black, S.S.C.

Friday, January 31.

FIRST DIVISION.

[Lord Trayner, Ordinary.

LAIDLAW *v.* GUNN.

Reparation — Slander — Issue — Malice — Probable Cause—Privilege.

A domestic servant was convicted of stealing certain articles from her master's premises, and was dismissed. Thereafter she instructed a law-agent to demand the balance of her wages from her master. In the course of the correspondence which followed with the law-agent, the master wrote—"We now miss many more things than those found in her possession;" and in a subsequent letter—"We have no doubt she has also taken the things now amissing."

In an action of damages by the servant against her former master, the pursuer averred malice, and proposed the following issue— . . . "Whether the defender falsely, maliciously, and calumniously says" (in the letter scheduled) "of and concerning the pursuer, that 'We' (that is, the defender) 'have no doubt she has also taken the things now amissing,' meaning thereby that she had stolen the things referred to in said letter, to the loss, injury, and damage of the pursuer?"

Held that although the occasion was privileged on which the defender wrote the letter complained of, the statements therein would bear the innuendo put on them, and the defender was entitled to an issue of malice.

This was an action by Worthly Moir Baird Laidlaw, domestic servant, against John Gunn, proprietor of Queen's Hotel, St Colme Street, Edinburgh, in which the pursuer claimed £500 as solatium and in name of damages for an alleged slander, and £3, 2s. 9d., balance of wages due to her by the defender. The pursuer entered the defender's service at the Queen's Hotel as laundry-maid on 24th May 1889. On 15th August 1889 she was arrested, and on 16th August 1889, having pleaded guilty, was convicted in the Edinburgh Police Court of having stolen certain articles from the defender's premises. Thereafter the pursuer was dismissed from the defender's service.

On 16th and again on 17th August 1889 the pursuer waited on the defender at the Queen's Hotel and asked for payment of her wages, but failed to get a settlement.

The pursuer on 19th August 1889 instructed a law-agent, David Barclay, to recover her wages from the defender, and he accordingly wrote the defender on that day requesting a settlement. The defender on 22nd August 1889 replied as follows—"I have recd. your note regarding the woman Laidlaw. When she left this on the 17th I asked her to call back on the 20th and she wd. get what money I owed her. I presume you are aware she was dismissed for very serious