to be, and are injured; I cannot say that the owners of the place would be liable in that instance. The question may be tested in a very simple way. If there were a well outside a garden wall, and children were in the habit of going there, and one should be drowned, then the owner may be liable; but if the well is inside the garden wall, and a boy in pursuit of a ball that has gone over the wall climbs up, and without looking where he is about to go, drops into the well, I should be inclined to hold that the owner is not liable. I think that in this case the defenders are not liable for damages.

LORD RUTHERFURD CLARK—I also agree that the defenders should be assoilzied, but I wish to put my judgment on this ground, that no fault has been proved against the defenders.

LORD KINNEAR—I concur, and agree with Lord Rutherfurd Clark in saying that in my opinion no fault has been proved against the defenders.

The Court dismissed the appeal and assoilzied the defenders.

Counsel for the Appellant—J. Clark. Agent—D. Dougal.

Counsel for the Respondents—Ure—Deas. Agents—Fodd, Simpson, & Marwick, W.S.

Thursday, February 27.

SECOND DIVISION.

BROWN AND OTHERS *v.* BROWN AND OTHERS (BROWN'S TRUSTEES).

Succession — Vesting — Trustees' Power to Retain the Capital.

A truster directed his trustees to pay a certain annuity, and further, on the youngest of his children attaining the age of 25 years, "to divide to them equal shares of the remainder of my said trust property, but to retain one-half of the said remainder for and on behalf of my said daughter . . . and until her marriage or death to pay her the free annual income of the said half, and to pay over the other half, share and share alike, to my said sons, . . . and on the marriage or death of my said daughter, then to pay over to my said sons the remaining unpaid portion of their respective equal shares of the remainder of my said trust property divided to them on the youngest of my said children attaining twenty-five years of age, but hitherto retained on behalf of my said daughter, their sister, but with power to my said trustees, if they see fit, to settle my daughter's portion on her, and excluding all right of her husband therein; . . . but declaring that the shares of my said children shall vest in them on their respectively attaining the age of twenty-five years." . . . .

Held that when the youngest child had attained the age of 25 years the trustees were bound, after providing for the payment of the said annuity, and on receiving a joint discharge from the testator's children, to make over to them the one-half share of residue which the testator directed them to retain for behoof of his daughter.

Major Robert Brown, late of the Madras Army, died on 29th May 1869, survived by three children, James, Robert, and Caroline. He left a trust-disposition and settlement by which he directed his trustees to provide an annuity for his sister, and to accumulate the whole free annual income of the estate until the eldest of his children should attain the age of sixteen years, and to apply it for the education of his children until they should respectively attain the age of twenty-one, and as each attained majority to pay to each their respective equal shares of the income of the trust-estate so accumulated, until the estate should fall for division under the 5th purpose, which was in these terms—"I direct my said trustees, on the youngest of my said children attaining the age of twenty-five years, then to divide to them equal shares of the remainder of my said trust property, but to retain one-half of the said remainder for and on behalf of my said daughter, and, until her marriage or death, to pay to her the free annual income of the said half, and to pay over the other half, share and share alike, to my said sons, and on the marriage or death of my said daughter, then to pay over to my said sons the remaining unpaid portion of their respective equal shares of the remainder of my said trust property, divided to them on the youngest of my said children attaining twenty-five years of age, but hitherto retained on behalf of my said daughter, their sister, but with power to my said trustees, if they see fit, to settle my daughter's portion on her, and excluding all right of her husband therein: Further, it is hereby provided and declared that although I have directed my trustees to divide, and partly to make over payment to my said children on the youngest of them attaining the age of twenty-five years, still, if my trustees shall find that it would injure my property to sell it off at that time, I authorise them to delay payment until a more suitable time in their opinion shall come, until which time each child shall receive the income of that portion of the remainder of the said trust that each child would have received in capital had payment not been delayed; but declaring that the shares of my said children shall vest in them on their respectively attaining the age of twenty-five years, or in their lawful issue alive at the time of their prior death." These provisions were declared to be in full of all legal claims competent to the children on their father's death.

Miss Caroline Reid Brown, the testator's youngest child, attained the age of twenty-five on 27th May 1889, and she and her two brothers, James C. F. Reid Brown and Robert J. Reid Brown, then requested the trustees to make over the whole trust-

estate to them on their joint receipt and discharge after provision made for the aforesaid annuity. The trustees declined to do so without judicial authority to that effect.

A special case was accordingly presented by (1) the beneficiaries and (2) the trustees to have the judgment of the Court upon the following questions—"(1) Are the said trustees bound, after making due provision for the payment of the said annuity, and on receiving a joint discharge from the parties of the first part, to make over to them the one-half share of residue which the testator directed his trustees to retain for behoof of his daughter, or any, and if so, what part thereof? or (2) Are the said trustees bound to retain the said half share of residue, or any, and if so, what part thereof, invested in their own names until the marriage or death of Miss Caroline M. F. R. Brown?"

The parties of the first part maintained that the whole estate had vested in them, and the period of division having arrived, that the terms of the deed of settlement entitled them to immediate payment thereof; that these terms conferred on them an absolute right of fee in the said estate, upon their shares of which they were entitled to test, and which fee was not in any way protected against the diligence of creditors or onerous assignees; that no interest postponed to theirs was created by the will, and that although Miss Brown had presently a limited liferent interest in a very small portion of the estate which belonged to her brothers in fee, she and they having arranged amongst themselves to offer a joint discharge, the trustees were not entitled to withhold the funds from them; and that it was inexpedient and disadvantageous to them to keep up the machinery of a trust for the management of so small a fund.

The parties of the second part maintained that upon a sound construction of Major Brown's last will and testament it was their duty, after providing for payment of the said annuity, to retain one-half of the residue of the trust-estate invested in names of the trustees until the marriage or death of Miss Caroline M. F. R. Brown, and meanwhile to pay over to her the free annual income of the share of residue so retained. They further maintained that, in view of the clearly expressed wishes and intentions of the testator, they were not bound to make over the said share of residue to the parties of the first part without judicial authority to that effect.

Authorities—*Jamieson* v. *Lesslie's Trustees*, June 19, 1889, 16 R. 807; *Christie's Trustees* v. *Murray's Trustees*, July 3, 1889, 16 R. 913; *Duthie's Trustees* v. *Forlong*, July 17, 1889, 16 R. 1002; *Campbell's Trustees* v. *Campbell*, July 17, 1889, 16 R. 1007.

At advising—

LORD JUSTICE-CLERK—In this case the trustees under the last will and testament of the deceased Major Robert Brown desire to obtain the sanction of the Court before they pay over the trust-estate in their hands to the beneficiaries under the will.

It was plainly the intention of the testator that they should pay over the trust-estate to the beneficiaries, but the difficulty arises under a subsequent direction in the deed. The direction is that when the youngest of the truster's children, Miss Brown, should attain the age of twenty-five years, the trustees were, "to divide to them equal shares of the remainder of my said trust property, but to retain one-half of the said remainder for and on behalf of my said daughter, and until her marriage or death to pay to her the free annual income of the said half, and to pay over the other half, share and share alike, to my said sons, and on the marriage or death of my said daughter, then to pay over to my said sons the remaining unpaid portion of their respective equal shares of the remainder of my said trust property." Now, put into simple English that means, that when all the children had attained the age of twenty-five, each became fiar of a third share of the trust-estate, but as the father was naturally desirous that his daughter should draw a larger income from his estate for a time at least, he directed his trustees to pay to the sons only one-half of their shares, and to hold the other half and pay the income to his daughter. There is no direction that the trustees should withhold the capital of the shares from his sons except for that purpose, and no desire that the *corpus* of the share of each should not be handed over at the proper time. The daughter has now come to an agreement with her brothers, and the legatees are prepared to take payment of their shares and grant the trustees a full discharge, and I think the fiars are entitled to have their shares paid over to them. There is no duty upon the trustees to withhold payment, and there could have been no pretence for such a plea but for the case of *Christie's Trustees*.

That case was a very peculiar one and quite different from the present. There General Christie created a trust for the purpose of giving the fee of the trust-estate to his children, but he directed them not to pay over the share to one of his daughters; "it was not to go into her hands." The Court thought that was a direction which the truster was entitled to give to his trustees, and which they would not set aside.

In this case there is no such direction at all. The purpose of the direction in this deed was solely to give one of his children a larger income than the others for a time. The daughter was quite entitled to give up her special interest under that arrangement after she had attained the age of twenty-five years. No doubt the trustees are empowered to settle the daughters' share upon her excluding the right of her husband. Whether that direction might have created some difficulty or not under the former law as to married women's property I do not say, but I think it is of no importance now.

LORD RUTHERFURD CLARK concurred.

LORD KINNEAR—I am of the same opinion, because I think the testator has given his children an absolute right to their shares of

his trust-estate when they attained the age of twenty-five. I do not think that the directions in the deed are repugnant to that construction, but I think they are inoperative unless the children agree to abide by them, because I remain of the opinion, which Mr Campbell said was an old-fashioned one, that if persons have an absolute right to property they are entitled to demand conveyance of it from their debtor.

The Court answered the question in the affirmative.

Counsel for the First Parties—Jameson—S. M. Penney. Agent—F. J. Martin, W.S.

Counsel for the Second Parties—W. Campbell. Agents—Fraser, Stodart, & Ballingall, W.S.

Friday, February 28.

FIRST DIVISION.

[Sheriff of Aberdeen.

WATT AND OTHERS (REID'S EXECUTORS) *v.* REID.

Succession—Agricultural Lease—Heir and Executor—Threshing-Mill—Dung—Heritable or Moveable.

In a question between the heir and executor of the tenant of agricultural subjects who died during the currency of the lease—*held* (*following Brand's Trustees*, 3 R., H. of L., 16) that a threshing-machine partly attached to the walls of the building in which it was erected, and partly suspended from the roof, was heritable, and passed with the subjects to the possession of the tenant's heir succeeding to the lease, who was also entitled to the dung made on the farm both during the lease and while the executors were in possession of the farm, because dung, although in its nature moveable, became heritable by being dedicated to the land.

Cumming (*Murray's Trustee*) v. *Graham*, July 19, 1889, 26 S.L.R. 762, *followed.*

William Reid, farmer, Longley, Kildrummy, Aberdeenshire, died on 28th December 1887 leaving a testament whereby he nominated certain parties as his executors. The testator's heir-at-law was his son William Reid. The lease of the farm was for nineteen years, and at the deceased's death there were nine years still to run. The executors of the deceased William Reid raised the present action in the Sheriff Court of Aberdeen against the heir-at-law, concluding, *inter alia*, for payment of the value of a threshing-machine taken possession of by the defender, and also for the value of the dung made on the farm, produced from the whole crop of 1887, and some straw from crop 1886. They pleaded that, in a question between heir and executor, the dung and threshing-mill being moveables they were entitled to payment therefor.

The defender claimed the threshing-mill and dung as heritable estate belonging to him as heir-at-law of his deceased father, and averred that they did not fall into executry.

The parties renounced probation.

The Sheriff-Substitute (Brown) remitted to Mr Copland, auctioneer, Huntly, who reported as follows—"I have examined the threshing-mill on this farm. It is driven by water, with a start and alvh wheel. The two bushes of water-wheel shaft—one of them is supported upon a large stone built into the wall of the building, and fixed to it with two screw bolts; the other one is supported and fixed similar to a stone wall termed the outerhead outside the building. There are two large beams cross the house, and are built into the walls at each end for fixing and supporting the mill, which is done by the framing beams of the mill being tenoned and bolted to these beams with four sunk bolts—this is all the fixing and support of the mill. The two supports for the bushes of the roller pinions are fixed at one end to a cross piece fixed to mill framing and into stone wall. The other end of them are nailed to one of the large beams that support the mill. The fan below the mill stands upon the floor and is fixed to the mill.

"I consider the two large beams built into the walls part of the mill, as, owing to the construction of this mill it cannot be set up without them or similar beams built into the walls.

"*Note.*—This mill is quite different from the ordinary construction of these mills. Instead of being set on stones in the floor with posts down the whole height of the framing, it is hung on beams built into the walls exclusively for its support. Such mills, in my experience, sometimes belong to the proprietor, and are given over at dead inventory to the tenant. In other cases the mill belongs to the outgoing tenant; it entirely rests upon the conditions of lease whether the incoming tenant is bound to take the outgoing tenant's mill at valuation at all. In many cases in my experience as an auctioneer the outgoing tenant has had to expose his mill to be sold by public roup along with his other effects, the incoming tenant not being at all bound to relieve the outgoing tenant of the mill on the farm."

By interlocutor of 27th February 1889 the Sheriff-Substitute found that in a question between the executors and the heir of the deceased William Reid, the threshing-mill and dung were heritable estate, and fell to the defender as the heir and successor of the deceased in the estate of Longley.

"*Note.*—The only matters raised in the record which have been under contention in the process are as to the threshing-mill and the dung, in regard to which both parties have renounced probation, being content to take a judgment on the statements and admissions contained in the documents referred to in the minute No. 7. I cannot gather from Mr Copland's report that the