your Lordship has said, is a practical admission, after a report by their own engineer, that it was not in excellent working condition when it was sent.

A good deal has been said as to whether the defects were material. Surely they were, when without their being remedied the engine would not work at all. But on this point it is important to observe that according to the evidence of the pursuers' own witness, the engine as delivered (sold as an engine of 4 h.p.) could not be worked much above three-fourths of that power, and that to bring it up to the description in the contract, would require an expenditure on repairs to the extent of about a fifth of the whole price.

I am of opinion that there were material defects in the engine, and that the pursuers failed to fulfil their contract.

I agree with Lord Young's observations on the Sheriff-Substitute's findings.

I think that the appeal should be sustained, and the defender assoilzied.

LORD JUSTICE-CLERK—As your Lordships have both expressed an opinion as to the *bona fides* of the parties in this case, and as it might be supposed, if I remained silent on that matter that I was of a different opinion, I think it right to say that I entirely concur with what your Lordships have said as to the perfect *bona fides* of both the parties.

LORD MONCREIFF was absent.

The Court pronounced the following interlocutor:—

> Sustain the appeal, and recal the interlocutors appealed against: Find in fact (1) that the contract for the sale of the gas-engine in question was contained in the letter from the pursuers to the defender, and telegrams dated respectively 16th and 17th October 1895; (2) that the said gas-engine was not conform to contract, and was timeously rejected by the defender: Find in law that the defender was entitled to reject the engine as disconform to contract: Therefore assoilzie the defender from the conclusions of the action, and decern: Find him entitled to expenses in this and in the inferior Court, &c.

Counsel for the Pursuers—J Wilson—J. J. Cook. Agents—Wishart & Sanderson, W.S.

Counsel for the Defender—Salvesen—T. B. Morison. Agent—Peter Morison junior, S.S.C.

Thursday, June 25.

SECOND DIVISION.

[Lord Low, Ordinary.

URIE'S TRUSTEES *v.* URIE.

Succession—Legitim—Clause of Forfeiture—Whether Applicable to Person Taking No Benefit under the Settlement.

A testator directed his trustees, after the death or second marriage of his wife, to hold, apply, pay, and convey one-fourth of the residue of his estate for behoof of his son A in liferent, and to the children of A in fee, and made similar provisions for other sons and children of sons. He provided that these provisions were to be in full of all legal claims, "declaring that in the event of any of my sons or their descendants repudiating this settlement, or by any means preventing it from taking effect, in whole or in part, then such sons as well as their descendants shall forfeit their whole right and interest in those portions of my means and estate that I am entitled to dispose of," such right and interest to pass to the sons and descendants of sons abiding by the settlement. By a codicil he revoked the liferent in favour of A, and conferred it upon A's children, and with this alteration confirmed the settlement in every respect. On the death of his father A claimed and was paid legitim. *Held* that the clause of forfeiture did not affect A's children, as A was entirely unprovided for by his father's testamentary dispositions, and the clause was only intended to apply to the acts of a son for whom a provision was made in the will.

George Urie, blacksmith in Glasgow, died on 28th June 1885, leaving a trust-disposition and settlement dated 28th November 1876, and codicil thereto dated 5th May 1879, whereby he conveyed to trustees therein mentioned, for the purposes therein set forth, his whole means and estate, heritable and moveable, then owing and belonging to him, or which should be owing or belonging to him at his decease. The first trust purpose was payment of debts, and the second was payment of the whole free annual income of the estate to the widow during all the days of her viduity. The third purpose proceeded as follows:—"My trustees shall, upon the lapse of the foresaid liferent, by the death or second marriage of my said spouse, or upon my own death should she predecease me, hold, apply, pay, and convey the whole rest, residue, and remainder of my means and estate as follows, viz.:—One-fourth part or share thereof to and for behoof of my son John Urie for his liferent alimentary use allenarly, not affectable by his debts or deeds or the diligence of his creditors, and to and for behoof of his lawful children alive at the period of payment after mentioned, jointly with the lawful issue of any

of his children who may have predeceased that period leaving issue (the division being *per stirpes*); whom failing, the lawful children alive at said period of payment of my other sons Thomas, George, and James (the division being *per stirpes*) jointly with the lawful issue of such of the children of my said sons, Thomas, George, and James as may predecease said period leaving issue, such issue being entitled equally among them to the share their parent would have been entitled to if in life; whom all failing, my own nearest heirs and assignees in fee." Then followed similar provisions of one-fourth parts or shares in favour of each of the testator's sons Thomas and George and their children, and of the children of his son James (who had predeceased him). Then followed, *inter alia*, these declarations and provisions—"Declaring that the fee or capital of the provisions above conceived in favour of my grandchildren and their issue shall be payable only upon the lapse of the whole of the said liferents in favour of my said sons John, Thomas, and George Urie, and only upon the youngest of the whole of my said grandchildren attaining, if a male, the age of twenty-one years complete, or, if a female, attaining that age or being married, whichever of these events shall first happen: Declaring further, that until the arrival of said period of payment, my trustees shall pay or apply the whole or such part as they may think proper of the annual income or produce of the shares of residue prospectively falling to my said grandchildren, as and when the same shall be set free, to and for behoof of said grandchildren respectively, in such way and manner as to my trustees shall seem proper. . . . And I provide and appoint that the provisions hereby made in favour of my said grandchildren and their issue shall become vested interests in them at and only upon the arrival of the period of payment of the fee or capital thereof . . . Which provisions in favour of my said wife and sons and their descendants respectively are hereby declared to be and shall be accepted of as in full to my said wife and sons respectively of all terce of land, *jus relictæ*, legitim, deadspart, portion-natural, and generally of the whole claims competent to them by, through, or in consequence of my decease: Declaring that, in the event of any of my said sons or their descendants repudiating this settlement, or by any means preventing it from taking effect in whole or in part, then such sons, as well as their descendants, shall forfeit their whole right and interest in those portions of my means and estate that I am entitled to dispose of, which right and interest shall in that event accresce and belong to such of my sons, the said John, Thomas, and George and their descendants, and the descendants of my said son James, as shall abide by this settlement and accept of the provisions herein contained."

The codicil was as follows:—"I do hereby revoke the liferent provision of one-fourth part or share of the residue of my estate in favour of my son John Urie specified in the third purpose of the said trust-disposition and settlement, and instead I direct my trustees to hold and apply, pay and divide, the said one-fourth part or share of said residue to and for behoof of the lawful children alive at said period of payment of my said son John Urie, jointly with the lawful issue of any of his lawful children who may have predeceased that period leaving issue (the division being *per stirpes*); whom failing, the lawful children alive at said period of payment of my other sons, the said Thomas, George, and James Urie (the division being *per stirpes*) jointly with the lawful issue of such of the children of my said sons Thomas, James, and George as may predecease said period leaving issue, such issue being entitled equally among them to the share to which their parent would have been entitled if in life; whom all failing, my own nearest heirs and assignees: And with this alteration I confirm the said trust-disposition and settlement in every respect."

The testator was survived by his widow Mrs Agnes Main or Urie, and by two sons John and George, and the issue of two deceased sons Thomas and James. Mrs Agnes Main or Urie died upon 14th April 1894 without having married again.

John Urie claimed and was paid his legitim, amounting to £2414, 9s. 6d., and granted a discharge dated 6th October 1885.

On the death of the testator's widow questions arose as to who were entitled to the income, and eventually the fee, of the one-fourth share provided by the codicil to the children of John Urie, and the trustees accordingly brought the present action of multiplepoinding.

Claims were lodged (1) for the lawful children of John Urie, (2) for the lawful children of Thomas Urie, and for George Urie and his children, and (3) for the lawful children of James Urie.

The claimants Thomas Urie's children, George Urie, and James Urie's children claimed to be ranked and preferred each to one-third of the income of the fund *in medio*, and the claimants Thomas Urie's children, George Urie's children, and James Urie's children also claimed the eventual fee of the fund equally among them *per stirpes*. These claimants also claimed alternatively a third share each of the sum paid to John Urie as legitim, but this claim was not at this stage under the consideration of the Court, and was ultimately abandoned.

They pleaded—"(1) On a sound construction of the trust-disposition and settlement and codicil of the said George Urie, the provisions in favour of the said John Urie and his lawful children have been forfeited by their father's claiming and accepting payment of his legitim, and the claimants, under the provisions in said trust-deed and codicil, are entitled to be ranked and preferred in terms of the first alternative of their claim."

After a hearing in the Procedure Roll the Lord Ordinary (Low) on 29th May 1896 issued the following interlocutor—"Finds that the right to the portion of the

trust-estate bequeathed to the children of John Urie by the trust-disposition and settlement and codicil of his father George Urie, mentioned on record, has not been forfeited by the said John Urie having claimed and received payment of his legitim out of the trust-estate, and with that finding, appoints the cause to be enrolled for further procedure; meantime reserves all questions of expenses."

Opinion—"The only question in this case with which I have at present to deal is, whether John Urie, by claiming his legitim, caused the provisions made for his children by the settlement of his father, the late George Urie, to be forfeited.

"If the original settlement had not been altered, and if John Urie had repudiated the liferent thereby provided to him, and claimed legitim, I should have had difficulty in coming to any other conclusion, upon a construction of the clause of forfeiture, than that, not only John Urie's right of liferent, but also his children's right of fee, was forfeited.

"But by the codicil the provision in favour of John Urie was revoked, and the question is, whether the clause of forfeiture applies to the case of a son who was not a beneficiary under the settlement claiming legitim?

"It was argued that the language of the clause was wide enough to cover such a case, because it was declared that a forfeiture should take place, not only 'in the event of any of my said sons or their descendants repudiating this settlement,' but also in the event of their 'by any means preventing it from taking effect in whole or in part.' The argument was that by claiming legitim John Urie had prevented the settlement from taking effect.

"It is quite certain that the clause, as originally framed, was intended only to apply to the sons—John, Thomas, and George—who were given a liferent interest by the settlement, because although another son—James—is mentioned in the settlement, he was dead, and his name is only brought in for the purpose of describing a class of beneficiaries, namely, his children. But the result of the codicil was to strike John out of the settlement as a beneficiary, and his name thereafter only remained in the settlement, like that of James, for the purpose of describing a class of beneficiaries. The question, therefore, whether the 'said sons,' to whom the clause refers, includes John, is a question of construction?

"Now, the penalty for any of the sons repudiating the settlement, or preventing it from taking effect, is that 'such sons, as well as their descendants, shall forfeit their whole right and interest in those portions of my means and estate that I am entitled to dispose of, which right and interest shall, in that event, accresce and belong to such of my sons . . . and their descendants . . . as shall abide by this settlement.' That is a penalty which is only applicable to persons who have been given a right and interest in the succession, because the event contemplated is the repudiation of the settlement by a son or his descendants, and the penalty is the forfeiture of the right of the son and his descendants. The penalty, therefore, does not apply to the circumstances which have arisen. The truster has declared his intention if a son, for whom he has made a provision, repudiates the settlement, but he has not declared his intention if a son to whom he has given nothing claims his legitim.

"No doubt, in order that his intention that John should get no part of his estate might be enforced, the truster might very well have stipulated that the children of John should take one-fourth of the estate only on condition that he should not claim legitim. The truster may, indeed, have believed that the clause of forfeiture would have that effect. But, in my opinion, that is not what the clause of forfeiture says. It is a clause which is framed upon the ordinary basis of a clause of forfeiture, the basis, namely, that an election is offered between conventional and legal provisions, and the forfeiture is to be incurred if the beneficiary chooses the latter and rejects the former. John therefore, who had no election given to him, does not seem to me to fall within the scope of the clause, and I am accordingly of opinion that the right of fee given to his children has not been forfeited."

On 4th June the Lord Ordinary granted leave to reclaim.

The claimants Thomas Urie's children, George Urie and his children, and James Urie's children reclaimed and argued—John Urie by claiming his legitim had prevented his father's settlement, which was intended to control the succession to his whole estate from taking effect in part. The forfeiture had therefore been incurred, and his descendants as well as himself were deprived of all right under the will. The fact that John Urie was deprived of his liferent by the codicil did not make any difference. He was one of the said sons referred to in the clause of forfeiture, and there was nothing in the codicil to show that the testator intended that thereafter this clause should not operate upon John's preventing the settlement from taking effect. Indeed, with the alteration of depriving him of his liferent, the testator in the codicil confirmed the settlement in every respect. The undoubted intention of the truster was unfavourable to John, but if the respondent's contention received effect, he would get more than any of his brothers, and his children would be in no worse position than any of the other families. The construction which would give effect to the testator's wishes was entitled to prevail.

Counsel for the respondents were not called upon.

At advising—

LORD JUSTICE-CLERK—I think the Lord Ordinary's interlocutor must be affirmed. John Urie, at the time this testament came into operation, had nothing given to him which he could accept as being in full of all

his claims, and he had nothing under the settlement which he could repudiate. He had no interest in the settlement at all, and was not in a position to demand anything under the settlement. Therefore I think the Lord Ordinary is right when he holds that the penalty clause does not apply under the circumstances which have arisen.

LORD YOUNG—I am of the same opinion, and really without any doubt. The will divides the estate of the testator into four parts, and it gives one-fourth to each of his sons in liferent, and to the sons and descendants of each in fee, and it contains the declaration that "in the event of any of my said sons or their descendants repudiating this settlement, or by any means preventing it from taking effect in whole or in part, then such sons, as well as their descendants, shall forfeit their whole right." Undoubtedly that applied to the whole three sons, as the will said "in the event of any of my said sons repudiating the settlement." The dead son of course could not repudiate; he could do nothing. When the codicil was made and executed, one of the sons, John, is taken out of the number. He is no longer "one of my said sons." He is taken out of the settlement altogether—as completely out of it as if he had never been in it. Accordingly upon his father's death he is left, so far as his father's will is concerned, without anything—destitute. His children take a share under the will, and they might have repudiated the settlement like any of the other descendants of his sons, or done something preventing it taking effect; but John could do nothing in the way of repudiating the settlement, for there was nothing in the settlement he could repudiate. He was not in it at all. I think the true reading of the clause, is "in the event of any of my said sons or their descendants repudiating this settlement, or by any means preventing it taking effect"—meaning, in the event of their repudiating it or by any other means preventing it taking effect. Now, John could not do that; he could not prevent it taking effect by repudiation. But it is said he could prevent it taking effect if he could be regarded as one of the sons to whom it applied after the codicil, by taking a fund of legitim which would diminish the estate for division among the others. But that is not taken under the settlement, and he no more diminishes the estate under the settlement by taking that than if he had been a creditor of his father upon his father's death, say upon a bond for £1000 which the father had granted to his son for lent money—a quite conceivable case—and he had demanded payment of that sum of money. He would thereby have done something which would have diminished the estate, and prevented the will taking effect with respect to that £1000 which he claimed as his debt, but it would not have been a reasonable or admissible meaning to put on this will that it was intended to apply to repudiation of that kind. But when his father leaves him nothing and he claims his legal provision of legitim—that is, what is due to him by law—he does no more to interfere with the operation of the will than in the case which I have supposed of his claiming payment of the £1000 bond which his father owes him. Therefore I do not think the clause applies to the case at all, and the true reading of the provision is in my opinion this:—"If any son repudiates what I have given him under the will, and claims something else or does anything inconsistent with my will taking effect according to its expression, he shall forfeit his right, and if any descendants of sons who are provided for by this will, repudiate it, claiming the legal provisions which descendants might, or in any other way interfere with the execution of my will, according to the intention expressed, they shall forfeit"—not that a son repudiating or doing anything to hinder the will, shall forfeit for himself and his descendants, but that he shall forfeit for himself, and descendants shall be in the same position as sons. If they do anything to repudiate or prevent the will taking effect, they shall forfeit for themselves. It is not only capable I think of that reading and interpretation, but that is in my opinion the true reading and interpretation. But if the clause were only reasonably capable of that reading and interpretation I should adopt it and give effect to it as leading to the real justice and equity of the case, which is presumably in accordance with the intention of the testator. I therefore agree with the judgment of the Lord Ordinary.

LORD TRAYNER—I agree with the Lord Ordinary, and with the views which he has stated in support of his interlocutor.

LORD MONCREIFF—I agree with the Lord Ordinary for the reasons which he has given. I think that in the circumstances the clause of forfeiture does not apply to the case. It applied only to the case of a son, for whom a provision is made in full of legitim in the will; and as by the codicil the testator struck John out of his will altogether, and deprived him of the provision which he had given him under the will, I think the clause of forfeiture does not apply to the case which has arisen.

The Court refused the reclaiming-note, and adhered to the interlocutor reclaimed against.

Counsel for the Claimants Thomas Urie's Children and George Urie and his Children—W. Campbell—J. Reid. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Claimants James Urie's Children—J. Harvey. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Respondents John Urie's Children—H. Johnston—Umpherston. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for the Pursuers—J. Harvey. Agents—Morton, Smart, & Macdonald, W.S.