case which the pursuer states on record is this—He says that his two sons Terrence and Michael, and another man named Houston, were at the defenders' station in Glasgow intending to take the train to Paisley; that Houston, who was in front, entered the train immediately after it had started; that Michael Hanlon was then prevented from entering by an official of the defenders, and that on seeing this Terrence did not attempt to enter, but remained on the platform. The pursuer then avers that "thereupon a ticket-collector, or another of the defenders' servants, seized hold of the said Terrence Hanlon by the collar of the coat, pushed him violently and thus caused him to fall forward, and suddenly let go his hold. This caused Terrence Hanlon to fall between the platform and the train," with the result that he received such injuries that he died the following morning. Now, I think that there is here averred matter which necessitates inquiry. The question whether the ticket-collector was acting within the scope of his employment cannot be decided without an inquiry into the facts. If a ticket-collector assaults a person in circumstances which make it entirely outwith and independent of his duty, then the company are not liable, but if he commits what looks like an assault in endeavouring to do his duty by preventing a person from getting into danger, then it becomes a question of fact whether or not the company are responsible in respect, not that it was a thing which he was not entitled to do as being outwith the scope of his employment, but that he did the thing in such circumstances and in such a way that he must be held while in execution of duty to have acted in a culpable manner; in that case, if he so acted, his employers will necessarily be responsible.

As regards the form of issue, I am of opinion that the issue proposed by the pursuer ought to be the issue for the trial of the cause. It will be for the judge at the trial to direct the jury as to the way in which they must look at the facts in dealing with the question whether the ticket-collector was acting within the scope of his employment.

Lord Young—I agree in the result at which your Lordship has arrived. Perhaps I may repeat what I have already said with respect to the form of the issue, which simply puts the question whether the death of the pursuer's son was due to the fault of the defenders' servant. I think that issues in such cases as the present are becoming so uniform in style as to be of practically no value at all. They might be printed with the names and dates blank, and sold for a trifling sum per hundred. If an issue of that kind is all that you are to have, why need you have any issue at all. You have everything on the record. With regard to the relevancy of the action, I think with your Lordship that it is clearly essential to the pursuer's case to prove that the defenders' servant erroneously thought that the deceased was going to attempt to get into a moving train, and that it was his duty to do what he could to prevent him, and that following up that mistake he proceeded to act in such a clumsy manner that the pursuer's son was hustled over the platform, run over by the moving train, and killed. The idea that this ticket-collector committed a wanton assault upon a man whom he did not know and had never seen before, is, I think, absolutely ridiculous. The case is one within the region of those authorities, and the rule of law which they illustrate, in which a servant, while discharging what it was within the scope of his duty to discharge, acted under a mistaken notion of his own in such an unjustifiable and careless manner as to render his employer responsible. The defenders are under a duty to the public to have servants who have just notions as to what they ought to do in the discharge of their duty, and who ought to discharge it in a reasonable and satisfactory manner at the responsibility of the defenders. If it is proved here that one of the defenders' servants mistook his duty and proceeded to discharge it in a blameworthy manner, then the pursuer will be entitled to a verdict, but if otherwise not.

Lord Moncreiff concurred.

Lord Trayner was absent.

The Court pronounced this interlocutor:—

"The Lords approve of the issue No. 11 of process, and appoint it to be the issue for the trial of the cause: Find the pursuer entitled to the expenses of the discussion in the Summar Roll: Remit," &c.

Counsel for the Pursuer — Younger. Agent—James M'William, S.S.C.

Counsel for the Defenders—Balfour, Q.C. — A. S. D. Thomson. Agents — John C. Brodie & Sons, W.S

Wednesday, February 15.

SECOND DIVISION

CRAW'S TRUSTEES *v.* CRAW.

Succession—Construction of Testamentary Writings—"Heirs and Successors."

A testatrix by her trust-disposition and settlement provided as follows:—"I appoint and direct my trustees to make payment of the following legacies, viz.— . . . "To A" (a son of her husband by a former marriage and his only child) "and his heirs and successors the sum of £1000. In the event of the said A predeceasing me without leaving lawful issue of his body, I leave and bequeath to" B (her husband), "his heirs and assignees, the sum of £500 in consideration of the expenditure incurred by him out of his funds on my property." A predeceased his father and the testatrix, unmarried and intes-

tate, and at the time of his death his father was his nearest relative and heir. *Held* that the expression "heirs and successors" in the bequest to A was subject to interpretation, and in this case was intended to be equivalent to "heirs of his body," and that consequently the bequest of £1000 fell into residue.

By antenuptial contract of marriage dated 24th October 1863, entered into between John Craw (hereinafter called John Craw senior) and Mrs Ann Scott Bell or Craw, then Miss Ann Scott Bell, Mrs Ann Scott Bell or Craw, in consideration of similar provisions by John Craw senior in her favour, conveyed to the marriage-contract trustees therein mentioned the whole estate, heritable and moveable, which belonged to her at the date of the said intended marriage, or which should belong to her during the subsistence of the said then intended marriage, and particularly certain heritable subjects called Lanton Tower, in the parish of Jedburgh and county of Roxburgh, declaring that the said estate and effects, and the proceeds and annual interest and produce thereof, should be held and applied by the said trustees for behoof of the spouses during the subsistence of the marriage in alimentary liferent, and for behoof of the survivor of them also in liferent, and as an alimentary provision for behoof of himself and herself, and of the child or children of the wife. By this contract of marriage it was further provided that failing children of the marriage and their lawful issue, the estate derived from Mrs Ann Scott Bell or Craw should be paid and assigned in such way and manner as she might have directed or should direct by any deed executed or to be executed by her. There was no child of this marriage, and Mrs Ann Scott Bell or Craw died on 17th June 1881 survived by John Craw senior, and leaving a trust-disposition and settlement, whereby she, on the narrative of the antenuptial contract of marriage, conveyed to trustees the whole estate, heritable and moveable, which should belong to her at the time of her death.

After providing for payment of debts, funeral expenses, and the expenses of the trust, this trust-disposition and settlement proceeded as follows:—"*Second*, after the death of the said John Craw [*i.e.*, John Craw senior], if he shall survive me, my trustees shall, with all convenient speed thereafter, proceed and realise and convert into cash my whole means and estate; *Third*, at the first term of Whitsunday or Martinmas that shall happen six months after my death, I appoint and direct my trustees to make payment of the following legacies, viz.—To the said William Oliver and Robert Scott as a small acknowledgment of my esteem and the many kindly services they have performed for me, each the sum of £100, whom failing both or either of the said William Oliver and Robert Scott, then to their heirs and successors equally between them, share and share alike: To my cousin William Bell, presently Chief-Constable at Leeds, of the sum of £200; to John Craw doctor of medicine [*i.e.*, John Craw junior], son of the said John Craw [*i.e.*, John Craw senior], and his heirs and successors, the sum of £1000: In the event of the said John Craw, doctor of medicine, predeceasing me without leaving lawful issue of his body, I leave and bequeath to the said John Craw, my husband, his heirs and assignees, the sum of £500 in consideration of the expenditure incurred by him out of his own funds on my property: And with regard to the residue and remainder of my means and estate, I appoint my trustees to pay, assign, dispone, and convey the same in favour of the child or children alive at my death, procreated of the marriage between my uncle Dr William Bell, Inspector-General of Hospitals, now deceased, and Mrs Zébée Stewart Gordon, his wife, equally between and among them, share and share alike." . . .

In the testing clause of this trust-disposition and settlement there was a declaration that the legacies and residue of the said Ann Scott Bell or Craw's estate thereby bequeathed should not be payable until the first term of Whitsunday or Martinmas happening six months after the death of John Craw senior, the testatrix's husband, should he survive her, the liferent of the estate should he survive her being thereby confirmed.

John Craw senior was thrice married, the testatrix being his second wife. John Craw junior, designed in Mrs Ann Scott Bell or Craw's trust-disposition and settlement as "John Craw, doctor of medicine," was his son by his first marriage, and was his only child. John Craw junior died unmarried and intestate on 1st July 1874. He predeceased his father and the testatrix, and his father John Craw senior was at the time of his death his nearest relative and heir.

John Craw senior liferented the testatrix's estate until his death, which occurred on 19th January 1897. John Craw senior left a general disposition and settlement dated 10th January 1895, whereby he gave, granted, assigned, and disponed to his third wife, who survived him, the whole estate, heritable and moveable, which should belong to him at the time of his decease, including therein all legacies or sums of money, if any, to which he or his heirs and representatives might have right as heir and successor of his son, the deceased John Craw junior, and he appointed his third wife to be his sole executrix and universal legatory.

The estate of the testatrix Mrs Ann Scott Bell or Craw having been realised, questions arose as to the parties entitled thereto; and the present special case was accordingly presented for the opinion and judgment of the Court.

The parties to the special case were (1) the testamentary trustees of Mrs Ann Scott Bell or Craw, (2) the executrix-nominate of John Craw senior, and (3) the residuary legatees under Mrs Ann Scott Bell or Craw's trust-disposition and settlement.

The second party contended that John Craw senior being the nearest relative of

his son John Craw junior at the time of the latter's death, and also at the time of the testatrix's death, was his son's heir and successor within the meaning of Mrs Ann Scott Bell or Craw's trust-disposition and settlement; that the legacy of £1000 above mentioned vested in John Craw senior, and that she, as his sole executrix, was now entitled thereto. She also contended that the event specified with regard to the legacy of £500 above mentioned, viz., the death of John Craw junior without lawful issue of his body, having happened, that legacy of £500 either vested in John Craw senior at the testatrix's death, or in herself, the second party, as heir and assignee of John Craw senior at John Craw senior's own death. She accordingly claimed payment of both legacies.

The third parties, the residuary legatees of Mrs Ann Scott Bell or Craw, contended that only one legacy was payable. They maintained, with regard to the legacy of £1000, that the words "the heirs and successors" of John Craw junior had, in the meaning of the trust-disposition and settlement, the same sense as the words "the lawful issue of his body" in the clause immediately following, or at all events that John Craw junior having predeceased the testatrix, and having left no issue, the legacy lapsed and fell into residue.

Alternatively they maintained that the testatrix did not intend that the legacy of £500 should be payable besides that of £1000, and that if the legacy of £1000 was payable, that of £500 had lapsed and fallen into residue.

The questions of law for the opinion and judgment of the Court were as follows:—(1) Are both the said legacies, one of £1000 and one of £500, payable out of Mrs Craw's estate? (2) Is the said legacy of £1000 payable to the heirs and successors of John Craw junior? and if so, Is the second party, as executrix and universal legatory of John Craw senior, entitled thereto? (3) Is the second party entitled to payment of the legacy of £500? (4) John Craw, M.D., having predeceased Mrs Craw without issue, does the £1000 legacy to him fall into residue?

The fourth question was added by way of amendment.

Argued for the third parties—The intention of the testatrix here plainly was to give her stepson £1000, and in the event of his predeceasing her without leaving issue, to give his father £500, but it was not her intention that in any event the father should get £1500. The word "heirs" was flexible in meaning and subject to interpretation, and the apparent intention of the testatrix here showed that in this deed it was to be read as equivalent to "heirs of his body," or "lawful issue of his body," the words used in the immediately succeeding clause—See *Hunter* v. *Nisbett*, November 14, 1839, 2 D. 16, and *Matthew* v. *Scott*, February 21, 1844, 6 D. 718, *per* Lord Mackenzie at p. 721.

Argued for the second party—The word "heirs" must receive its ordinary meaning as heirs whomsoever. It could only be held to mean "heirs of his body" when that interpretation was shown by the context to be the only reasonable one—*Thorburn* v. *Thorburn*, March 18, 1858, 20 D. 829; *Cleland* v. *Allan*, January 13, 1891, 18 R. 377. The heir of John Craw junior took as conditional institute. Here there was nothing to restrict the meaning of the word "heirs." If John Craw junior's heir had been his brother it could not have been contended that both legacies were not to receive effect. If John Craw junior had died without issue, but leaving a will, his father might not have got anything as his heir.

Lord Young—I think the true construction of this will is that £1000 was to go to John Craw junior and to his issue if he left issue, but that if he predeceased the testatrix without leaving issue, his father John Craw senior was to have £500. John Craw senior did not get that sum during his life, for he was liferented in the whole estate, but he was entitled to it, and it passed to his third wife as his universal legatory. If the third question and the question which is to be added to the case are answered in the affirmative that will give effect to my view of the meaning of this deed.

Lord Moncreiff—I think the meaning of this passage in Mrs Craw's settlement is that John Craw junior and the heirs of his body, if he had any, were to get £1000, but that if he predeceased the testatrix without leaving issue, and this legacy of £1000 was consequently not payable, John Craw senior, his father, should have £500, the sum of £1000 by which the residue had been increased owing to the predecease of the son without leaving lawful issue being available to pay the £500 given to the father. No intelligible reason was stated why the father should be given £500 in the event of the son's predecease and also get £1000 as his son's heir, while he was not to get the £500 if the son took the £1000. This aids us in the construction of the passage, and I think shows clearly that the two gifts were meant to be alternative, the second only being given in the event of the failure of the first.

The only difficulty arises from the somewhat incorrect use of the words "heirs and successors" in the gift to John Craw junior. It has, however, been decided that these words are open to construction in the light of the context in which they occur, and so construing them here, I have no difficulty in holding that in this passage they are used as equivalent to the words "heirs of his body."

The Lord Justice-Clerk concurred.

Lord Trayner was absent.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties to the special case as amended, Answer the first and second questions therein stated in the negative: Answer the third and fourth questions therein stated in the affirmative: Find

and declare accordingly, and decern: Find the first and third parties entitled to their expenses out of the residue of the estate of the deceased Mrs Scott Bell or Craw: Find the second party entitled to one-half of her expenses out of said residue, all as the same may be taxed by the Auditor."

Counsel for the First and Third Parties—Sym. Agents—Purves & Barbour, S.S.C.

Counsel for the Second Party—Craigie. Agents—W. & W. Saunders, S.S.C.

Thursday, February 16.

SECOND DIVISION.

[Sheriff of Lothians and Peebles.

BAIN *v.* GEORGE LAWSON & SON.

Process—Sheriff—Dismissal for Default—Reponing—Sheriff Courts (Scotland) Act 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 20—*Act of Sederunt, 4th December* 1878, *sec.* X.—*Act of Sederunt, 21st November* 1895, *sec.* 2.

The pursuer in an action having failed to appear at a diet appointed by the Sheriff-Substitute for the adjustment of the record, and having failed to pay the dues chargeable before the closing of the record under Act of Sederunt, 21st November 1895, Table A, Part XII. 4, the Sheriff-Substitute dismissed the action. Upon appeal to the Sheriff, the pursuer's agent stated that, the diet being just at the close of the summer session, when he was much occupied, the matter had escaped his attention. The Sheriff held this explanation to be insufficient, refused to repone the pursuer, and adhered. *Held* that the Sheriff had power at common law, apart from section 20 of the Sheriff Courts (Scotland) Act 1876, to dismiss an action for default; that the exercise of this power was a matter within the discretion of the sheriffs; that the Court ought not readily to interfere with what they had done in the exercise of their discretion; and that there was no sufficient reason for doing so here.

Opinion (*per* the Lord Justice-Clerk) that in the circumstances of this case the Sheriffs had acted rightly in dismissing the case, and refusing to repone the pursuer.

William Bain, accountant, Edinburgh, brought an action in the Sheriff Court at Edinburgh against George Lawson & Son, bakers, Edinburgh, and William Lawson, sole partner of that firm, in which he craved decree for payment of the sum of £50, 3s. 10d.

By interlocutor dated 19th July 1898 the Sheriff-Substitute (MACONOCHIE) appointed the case to be put to the roll on Tuesday, 26th July, with a view to adjust and close the record.

At this diet there was no appearance for the pursuer, and it was intimated by the Sheriff-Clerk that the dues payable by each party before the closing of the record had not been paid by him or on his behalf.

The Sheriff Courts (Scotland) Act 1876 (39 and 40 Vict. c. 70), sec. 20, enacts as follows:—"Where in any defended action one of the parties fails to appear by himself or his agent at a diet of proof, diet of debate, or other diet in the cause, it shall be in the power of the sheriff to proceed in his absence, and unless a sufficient reason appear to the contrary, he shall, whether a motion is made to that effect or not, pronounce decree as libelled or absolvitor (as the case may require) with expenses; or, if all parties fail to appear, he shall, unless a sufficient reason appear to the contrary, dismiss the action."

The Act of Sederunt, 4th December 1878, enacts as follows:—"X. Whenever a procurator on one side attends any meeting ordered by the sheriff for adjusting the record, or for any other purpose, and the other is absent, or not prepared to proceed, the sheriff shall have power to decern against the opposite party for payment of the fee for attendance to the procurator who is ready."

Under the table of fees annexed to the same Act of Sederunt the following fee is made chargeable:—Table I. 6 (21). "Attendance at calling in motion or compearance roll, or at diets for adjustment, or when the case is ordered to the roll for any purpose other than a debate, 5 shillings."

The Act of Sederunt, 21st November 1895, made in pursuance of the powers vested in the Lords of Council and Session by the Courts of Law Fees (Scotland) Act 1895 (58 Vict. c. 14), sec. 2, enacts as follows:—"The sheriff-clerk shall be responsible for the collection of all fees specified in the tables, and it shall be his duty to refuse to receive any paper chargeable with a fee, or transmit any service or petition for completion of title for extract, or allow any marking of an appeal, or other marking, to be made in respect of which a fee is payable unless the appropriate fee has been paid; and it shall further be his duty when a fee is declared payable prior to any particular step being taken in a process, and such fee has not been paid by either party, to call the attention of the sheriff to the matter, and the sheriff, unless the fee is thereupon paid, shall proceed with the case as if the party by whom the unpaid fee is payable were absent or in default." By the definition clause (sec. 7) "sheriff" includes "sheriff-substitute." Among the fees which are declared to be chargeable in terms of sec. 1 is the following:—Table A. Part XII. 4. "Each party before the closing of the record, 5 shillings."

On 26th July (the day appointed for the adjustment and closing of the record) the Sheriff-Substitute issued the following interlocutor:—"The Sheriff-Substitute, in respect of the pursuer's failure to attend this diet of the cause, and also in respect that the Sheriff-Clerk calls the attention of the Sheriff to the fact that the dues of