register would not bear investigation. The pursuer does not come within the meaning of the words if so interpreted; and the result is that she has not stated a relevant case.

Counsel for the defenders claimed that as the judgment of the Court was really a judgment on the merits, and involved sustaining the defenders' third and fourth pleas-in-law, the decree should be one of absolvitor.

The Court recalled the interlocutor reclaimed against, and assoilzied the defenders with expenses.

Counsel for the Pursuer and Respondent—Trotter. Agent—Robert Anderson, Solicitor.

Counsel for the Defenders and Reclaimers—Dundas, Q.C.—Cook. Agents—Simpson & Marwick, W.S.

Wednesday, June 8.

SECOND DIVISION.

MELLIS' TRUSTEES *v.* LEGGE'S EXECUTRIX.

Succession — Legacy — Objects of Gifts — Falsa demonstratio—Legacy to Trustees —Whether Gift Annexed to the Office of Trustee.

A testator conveyed his whole estate to trustees named, "and to the acceptors or acceptor, survivors or survivor" of them in trust, directing them to hold for certain purposes; and lastly, upon these purposes being satisfied, providing as follows — "I direct my said trustees, the said A, B, C, and D" (naming them again), "to divide the free residue or remainder of my said means and estate equally amongst themselves, share and share alike, declaring that if any of my said trustees shall die before the said residue shall become payable as aforesaid, then such share or respective shares to which they would have been entitled if they were alive shall vest in and be payable to "their representatives." A predeceased the testator. In a competition between (1) A's executrix, with concurrence of his other representatives, (2) B, C, and D, who had acted as trustees and were still surviving at the period of payment, and (3) the representatives of the testator's next-of-kin—*held* (*diss.* Lord Trayner) that the gift of residue was only in favour of those of the trustees named who had survived the testator and accepted office as trustees (their representatives taking their share at the period of payment if they had predeceased that period), and that consequently the representatives of A had no right to any share of the residue; and (2) (*dub.* Lord Young, Lord Trayner giving no opinion on this question) that the share which would have been payable to A if he had survived was payable to B, C, and D equally.

John Mellis, farmer, Smallburn, in the county of Aberdeen, died on 22nd February 1892, leaving a trust-disposition and settlement whereby he conveyed his whole means and estate, heritable and moveable, in trust "to and in favour of William Legge, retired merchant, residing in Huntly; William Scott, farmer, Corsiestone, Drumblade; James Davidson, farmer, Newton, Cairnie; and John Scott, farmer, Bruntstane, Huntly, and to the acceptors or acceptor, survivors or survivor of them," and nominated and appointed his said trustees to be his sole executors. The first three trust purposes were, (1) payment of debts, (2) payment of the interest or annual produce of the estate, heritable and moveable, to the testator's sister Barbara Mellis, if she should survive him, during her life, with power also to pay to her such part of the capital and at such times as the trustees should deem necessary for her use and behoof, (3) on the death of Barbara Mellis, or in the event of her predeceasing the testator, payment of the interest or annual produce of the remainder of the testator's means and estate to Mrs Jane Mellis or Yeats, the testator's sister, during all the days of her life. The deed then provided as follows—"*Lastly*, That on the death of the longest liver of the said Barbara Mellis and Mrs Jane Mellis or Yeats, I direct my said trustees, the said William Legge, William Scott, James Davidson, and John Scott, to divide the free residue or remainder of my said means and estate equally amongst themselves, share and share alike; declaring that if any of my said trustees shall die before the said residue shall become payable as aforesaid, then such share or respective shares to which they would have been entitled if they were alive shall vest in and be payable to their several heirs, executors, and successors, and I appoint my said trustees to pay and deliver the same to them accordingly."

The testator left moveable estate amounting, before deduction of debts and expenses, to £1415, 3s. 7d. or thereby, and after deduction of debts and expenses to £388, 2s. 1d. or thereby.

The testator, who died unmarried, was survived by his sister Barbara Mellis, who was at the date of his death his sole next-of-kin. Mrs Jane Mellis or Yeats, named in the trust-disposition and settlement of the deceased, predeceased the testator, having died on 26th February 1889. Barbara Mellis received the liferent of the testator's estate until her death on 1st September 1897. She left a disposition and settlement dated 16th April 1889, under which certain persons were appointed her executors.

William Legge, one of the trustees and residuary legatees nominated by the testator in his trust-disposition and settlement, predeceased the testator, having died on 21st September 1891. He left a holograph settlement, dated 26th Septem-

ber 1885, in which he left all his property, heritable and personal, to his wife, Mrs Mary Spence or Legge, who was appointed executrix under his will by the Sheriff of Aberdeen, Kincardine, and Banff, at Aberdeen. William Legge was a stranger in blood to the testator. The remaining trustees nominated in the testator's settlement accepted and acted in the trust. They were grandnephews of the testator.

Questions having arisen regarding the persons entitled to the share of residue which William Legge would have taken if he had survived the liferentrix, this special case was presented for the opinion and judgment of the Court.

The parties to the special case were, (1) the testator's surviving trustees; (2) William Scott, James Davidson, and John Scott; (3) the representatives of William Legge; (4) the executors of Barbara Mellis, the sole next-of-kin of the testator.

The second parties maintained that they, as surviving and accepting trustees, were entitled to the share of residue in question to the exclusion of William Legge's heirs, executors, and successors. The third parties (who had arranged *inter se* for the division of the fund if they were held entitled to the same) maintained that Mrs Legge was entitled to the fund as executrix and universal disponee under her husband's will; or, alternatively, that the rest of the third parties were entitled thereto as his heirs, executors, and successors. The fourth parties maintained that the testator died intestate *quoad* the share in question, and that they were entitled to payment of the same.

The question of law for the opinion and judgment of the Court was as follows—"Does the share of residue which would have fallen to the said deceased William Legge the predeceasing trustee, had he survived the liferentrix of the testator's estate, now fall to be paid to the second, third, or fourth parties?"

Argued for the third parties—The third parties were entitled to the share of residue in question. This was a legacy to an individual named and his representatives *simpliciter*, and although no doubt he was also nominated a trustee, a legacy so given was not, like a legacy given by way of recompense for acting as a trustee, conditional upon the legatee accepting office—*Henderson* v. *Stuart*, December 13, 1825, 4 S. 309 (306), where this distinction received effect. It was true there were not here, as in that case, two legacies, one of each character, but the nature of this legacy was clearly shown by the destination-over to representatives. If Legge had survived the testator his share of the residue would have vested *a morte testatoris*, and if thereafter he had predeceased the liferentrix, would have gone to his representatives without any destination-over. The only reasonable explanation of the destination-over was that the testator intended out of regard for Legge to benefit his representatives in the event of Legge predeceasing the testator—See *Hay's Trustees* v. *Hay*, June 19, 1890, 17 R. 961. Any other interpretation of this residue clause failed to give due effect to the destination-over. Legge predeceased the testator by a period of six months, and as the testator had ample time to alter his will if so advised, the fact that he had not seen fit to do so led to the view that he desired to have the bequest standing for the benefit of Legge's representatives. There could be no accretion here—*Paxton's Trustees* v. *Cowie*, July 16, 1886, 13 R. 1191, and if it were held that the third parties had no claim, then the result was intestacy as regards this share of residue. It was a well-recognised rule that the Court would avoid an interpretation of a testamentary writing which would result in partial intestacy, if any other interpretation was reasonably possible, and in this view also the third parties were entitled to prevail. In England the rule was that where the gift to the person nominated as trustee was a gift of residue, such a gift was not conditional upon his accepting the trust—Roper on Legacies, 780—*Griffiths* v. *Pruen* (1840), 11 Simons 202; *Christian* v. *Devereux* (1841), 12 Simons, 264. A distinction was recognised between a general or specific legacy, and a legacy of a share of residue, and the ground of this distinction was that if the gift of residue were to be held as conditional the result would be intestacy if the trustee did not accept office, which was not likely to be the testator's intention. In the residue clause the words "acceptors or acceptor, survivors or survivor of them" were not repeated, and the expression "my said trustees" was merely *demonstratio*, and did not import any condition as to accepting and surviving the testator.

Argued for the second parties—1. The gift of residue here took the form of a direction to trustees to divide among themselves, that is, among those who had acted as trustees. The provision in favour of representatives was intended to provide for the case of a trustee who had survived the testator and had accepted office and acted as a trustee, but had predeceased the period of payment. The direction was given to the testator's "said trustees," and the only representatives entitled to participate were representatives of any of his "said trustees" who died before the period of payment. The testator's "said trustees" meant the trustees in whose favour the conveyance in trust was granted, that is, those of the persons named who survived the testator and accepted office, and who had "held" the estate for the trust purposes mentioned. The direction was (1) to "hold" and then (2) to divide among themselves. This could only apply to those who had acted as trustees. If this were so the representatives of one of the persons named who had predeceased the testator and had consequently never acted as a trustee were not entitled to anything under the deed. Moreover, here the gift was to trustees in their capacity as trustees, and only those who had accepted and acted, or their representatives, were entitled to participate. The case most nearly resembling the present was *Slaney* v. *Watney*, 1866, L.R., 2 Eq. 418. 2. The second parties were

entitled to the whole of the residue, including the share in question, not upon the principle of accretion, but because the testator, as already explained, had directed the whole residue to be divided among those of the persons named who had accepted and acted as trustees, together with the representatives of those who had so accepted and acted but had predeceased the period of payment.

Argued for the fourth parties — The fourth parties were entitled to the share of residue in question, on the ground that it had fallen into intestacy, and consequently passed to the fourth parties as representing the testator's next-of-kin. 1. The presumption was that when a legacy was given to a person who was also nominated a trustee, it was given to him in his capacity as a trustee, and if he predeceased the testator or did not accept office, then his legacy lapsed—Jarman on Wills (5th ed.) vol. ii., 966; *Calvert* v. *Sebbon*, 1841, 4 Beav. 222; *Hanbury* v. *Spooner*, 1843, 5 Beav. 630. Nothing appeared in this case to rebut the presumption, but on the contrary the terms of the deed showed clearly that the testator intended to benefit only those who had accepted office as trustees and their representatives if they predeceased the period of payment. The representatives of Legge therefore were not entitled to the share in question. 2. There could be no accretion in favour of the second parties. It might be that this was a gift to a class in a certain sense, but it was a gift to a class defined as consisting of four individuals named, and when that was the case if one of the persons named predeceased the testator his share lapsed and did not accrue to the other three. Where the residue of an estate was given to A, B, C, and D *nominatim*, if A predeceased it was clear that his share fell into intestacy, and it made no difference that the gift was to A, B, C, and D as trustees—*Barber* v. *Barber*, 1838, 3 Mylne & Craig, 688; *Paxton's Trustees* v. *Cowie*, *cit.*; M'Laren on Wills and Succession (3rd ed.), vol. ii., 810.

At advising—

LORD JUSTICE-CLERK — The late John Mellis in settling his affairs constituted a trust to pay the liferent proceeds of his residuary estate and any capital out of it that they might deem necessary for the use and behoof of a sister, and on her death to pay the liferent to another sister, and on the death of the longest liver he directed his trustees to divide the residue of his estate among themselves equally—[*His Lordship read the latter part of the residue clause quoted above*]. It happened that one of those named as a trustee, William Legge, predeceased the testator, and several questions have arisen. William Legge's executor maintains that she as universal disponee under his will takes the part of the residue which would have fallen to him if he had been alive and become a trustee. The other trustees who were nominated and who accepted the trust maintain that William Legge had no right to any part of the residue, and that it falls to be divided among them. The next-of-kin of the deceased maintain that the share of the residue which was destined to William Legge if he became a trustee fell into intestacy by his predeceasing the testator, and that they are entitled to it.

The testator's testament is certainly very awkwardly framed, and it is not an easy matter to ascertain what his intention was. In the first place, he dispones to four persons, "and to the acceptors or acceptor, survivors or survivor of them," to be his trustees. And then, after stating the purposes of the trust, he states what is to be done after these purposes have been fulfilled, thus—[*His Lordship read the first part of the residue clause quoted above*]—following this up with the passage I have already read as to the case of any trustee dying before the time for dividing the residue has arrived. It is urged by Mr Legge's executor that as the testator in this passage again names the persons, that the will must be read as a gift of a share to each of these persons, whether the particular person has ever been a trustee or not. I do not so read it. I think the true reading of the words is that he is speaking of the four persons by name as he did before, and with the same qualification of their having accepted the trust; that his intention was that those who actually became his trustees should become residuary legatees, that they having fulfilled his purposes were to divide his estate among them. The direction is to "my trustees" to divide, and those only could be his trustees who survived him and accepted the trust. If "said trustees" as used by the testator meant necessarily all those whom he had named, then the anomalous result would follow that when he directed his "said trustees" in the later clause to pay to the heirs, executors, and successors of a dead trustee, the direction was to the dead trustee to do this along with the others. I think the fair meaning of the deed is that those whom he names who do become his trustees are to divide the residue, and that if a trustee who has accepted office and so served the truster in the administration of his estate should die before the time of division, those who succeed him are to get his share. This latter event did not occur. William Legge predeceased and never was a trustee—therefore the gift to him did not take effect. The only remaining question is whether the trustees who did accept and act are entitled to the whole fund. That is a question of considerable difficulty. But I am inclined to think the true reading is that they are—that the deceased intended that those who became his trustees and did the work of the trust should divide the fund when the period for divison came, subject to the proviso as to the case of an acting trustee being removed by death, an event which did not occur.

I am therefore of opinion that the question should be answered in favour of the second parties.

LORD YOUNG—I do not think it is of any great importance how this case is decided.

Such a case has never occurred before, and such a case is not likely to occur again. It is not likely to be of use as an authority for the decision of other cases.

My own impression is that the legacy was given to the four trustees as trustees—to the persons nominated as trustees. The disposition is to them in that capacity, and I think that if any of them refused to accept, or if death interposed to prevent any of them from accepting, then there was no gift to him. One of them did predecease. I am of opinion that he took nothing, and in the same way that his heirs took nothing. There was no disposition or gift to anyone except to a trustee or the heirs of a trustee, and just as there was no disposition in favour of anyone unless he became a trustee, so there was no disposition in favour of heirs of anyone except the heirs of one who had become a trustee.

The next question is, if this share does not go to the representatives of Legge, the person named as trustee, but who predeceased the testator, where does it go? Your Lordship is of opinion that it goes to the survivors. I confess that that is not my opinion. It is impossible to arrive with any certainty at what the testator meant. I do not believe he considered the case which has arisen, and I cannot say what would have been his view if he had been asked. I think that the case is very much the same as if all the trustees who were nominated had predeceased the testator. In that case there would have been, according to the view which I have already expressed, no disposition to any trustees under the will at all. The will would have stood in other respects, but an executor would have been appointed as the law directs in the usual way. The question then would come to be, to whom would the executor have been bound to pay if that had happened. It must be borne in mind that a will only speaks from the death of the testator, and in the case which I am now considering none of the persons nominated as trustees would have been in existence along with the will. In that view would the executor not have been bound to pay to the testator's heirs on the footing that the provisions in favour of trustees had fallen into intestacy. I am of opinion that he would. Having that opinion as to what would have been the result if all the persons nominated had predeceased the testator, I am of the same opinion as to the share of the one who did die before the date of the testator's death. I think his share falls into intestacy. That is my impression, but I shall not insist on this, but am prepared to concur with the majority of the Court. As I said, it is not of any importance how the case is decided, and I do not dissent from the view which has commended itself to the majority of your Lordships.

LORD TRAYNER—The residuary clause in Mr Mellis' will which we have here to construe is conceived in favour of "my said trustees, the said William Legge, William Scott, James Davidson, and John Scott," who are directed by the testator, on the death of the liferentrix, to divide the free residue equally among themselves, share and share alike. To this is added a declaration that if any of "my said trustees" should die before the residue became payable, then the share to which they would have been entitled "if they were alive," should vest in and be payable to their several heirs, executors, and successors, and he appointed his "said trustees to pay and deliver the same to them accordingly," If this clause had not had the words "my said trustees" (the first three words I have quoted above), but merely the names of the four legatees, I should have thought the clause and its effect free from all possible doubt. It would then have been a bequest in favour of certain legatees named with a conditional institution of heirs in the event of the failure of the legatee. In that case Mr Legge's predecease of the testator would not have made any difference except this, that his heirs, and not himself, would have received a fourth of the residue when the sum became payable. I mean that the conditional institution of Mr Legge's heirs would have prevented the legacy from lapsing by reason of his predeceasing the testator. But the introduction of the words I have referred to has given rise to the contention that the bequest of residue was given only to the persons among those named who became trustees and had the administration of the estate; that as Mr Legge never held that character and was dead, he could not, in obedience to the testator's direction, take any part in the division "among themselves" of the residue; and that, in short, as Mr Legge never was a trustee, his name must be dropped out of the clause as if it never had been there. I have been unable to come to that conclusion. In my opinion, the residuary bequest is not only intended to be to the four persons named, but is quite sufficiently expressed to carry out the intention. The words "my said trustees" are only used (superfluously used I think) to denote that the four persons to whom the residue is bequeathed are the same four persons who had been nominated as trustees; the words are words of description or designation, and if they are wrong, do no harm, so long as the person meant is clear—*Falsa demonstratio non nocet, dummodo constet de persona.* That Mr Legge did not survive to divide the residue among himself and the others named is, I think, no reason why his heirs should not take his share. The testator clearly intended that some person or persons should take part of the residue, although not a trustee engaged in the division, for he provides that his "said trustees" shall pay to the heirs of such trustees as did not survive the period of division, the share to which they would have been entitled if they had been alive. This excludes the idea urged upon us that the surviving trustees should take the whole residue among themselves. The conditional institution of heirs in itself shows, in my opinion, that the residuary bequest was

one in favour of individuals, and not to persons holding the office of trustee. An individual has, or may have, heirs—a trustee *qua* trustee has no heirs.

It was a more intelligible argument, but not more sound, that the testator intended the residuary bequest by way of recompense to his trustees for their trouble in administering the estate. I dismiss that idea just because there is nothing in the testator's will to suggest it; and second, because the testator expressly directed that the heirs of the trustees, one or more, should take the predeceasing trustee's share, and these heirs could not have taken any part in the administration of the estate, nor be recompensed for work they could not and did not perform.

In my opinion, Mr Legge's heirs are entitled to the share of the residue which he would have taken had he survived the period of division, and that this is in accordance not only with the intent of the testator, but also with his express and explicit direction.

LORD MONCREIFF — The opinion which I formed at the discussion, and which I still retain, is that the gift of a share of residue to William Legge, and failing him by death before payment of the share, to his heirs, executors, and successors, was conditional and dependant upon his surviving the truster, and accepting and acting as trustee.

The other view is that the gift of a share of residue to William Legge and each of the other three persons named was entirely independent of their appointment as trustees; and that the destination to their heirs, executors, and successors was a proper conditional institution to meet the event of any of the original legatees dying before receiving payment of their shares whether before or after the truster.

I cannot reconcile the latter view with the language of the deed, which throughout implies that the gift of a share of residue is only made to those of the parties named who accept and act as trustees.

1. The conveyance is to "the acceptors or acceptor, survivors or survivor" of the persons named as trustees for executing the trust thereby created.

2. The direction as to division of residue on the expiry of the two liferents is—"I direct my said trustees" [*again naming them*] "to divide the free residue or remainder of my said means and estate equally amongst themselves share and share alike."

3. But then the truster contemplates the possibility of one or more of "my said trustees," that is, those who accept and act as such, "dying before the residue shall become payable as aforesaid," that is, before the expiry of the liferents. In that case it is provided that the share of the deceasing trustee shall vest in and be payable to his heirs, executors, and successors. If this is to be read as a destination-over, if it implies more than a gift to the trustee, his heirs, executors, and successors, that is, a fully vested right of fee, it, in my opinion, depends upon the original legatee surviving the truster and becoming a trustee. The heirs substituted are the heirs of a trustee.

Stress is laid on the fact that in the residuary clause the names of the four persons nominated trustees are again inserted in full. This, it is contended, would have been unnecessary if it had been intended that the gift of residue should be confined to trustees. I do not think that too much weight should be attached to this circumstance, because while the names are inserted the persons named are described as "my said trustees," the truster no doubt comtemplating and expecting that they would all survive him and act.

On the other question raised in the case between the second parties and the fourth parties, I think, not without some hesitation, that the second parties are entitled to prevail. I do not think that there was accretion in the proper sense of the term; the true position of the second party is that the residue fell to be divided equally among those of the persons named who accepted and acted as trustees; subject always to this provision in favour of those who acted, but died before division, that their shares should go to their representatives. In this view there was no intestacy; the bequest of residue being to the trustees, the whole fund vested in those who acted as such, and is now divisible among them.

The Court pronounced the following interlocutor:—

> "The Lords having heard counsel for the parties to the special case, Answer the question therein stated by declaring that the share of residue of the estate of the deceased John Mellis left to William Legge had he survived the truster falls to be paid to the parties of the second part: Find and declare accordingly, and decern: Of consent find the whole parties to the special case entitled to their expenses as between agent and client as the same may be taxed out of the trust-estate of the said deceased John Mellis."

Counsel for the First and Second Parties—Younger. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Third Parties—W. Thomson. Agents—J. Douglas, Gardiner, & Mill, S.S.C.

Counsel for the Fourth Parties—J. J. Cook. Agents—Dove, Lockhart, & Smart, S.S.C.