we still have it that while the general height of the wall was 5 feet (or 4 feet 11 inches, as the pursuer puts it), there was, even where the heap of rubbish lay, a height of wall above it to the extent of 3 feet. The wall was a sufficient indication even to a young boy of ten years of age that he was not entitled to climb upon it, and I cannot think that the defenders are responsible for the consequences of his having done so. It is averred for the pursuer that the defenders intended to protect the wall by a railing on the top, but failed to do so. An averment of this intention seems to me to have no bearing on the question of their liability. The material point is, whether it was their duty to protect the wall against children climbing on it in some such way, and I am unable to say that it was. The case, I think, is governed by the principle applied in *Kelly* v. *Merry & Cuninghame*, 27 S.L.R. 410."

The pursuer appealed to the Court of Session, and argued—The pursuer's averments set forth a relevant case of fault against the defenders in failing to take sufficient precautions to render this place safe for children as they were bound to do. It was their duty to make it impossible for a boy of ten to climb on to a wall in such a position. See *Findlay* v. *Angus*, January 14, 1887, 14 R. 312. Whether the defenders had taken sufficient precautions was a jury question, and the pursuer was entitled to an issue.

Counsel for the defenders were not called upon.

LORD JUSTICE-CLERK — In my opinion there is no relevant case set forth on this record. It is stated that this wall was a fence marching off one place from another, and that it was 5 feet in height. It is averred that there was a pile of rubbish placed against it by the defenders, two feet in height, but that left 3 feet of wall above the pile of rubbish. A boy ten years of age must have known perfectly well that a wall such as this was an obstruction he had no business to pass. And in this case he was not going to pass it. He was not going there for any legitimate purpose. He went on to the wall for the purpose of amusing himself by walking on the top of it, and it was while walking along the top of it for no purpose that he lost his balance and fell over. It seems to me that is a case which cannot be held relevant.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court dismissed the appeal and affirmed the interlocutor appealed against.

Counsel for the Pursuer and Appellant—Guy—Findlay. Agent—Henry Robertson, S.S.C.

Counsel for the Defenders and Respondents—Sol.-Gen. Dickson, Q.C.—Malcolm. Agents—Clark & Macdonald, S.S.C.

Tuesday, July 6.

FIRST DIVISION.

WHITEHEAD'S TRUSTEES *v.* WHITEHEAD.

Succession—Liferent or Fee—Direction to Hold "for behoof of" Beneficiaries and Pay Interest.

A truster directed his trustees, "previous to their dividing the residue of my said estate as after mentioned, to set apart and invest . . . the sum of £1600, in two sums of £800 each, for behoof of my two unmarried daughters M and W, said sums to be so invested in the names of my said trustees for their behoof, and the interest to be paid to them respectively so long as they remain unmarried. . . . Declaring that in the event of either of my two daughters contracting marriage or dying . . . the interest on said sum effeiring to such daughter shall be paid to my other unmarried daughter so long as she shall remain unmarried." The trustees were further directed, in the event of the marriage of either of these daughters, to pay to her a sum of £200 out of the £1600 for her outfit. In the residuary clause the truster directed that after payment of his debts and "after investing the said sum of £1600," his trustees should make over "the residue of my said estate and effects to and among my three daughters E., M., and W. . . . but deducting from the shares of my said children any sum or sums that may have been paid by my said trustees to any of my said daughters for outfit in the event of the marriage of either of them." No other provision was made as to the fee of the £1600 which the trustees were directed to invest for behoof of the two unmarried daughters.

Held (1) that no fee in the principal sum was conferred upon the unmarried daughters by the direction to hold it on their behoof and pay them interest; (2) that it fell into residue; (3) that on renouncing their liferent they were entitled to call upon the trustees to pay over their shares of the sum as residue.

Mr William Whitehead, North Bridge Street, Edinburgh, died on 24th June 1866, leaving a trust-disposition and settlement, dated 7th May 1858, by which he conveyed to trustees his whole estate heritable and moveable. After providing for payment of his debts, and for conveying his business to his son Josiah Whitehead, the truster proceeded—"(*Thirdly*) I hereby direct and appoint my said trustees, previous to their dividing the residue of my said estate as after mentioned, to set apart and invest on such good security as they may approve of the sum of £1600, in two sums of £800 each, for behoof of my two unmarried daughters, Marion Mason Whitehead and Wilhelmina Whitehead, said sums to be invested in the names of my said trustees for their behoof, and the interest thereof to be paid to them

respectively so long as they remain unmarried, and that at two terms in the year, Whitsunday and Martinmas, by equal portions; and I also authorise my said trustees to allow my said two unmarried daughters the use and enjoyment of all my household furniture, bed and table linen, silver plate, books, paintings, &c., so long as they remain unmarried; and declaring that in the event of either of my two daughters contracting marriage or dying, then and in either of these events, the interest on the said sum effeiring to such daughter shall be paid by my said trustees to my other unmarried daughter so long as she remains unmarried, and the furniture and other effects above specified shall be enjoyed by such unmarried daughter so long as she remains unmarried: *Fourthly*, In the event of the marriage of either or both of my said two daughters Marion Mason Whitehead and Wilhelmina Whitehead, I hereby authorise my said trustees to pay to each of them on her marriage a sum not exceeding £200 out of the said sum of £1600 to be set apart as aforesaid, and that for their outfit: *Fifthly*, after payment of all my debts and expense of mournings, and the expenses of realising and recovering my said estate, and after investing the said sum of £1600, I direct and appoint my said trustees to assign, dispone, convey, and make over the residue of my said estate and effects, heritable and moveable, to and among my three daughters Euphans Murray Whitehead, spouse of the said John Wallace Wright, and the saids Marion Mason Whitehead and Wilhelmina Whitehead, and that equally among them, share and share alike, but deducting from the shares of my said children any sum or sums of money that may appear to their debit in my business or private ledger at the time of my decease, or any sum or sums that may have been paid by my said trustees to any of my said daughters for outfit in the event of the marriage of either of them: And declaring that in case any of my said children shall die before the division of my said estate, then the share or shares of the child or children so dying shall accresce to the survivors or survivor of my said children, and be equally divided among them, share and share alike; providing nevertheless that in case the child or children so dying shall have left lawful issue, such issue shall be entitled to the share or shares of the said residue which their deceased parent or parents would have been entitled to if alive."

The truster was survived by his son (who subsequently renounced all claim upon his father's estate) and three daughters, of whom one was married to the Rev. John Wallace Wright. Under her marriage settlement the share of residue or intestacy to which she was entitled fell to her husband. The other two daughters, Miss Marion and Miss Wilhelmina Whitehead, were unmarried. They had no estate other than their interests under the trust-disposition. For some time the income of the £1600 and of their share of the residue had not been sufficient for their maintenance, and the trustees from time to time made payments to them out of the capital of their share of residue (other than the £1600) till it was nearly exhausted.

A special case was presented by (1) Mr Whitehead's trustees, (2) Miss Marion and Miss Wilhelmina Whitehead, and (3) Mr Wright's trustees, for the purpose of determining the following questions:—"(1) Has the fee of the said sum of £1600 been disposed of by the said settlement? or (2) Does it fall into intestacy? In the event of the first alternative being affirmed, (3) Has the fee of the said sum vested in the second parties? And if so, (4) Are the first parties bound to denude of the said sum now, or must they retain the capital till the expiry of the liferents by the deaths or marriages of both the unmarried daughters? In the event of the second alternative being affirmed, (5) Are the second parties entitled to renounce their liferent, and to obtain payment of their respective shares of the capital of the said sum?"

The second parties maintained that they were in right of the fee of the £1600, and that the trustees were bound to denude in their favour; and alternatively, in the event of its being held that it fell into intestacy, that they were entitled to renounce their liferent and call upon the trustees to denude.

Argued for the second parties—It was the tendency of the Court to construe a direction giving a liferent into a gift of a fee. The direction to invest the money for their behoof implied that the fee was held by the trustees for them—*Greenlees' Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136, at 139; *Lawson's Trustees* v. *Lawson*, July 17, 1890, 17 R. 1167. If it were held that there was only a liferent intended, then there would be intestacy as regards the fee, a result which the Court would be slow to arrive at. This sum did not go into the residue at all—*Ritchie's Trustees* v. *Ritchie*, March 16, 1894, 21 R. 679. (2) If it were held that there was intestacy, then they were entitled to renounce their liferent and call upon the trustees to denude, there being nothing in the terms of the gift of liferent to prevent this, and no other beneficiaries being brought in by accelerating the period of payment than those ultimately intended to be benefited.

Argued for third parties—It did not follow that where the interest of a sum was given the fee necessarily followed. Such a gift could not be inferred from the general tenor of the deed—*Sanderson's Executor* v. *Kerr*, December 21, 1860, 23 D. 227; *Alves* v. *Alves*, March 8, 1861, 23 D. 712. The money was to be "invested for their behoof" only to the extent indicated by the clause, *i.e.*, for their liferent. Accordingly, the fee either fell into intestacy, or, in accordance with the directions in the fourth and fifth purposes, formed part of the residue.

At advising—

LORD ADAM—I have found the questions raised in this case attended with a great deal of difficulty. The leading question is, whether the fee of a certain sum of £1600

which the late Mr Whitehead directed his trustees to invest for behoof of his daughters Marion and Wilhelmina Whitehead vested in them *a morte testatoris*, or whether it came under the residuary clause of his settlement, and fell to be divided between them and a married daughter Mrs Wright, or those in her right.

Mr Whitehead by his trust-disposition and settlement conveyed his whole property, heritable and moveable, to trustees, and after certain directions as to the payment of debts and expenses, and the sale of his business to his son, he directed them, by the third purpose of the trust, previous to dividing the residue of his estate as hereinafter mentioned, to invest the sum of £1600 in two sums of £800 each for behoof of his two unmarried daughters Marion and Wilhelmina, said sums to be invested in the names of the trustees for their behoof, the interest to be paid to them so long as they should remain unmarried. He further authorised his trustees to allow them the use of his household furniture, &c., so long as they should remain unmarried, declaring that in the event of either of them marrying or dying, the interest on the sum effeiring to such daughter should be paid to the survivor so long as she remained unmarried, and that she also should have the use of the furniture. By the fourth purpose the truster authorised his trustees to pay to each of his daughters on their marriage a sum not exceeding £200 out of the £1600 directed to be set apart as aforesaid, and that for their outfit.

By the fifth purpose of the trust the truster directed his trustees, after payment of his debts, the expenses of realising his estate, and after investing the said sum of £1600, to assign, dispone, convey, and make over the residue of his estate to his three daughters, equally among them, share and share alike, but deducting from the shares of his children any sum of money that might appear at their debit in his business or private ledger at the time of his decease, or any sum that might have been paid by the trustees to any of his daughters for outfit in the event of the marriage of any of them, and then there is a destination to the survivors at the period of division of his estate failing issue of the predeceasing child.

Now, it will be observed that by the third purpose of the deed the trustees are directed to invest two sums of £800 each in their own names for behoof of his two unmarried daughters, and that there are directions as to the disposal of the interest thereof so long as either of them continues to live and remain unmarried, but there are no directions at all given as to the disposal of the fee thereof. It is true that by the fourth purpose the trustees are authorised to pay £200 to a daughter for her outfit in the event of her marriage, but that is the only express direction given as to the disposal of the fee of the £1600 or any part of it.

It was argued to us with great force that as the money was directed to be invested for behoof of the daughters, that necessarily implied that the fee was held by the trustees for them, that the directions as to the payment of interest were not inconsistent with that view, and that the fee accordingly had vested in them.

I should have been disposed to give effect to this construction of the deed had I thought that the fee of the £1600 was not otherwise disposed of, but I think that there are implied directions with regard to it to be found in the residuary clause.

By that clause the truster directed the immediate division among his daughters of the whole of his estate, except this sum of £1600, which was not divisible until both unmarried daughters were either dead or married, and that equally among them. The only sum therefore which would remain in the trustees' hands was this sum of £1600.

But there is an express direction to deduct from the share of any child any sum which might appear to her debit in the truster's books, or have been paid by the trustees to her for outfit on her marriage. It appears to me that the share of which the truster is here speaking and from which such payment, if any, is to be deducted, is a share of the residue. But such a payment by the trustees could only be made out of the £1600 and after the death of the truster. It appears to me therefore that the truster intended that that sum should be included in and dealt with as part of the residue of his estate. I think accordingly that the truster intended that each daughter should have an equal share of the fee of his estate.

My opinion, therefore, is that the first question should be answered in the affirmative, and that that is the only question which can be answered in terms. But it follows from my opinion that a right to the fee of two-thirds of the £1600 has vested in the second parties, and if they choose to renounce their liferents there is no reason why the sum should not be immediately divisible. The liferents given to them are not protected liferents.

LORD MONCREIFF—If the case depended upon the third purpose of the trust-deed alone, there might be grounds for holding that the fee of the sum of £1600 belongs to the truster's two unmarried daughters, the second parties to this case, the direction being that the money is to be "invested" for behoof of these ladies.

The difficulty is created by the fourth and fifth purposes of the trust. By the fourth purpose it is provided that in the event of the marriage of either or both of these ladies the trustees are authorised to pay to each for her outfit a sum not exceeding £200 out of that sum of £1600; and in the fifth purpose it is provided that from the shares of residue falling to any of the truster's daughters there shall be deducted, *inter alia*, "any sum or sums which may have been paid by my said trustees to any of my said daughters for outfit, in the event of the marriage of either of them." The daughters here mentioned are clearly the unmarried daughters, because to them

alone are the trustees authorised to pay sums for outfit on marriage.

Now, these provisions seem to me to indicate that the purpose for which the sum of £1600 was set aside was to provide a fund for the support of the truster's unmarried daughters so long as they remained unmarried, but that it was intended that when this purpose was served, on both daughters either marrying or dying, the fee of that sum should fall into residue and be divided among the three daughters or their representatives subject to the deductions mentioned.

If the sum of £1600 were a fund in which the third daughter, who was married during the truster's lifetime, had no interest, why should the truster direct that any sum by which that fund might be diminished by advances from capital made by the trustees for the outfit of the unmarried daughters or either of them should be deducted from the shares of residue falling to them? If the argument for the second parties were correct, they, if they both married, would carry off the fee of the £1600, and thus their share of residue would suffer no deduction.

I am therefore of opinion that the fee of the sum of £1600 does not belong in fee to the second parties alone, but that it has been disposed of in the will as residue, and that right to a share of that fund as residue is vested in the second and third parties. I am further of opinion that the second parties are entitled to renounce their liferent and obtain payment of their shares of the said sum as residue.

LORD KINNEAR—I am of the same opinion as that expressed by Lord Adam and by Lord Moncreiff. I see the force of the argument that when a truster has directed a capital sum to be invested for certain beneficiaries there is an inference *prima facie* that the money so invested is to be held for them, or, in other words, that there is a gift to them of the capital sum, if there is nothing in the will to set aside or displace that inference. But then if the purpose of setting apart and investing the money is to provide an annual income to the truster's daughters during their lives or so long as they remain unmarried out of money which is ultimately destined to others, either to their exclusion or along with them, it would be perfectly accurate to say that the money is invested in the name of the trustees for their behoof, for the sole purpose of so investing it is their security or protection, the ultimate purpose requiring no such investment for its execution. The construction, therefore, of such a destination appears to me to depend not so much on the introductory direction to invest as upon the true meaning and effect of the clause which directs the appropriation of the money, and if it be clear, on a fair and reasonable reading of this clause, that the testator intended something else than an absolute gift, then I see no difficulty in giving effect to the direction.

I agree with Lord Adam and with Lord Moncreiff that on a sound construction of this deed the testator did not intend to make an absolute gift to the two unmarried daughters. The express directions in their favour are simply for the payment of interest while they or one of them remain unmarried and in life. That would probably not be conclusive of itself if there were no direction as to the disposal of the capital. But then there appears to me to be a sufficiently clear direction as to the disposal of the capital to relieve the case of substantial difficulty.

The testator goes on to dispose of the residue of his estate, and although he directs that this money is to be invested before the ascertainment of the residue, there is nothing to indicate that the money so invested is to be excluded from the residue. I say that because in the previous part of the will there is no direction, express or implied, for the disposal of the capital at all, so that if the residuary clause when considered by itself is sufficient to carry it, I see nothing in the direction that the investment is to be made before the ascertainment of the residue to exclude its effect for this particular sum. Now, when the deed goes on to direct what is to be done with the residue and to declare that it is to be divided among his three daughters, including Marion and Wilhelmina, he goes on to say that in ascertaining the equal shares of these three daughters the trustees are to deduct any sums that may have been paid to any of his daughters for outfit in the event of their marriage. But then the sums so authorised to be paid, and consequently to be deducted, are to be paid out of the invested sums of £800, and therefore when the truster says that in order to make the division of the residue equal you are to take into account the advances which may have already been made out of the invested sums, it appears to me that he says in very clear terms that the invested sums are to form part of the residue.

Accordingly, I agree with Lord Adam as to the manner in which the questions are to be answered.

The LORD PRESIDENT and LORD M'LAREN were absent.

The Court answered the first question in the affirmative.

Counsel for the First Parties—A. S. D. Thomson. Agents—Adam & Sang, W.S.

Counsel for the Second Parties—J. H. Millar. Agents — Melville & Lindesay, W.S.

Counsel for the Third Parties—Horne. Agents—A. & A. S. Gordon, W.S.