pointed out to her; that she was specially ordered to remain in the place where she was stationed, and she was warned of the danger of leaving that place. She left the place during the absence of the man in charge, and attempted to step across the opening above the revolving drum of the threshing-machine, with the result that the accident occurred.

I think that the case can be decided on the ground (1) that when she left her place, as she did, she was acting outwith the course of her employment; and (2) that she was guilty of serious and wilful misconduct. The accident did not arise out of or in the course of her employment. If she had obeyed the definite orders given to her the accident would not have happened. The girl did what she had no need to do, and what she had been expressly forbidden to do.

I go further, and say that I think the girl was guilty of serious and wilful misconduct. She did a thing which she had been forbidden to do, and against the danger of which she had been warned. I do not think that there can be a more distinct case of wilful misconduct than one in which the person injured is injured in consequence of having disobeyed a specific order such as that given here, and which was given in order to ensure her safety.

LORD YOUNG—I am of the same opinion. On the facts as set forth in the 10th to the 13th heads of the statement of facts, I am prepared to answer the fourth question of law in the negative and the fifth in the affirmative.

LORD TRAYNER and LORD MONCREIFF concurred.

The Court pronounced this interlocutor—

"Answer the fourth question in law in the negative, and the fifth question in law in the affirmative: Therefore recal the award and remit to the arbitrator to dismiss the application, and decern."

Counsel for the Pursuer—A. S. D. Thomson. Agents—Simpson & Marwick, W.S.

Counsel for the Defender—W. Campbell, Q.C. — Kemp. Agents — Lister Shand & Lindsay, S.S.C.

Thursday, January 25.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

SIMPSON *v.* MARSHALL.

Succession—Issue—Issue Born after Period of Vesting—Destination of Heritage—Fiduciary Fee.

A testator directed his trustees on his death to dispone and convey certain heritable subjects to his two daughters *nominatim* in liferent allenarly, and "to the issue of my said daughters equally between them *per stirpes* in fee." *Held* that issue of the daughters born after the death of the testator were entitled to a share of the fee.

Prescription — Positive Prescription — Ex facie Valid Title — Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 34.

In a codicil a testator directed his trustees on his death to convey certain heritable subjects to his two daughters *nominatim* in liferent allenarly, and to the issue of his said daughters equally among them *per stirpes* in fee. The deed contained a precept of sasine. Some years after the testator's death the trustees, on the narrative of the codicil, assigned to the elder daughter *nominatim* and her four surviving children *nominatim* in fee one *pro indiviso* half of the heritable subjects. The assignees under the assignation made up their title by notarial instrument. The elder daughter had a fifth child, who survived the testator but died before the date of the assignation and was not taken account of therein. The heirs of the fifth child brought an action to reduce the assignation as *ultra vires* and not in conformity with the directions of the codicil by which the fifth child was entitled to share with the other issue. Against this reduction prescription was pleaded.

Held that as the objection depended on facts extraneous to the deeds, it did not affect the validity of the deeds as an *ex facie* valid title on which to found prescription.

Prescription—Positive Prescription—Computation of Time.

In calculating the prescriptive period, the first day begins to run from midnight of the day on which infeftment is taken.

Prescription — Positive Prescription — Interruption—Compromise of Claim.

A beneficiary entitled to a share of the fee of certain heritable property under a trust-disposition and settlement objected to the title granted by the trustees to the beneficiaries and under which the beneficiaries had obtained infeftment. This title gave the objecting beneficiary one-fourth of the fee, and he claimed two-fifths. Pending the settlement of the dispute, the trustees, with consent of all the beneficiaries, instructed their factor to pay one-fifth of the proceeds of the property to each of the beneficiaries and to retain the remaining one-fifth in his own hands. *Held* that the agreement formed a bar to any of the beneficiaries pleading prescriptive possession on their title after the date of the agreement against the objecting beneficiary.

By trust-disposition and settlement dated 8th December 1836, David Melville disponed to trustees his whole estate, heritable and

moveable, for the purposes therein mentioned. These purposes included, *inter alia*, the following—"In the seventh place, that my said trustees, acceptors or acceptor, survivors or survivor of them, the major number accepting and surviving being a quorum, shall, so soon as they see fit, give, grant, and dispone to and in favour of the said Mrs Martha Melville or Simpson and Mrs Catherine Melville or King [his daughters], equally between them in liferent, for their liferent use respectively, allenarly, and in the event of any one of them deceasing without leaving lawful issue of her body, the share of deceased to be given and disponed and to belong to the daughter surviving in liferent for her liferent use allenarly, but excluding the *jus mariti* of her present husband or any future husband she may marry, and to the said Catherine Melville Simpson and John King, my grandchildren lawfully born, and other grandchildren to be lawfully born, by my said two daughters of their present or any future marriage, equally among them, share and share alike, any of whom failing the share or shares of the deceaser or deceasers to the survivors equally among them, share and share alike, my whole heritable subjects and estates before described in fee."

By codicil dated 11th April 1843 Mr Melville made, *inter alia*, the following alteration on his trust-disposition—"Eighth, I hereby alter the disposal of the property belonging to me in Helensburgh as provided for in my deed of settlement, and direct my trustees on my death to dispone and convey the same to my daughters before mentioned equally between them in liferent for their liferent alimentary use allenarly, exclusive of the *jus mariti* and right of administration of their husbands, present and future, and to the issue of my said daughters equally between them *per stirpes* in fee, the shares falling to the issue of each daughter to be equally divided among them, and the shares of such of them as may be females to be exclusive of the *jus mariti* and right of administration of their husbands." The codicil contained a precept of sasine.

Mr Melville died on 30th September 1845, survived by his daughters Mrs Simpson and Mrs King.

Mrs Simpson died on 1st December 1886. She had the following family—(1) Mrs Catherine Melville Simpson or Marshall; (2) Mrs Margaret Simpson or Fraser; (3) David Melville Simpson, born 28th April 1838 and died 6th August 1882 intestate, survived by his eldest son David Melville Simpson; (4) Alexander Simpson, born 12th April 1845, died July 1853 intestate and without issue; (5) John Simpson, born 11th April 1848, died 11th April 1886, leaving a general settlement of his estate in favour of his widow Mrs Jeanie M'Innes or Simpson, afterwards Howarth.

After Mr Melville's death the trustees continued to manage the trust-estate, and, *inter alia*, the property at Helensburgh. By disposition and assignation dated 17th and 22nd April 1868 the trustees, on the narrative of the provisions of the trust-disposition and settlement and the codicil, assigned to Mrs Simpson in liferent for her liferent use allenarly, and to her children Catherine Melville Simpson, Mrs Margaret Simpson or Fraser, David Melville Simpson, and John Simpson, equally among them, share and share alike, and their heirs and assignees, heritably and irredeemably in fee to the extent of one just and equal half *pro indiviso* the said codicil by which Mr Melville had conveyed to them the property in Helensburgh. The disponees under this disposition and assignation obtained themselves infeft for their respective rights of liferent and fee, conform to notarial instrument recorded 7th May 1868. This notarial instrument had an unattested indorsement on the back stating that it had been delivered to the keeper of the register for registration between ten and eleven o'clock on that date.

On the death of Mrs Simpson on 1st December 1886, David Melville Simpson, as son of his deceased father David Melville Simpson, claimed to be in right of two-fifth shares of the one-half of the Helensburgh property which had been liferented by Mrs Simpson, and claimed from the trustees two-fifths of the annual rents thereof, and his claim as minuted at a meeting of the trustees on 20th July 1887 was disputed by Mrs Catherine Simpson or Marshall, Mrs Margaret Simpson or Fraser, and Mrs Jeanie M'Innes or Simpson (afterwards Howarth). Pending the settlement of the dispute the trustees (of whom John King after mentioned was one), with the consent and approval of all the parties interested, by minute of meeting dated 22nd December 1888, instructed their factor to pay periodically one-fifth of the rents to each of Mrs Catherine Melville Simpson or Marshall, Mrs Margaret Simpson or Fraser, Mrs Jeanie M'Innes or Simpson (afterwards Howarth), and David Melville Simpson, and to retain the remaining fifth in his own hands. After 30th December 1888 the factor for the trustees managed the property and disposed of the rents in terms of these instructions.

In May 1898 David Melville Simpson raised an action against Mrs Marshall, Mrs Fraser, Mrs Jeannie M'Innes or Simpson or Howarth, John King, and David Melville's trustees, in which he sought reduction of (1) the disposition and assignation of April 1868; (2) the notarial instrument following thereon; (3) a notarial instrument recorded 3rd February 1896, by which Mrs Howarth was infeft in the one-fourth share of the half of the Helensburgh property formerly liferented by Mrs Simpson, of which Mrs Howarth's first husband John Simpson, *ex facie* of the disposition and assignation and notarial instrument above referred to, was proprietor; and (4) a disposition dated 13th January 1896, by which Mrs Howarth conveyed the said share to John King. The summons was served, according to the statement of the pursuer, between 2 and 3 p.m. on 7th May 1898, and according to the statement of defenders about 9 p.m. on same date.

Mrs Marshall, Mrs Fraser, and John

King lodged preliminary defences that they were entitled to absolvitor as they had possessed the property in dispute by themselves, their authors and predecessors, on an *ex facie* valid irredeemable title for more than the prescriptive period.

On 1st March 1889 the Lord Ordinary (STORMONTH DARLING) repelled the preliminary defences and allowed the defenders to satisfy production within eight days.

Opinion.—"This is a question arising on preliminary defences. The pursuer seeks to reduce (1) a disposition and assignation granted on 17th and 22nd April 1868 by the trustees acting under the trust-disposition and settlement of the late David Melville, merchant in Greenock; and (2) a notarial instrument following thereon, recorded in the Register of Sasines on 7th May 1868. Reduction is also asked of two later deeds, but they are merely consequential on these I have mentioned. The reason stated for reduction is that the disposition by the trustees did not properly carry out the directions of the settlement under which it bore to be granted, inasmuch as it conveyed one-half of the property to one of the testator's daughters in liferent, and to her four children alive at the date in fee, ignoring the fact that another of her children had survived the testator, but had died before the date of the disposition, and that his right had passed under the law of conquest to his elder brother, who is now represented by the pursuer.

"The only plea stated against satisfying the production, and therefore the only plea with which I have here to deal, is that of the positive prescription. It is that between 7th May 1868 and 7th May 1898 the defenders had peaceable possession of their respective shares of the property on an *ex facie* valid irredeemable title for the space of thirty years continually and together, that being the maximum period prescribed by section 34 of the Conveyancing Act of 1874 in cases where allowance has to be made for the minority of those against whom the prescription is used and objected. Further, it is said that this period began to run at 11 o'clock a.m. on 7th May 1868, when the notarial instrument was recorded; that it expired at the same hour on 7th May 1898, and consequently that the serving of this summons, which did not take place till between the hours of 2 and 3 p.m. on 7th May 1898, was ineffectual as a lawful interruption of the period. If the maxim *dies inceptus pro completo habetur* were held to apply, the plea of prescription would prevail, because the thirty years would be reckoned as complete on the morning of 7th May 1898. To some favourable cases that maxim did apply, as when the tocher depended on the endurance of a marriage for year and day (*Waddell*, M. 3465). There are other cases to which it might still apply. But it is not of universal application, and it has no place in the law of prescription. There the rule, as stated by Erskine (iii. 7, 30), is, 'Prescription runs *de momento in momentum*,' and again — 'The years of prescription must be fully completed before any right can be either acquired or lost by it, so that interruption made on the last day of the fortieth year will break its course.' Now, what is the last day of the fortieth year? Is it the last period of twenty-four hours necessary to complete forty, or thirty, or twenty years (as the case may be), reckoning from the hour at which the act happened which constituted the *terminus a quo*, or is it the day of the month of the last year which is of the same numerical denomination as the day of the month of the year in which the computation commenced? I think it is the latter. I acknowledge the force of the argument that here, as it happens, we know the very hour of infeftment, because it is noted on the instrument of sasine, and we also know the very hour of serving the summons through the post, because it is mentioned in the execution appended to the summons. But when a period of time is expressed by years the law does not attempt to parcel out the period into so many equal divisions of three hundred and sixty-five days and six hours each; it is content with the more rough and ready plan of taking the day in the last year corresponding to the day in the first regardless of leap years. The same rule applies to computations by months—thus when a bill payable one month after date is dated January 30th or 31st, the period is not carried into March, but expires on the last day of February. Accordingly, in cases of computation by months or years, and generally even by days, no note is taken of the hour of the first day at which the determining act is done; the time runs from midnight to midnight, or in other words, the day which forms the *terminus a quo* is thrown out of the calculation. That is the rule of computation in all matters of judicial procedure (*e.g.*, A.S., 16th February 1841, sec. 44; and *Ashley* v. *Magistrates of Rothesay*, 11 Macph. 709). It was also the rule under the old law, which required an instrument of sasine to be recorded within sixty days of the taking of sasine. There the hours of the two acts were noted just as they are here. But in the case of *Lindsay* v. *Giles*, 6 D. 771, where it appeared that sasine was taken between the hours of 11 and 12 o'clock, and the instrument was not recorded till between the hours of three and four on the sixtieth day thereafter, the recording was nevertheless held good. It is noteworthy that the Act 1617, c. 12, describes the years of prescription as 'following' and ensuing the date 'of their said infeftments.' Now, the word 'date' is much more commonly descriptive of a day than of any smaller division of time. It was further argued for the defender King that the summons in this case could not be held to have been served until 8th May, because the Citation Amendment Act of 1882, which permitted service by post, provided that the *inducice* should not begin to run for twenty-four hours after the time of posting. But the Act also provides 'that the posting shall constitute a legal and valid citation,' and accordingly it was held in *Alston* v. *Macdougall*, 15 R. 78, that the defender was cited when the posting took place.

"I therefore hold that prescription was validly interrupted, and I shall repel the preliminary defences."

The defender appealed, and on 14th March the Second Division of the Court pronounced the following interlocutor:—"Recal the said interlocutor reclaimed against: Reserve the preliminary defences to be dealt with along with the defences on the merits: Allow the defender to satisfy the production within eight days, and remit the cause to the said Lord Ordinary to proceed as accords."

A record was made up on the merits.

The parties lodged a joint-minute of admissions which obviated the necessity for a proof.

On 3rd November the Lord Ordinary reduced, decerned, and declared as against the compearing defenders in terms of the conclusions of the summons.

Opinion.—"This action of reduction relates to the fee of one-half of certain heritable subjects in Helensburgh which belonged to David Melville, merchant in Greenock, and the case for the pursuer is that the titles made up since Mr Melville's death ought to be set aside because they do not properly carry out intentions of that gentleman as expressed in his settlement. Under the titles as they stand the pursuer has one-fourth of one-half of the property, but he says that he ought to have two-fifths of one-half.

"Defences were lodged against satisfying production. These were founded on the plea of positive prescription, and the argument presented to me at that stage of the case was limited to the question whether prescription had been timeously interrupted by the serving of the present summons. In point of time it was a very fine question, turning on the lapse of a few hours, but I decided that interruption had been validly made. When the case went to the Second Division their Lordships seem to have thought that it would be more satisfactory before deciding anything to have a record made up on the merits, and accordingly appointed that to be done, reserving the effect of the preliminary defences. The case having come back to me, I allowed a proof, but the parties have obviated the necessity of that by agreeing on a minute of admissions. These relate chiefly to the facts of possession as bearing on the plea of prescription, and I think they afford a ground for disposing of that plea apart from the question of computation of time on which I formerly proceeded. But it may conduce to clearness if I invert the natural order, and deal first with the question whether the titles as they stand give proper effect to the will of the testator. Mr Melville died so long ago as 1845, survived by two daughters, Mrs Simpson and Mrs King, each of whom had issue. Mrs Simpson's family, with which alone we are concerned, consisted at her father's death of two daughters and two sons, but another son was born subsequently. The two daughters survive and are defenders. The sons are all dead. The pursuer is the heir of one of these, who was his father, and of another who died without issue in 1853. The *post natus* is represented by the defender King. By the seventh purpose of his principal settlement (taking it shortly) Mr Melville directed his trustees, so soon as they should see fit, to dispone to his two daughters equally in liferent for their liferent use allenarly, and to two of his grandchildren *nominatim* (these being the only grandchildren then born), and other grandchildren to be born lawfully by his said two daughters, of their present or any future marriage, equally among them, share and share alike, and to the survivors, his whole heritable estates. But the eighth purpose of his codicil ran thus—'I hereby alter the disposal of the property belonging to me in Helensburgh as provided for in my deed of settlement, and direct my trustees on my death to dispone and convey the same to my daughters before mentioned, equally between them in liferent for their liferent alimentary use allenarly, exclusive of the *jus mariti* and right of administration of their husbands, present and future, and to the issue of my said daughters equally between them *per stirpes* in fee, the shares falling to the issue of each daughter to be equally divided among them, and the shares of such of them as may be females to be exclusive of the *jus mariti* and right of administration of their husbands.' By another clause of the same codicil he revoked the provisions of his deed of settlement in so far as inconsistent with the provisions of the codicil, but in so far as not inconsistent he ratified and confirmed the same. Now, these two destinations, I think, differed in two particulars, and in two only. The conveyance directed by the codicil was to be made on the testator's death instead of being so soon as his trustees might see fit; and the division of the fee among the grandchildren was to be made *per stirpes* instead of being *per capita*. I see no ground for holding that by the abbreviated but comprehensive expression 'the issue of my said daughters,' he intended to abrogate the express provision in his principal settlement in favour of children to be afterwards born, and to confine the benefit to those who should be alive at his death. If I am right in that it is unnecessary to say more. But I do not think that cases like *Wood*, 23 D. 338, and *Ross*, 5 R. 833, which relate to pecuniary legacies payable to a class of children at the death of a liferenter or annuitant, have any application. The principle of these cases is that in the absence of evidence of a contrary intention a testator must be presumed to have meant the children in existence when distribution was to be made. But a direction to convey a heritable subject to a parent in liferent allenarly, and to his or her issue in fee, is not like a direction to pay money to a family of children on the death of the parent. The enjoyment of the gift in the former case is necessarily suspended till the whole possible family is ascertained at the death of the parent, and the rules of conveyancing are satisfied by the creation of a fiduciary fee, which may include future as well as present children.

I cannot therefore agree with the argument for the female defenders that the conveyance ought to have excluded John Simpson, the *post natus*. Now that is the only ground on which it can be maintained that the division was rightly made into four parts or shares. If each of the Simpson children was entitled to participate, there were five of them, and the pursuer, as admittedly representing two of these five, is entitled to two-fifths. The duty of the trustees was not to wait till 1868 and then to convey to four persons *nominatim*, but to convey in 1845 in the precise terms of the codicil.

Next, I turn to the defence of prescription. I adhere to my former opinion as to its having been validly interrupted, but I find on the admitted facts a fresh ground for repelling the plea. I do not, however, agree with that part of the pursuer's argument which impugns the title as *ex facie* insufficient to found prescription. No doubt you must have infeftment and its warrant. The warrant in this case consists not only of the so-called disposition and assignation by the trustees (which, however, contains no dispositive words, and was only an assignation), but also of Mr Melville's settlement and codicil; all of these are set out in the notarial instrument. It is also true that, if you carefully compare the testamentary deeds with the assignation, you may arrive at the conclusion that the latter deed has not given proper effect to the former. But you cannot reach that conclusion without a knowledge of extrinsic facts. The four persons named in the assignation might have been the whole children Mrs Simpson ever had, in which case there would have been nothing wrong, at least nothing that anybody would have had an interest to complain of. Now, the case of *Buccleuch*, 5 S. 57; *Forbes*, 6 S. 167; and *Lovat*, 25 R. 603, all show that a title may be good as a foundation for prescription, even when it bears evidence *in gremio* of an objection, the full ground of which has to be collected extraneously.

"But the plea of prescription requires not only title but possession, and the point on which I do agree with the pursuer is, that the defenders have not had possession for the requisite period, which in the present case means thirty years from 7th May 1868, when the notarial instrument was recorded. It is admitted that on the death of the liferentrix on 1st December 1886 the pursuer put forward his present claim. that I admit would not have been enough to oust the defenders from the only kind of possession possible in the case of property not personally occupied, *i.e.*, the enjoyment of the rents. But then it appears that with the consent and approval of the whole parties interested, the trustees instructed their factor to divide the rents into five shares, and to retain the disputed fifth in his own hands; and further, that the rents have been so dealt with ever since 30th December 1887.

"Accordingly, I think it is impossible to say that since that date there has been possession by the defenders of the only part of the property which is in dispute. They have voluntarily ceded possession, but to a neutral person who represents the one side as much as the other. And that is not the kind of exclusive possession which the law requires as the foundation of prescription.

"I shall therefore repel the defences, and give the pursuer the reduction he asks."

The defenders reclaimed.

Argued for defender John King—(1) The title sought to be reduced was a good one on which to found prescription, and the Lord Ordinary's opinion on this point was sound. The trustees in their disposition and assignation had validly assigned to the defenders the precept of sasine contained in the codicil—Bell's Lectures on Conveyancing, ii. 949—and the latter were entitled to execute the precept and take infeftment as they had done. (2) There being a *prima facie* irredeemable title, prescriptive possession had followed upon it for thirty years from its date. The notarial instrument had been recorded between ten and eleven a.m. [LORD TRAYNER—You have no habile proof that it was recorded between these hours. The writing on the back of the deed is not a certificate by the registrar, it is merely an unattested writing by a clerk]. If it was thought necessary, the fact that this was the true time of presentation could easily be certiorated by a certified copy of the entry in the minute book. Taking this to be a correct statement of the time of presentation, prescription admittedly ran *de momento in momentum*, not *de die in diem*—Ersk. iii. 7, 34; opinion of Lord President Campbell in *Mercer* v. *Ogilvy*, December 11, 1793, 3 Pat. App. 437. Prescription therefore began to run at eleven a.m. on May 7, 1868, and expired at the same hour on May 7, 1898. According to the pursuers' own statement, the summons was not served till between two and three p.m. on the latter day. By that time the thirty years had expired. The pursuers contended that no part of the first day should be counted. There was no reason why part of the first day should not be counted. No doubt under the Act 1617, c. 12, prescription ran from a "date"; but "date" did not necessarily mean a day, it meant a given point of time, and applied to a moment or an hour as well as a day. The defenders having therefore possessed the property in dispute on an *ex facie* valid title for more than the prescriptive period, they were entitled to succeed in this action. (3) Possession had not been interrupted during the course of the prescriptive period. During the course of that period the title had never been effectively challenged. The tenants of the subjects were the disponee's tenants, and the possession of tenants was to be accounted possession by the proprietors—Ersk., iii. 7, 5; *Campbell*, March 6, 1754, 5 Brown's Supplement, 812. The disponees were the only parties infeft, and there was no competing title. The civil possession of the property had been in them since 1868. The factor only drew the

rents as factor, and the fact that he retained a portion of the rents by arrangement of the trustees did not affect the legal possession of the disponees under their title. Besides, John King was a singular successor, the conveyance in whose favour was challenged, and he could not be prejudiced by the arrangement made in December 1888. In his case at least the title had never been validly challenged till the raising of the present action. (4) The pursuer had no interest to sue. The title which he sought to reduce was the title given to and accepted by his father. The pursuer had no title in his own person, and he made no allegation that his father had been defrauded, or that the title was taken in the present form without his knowledge or consent. (5) John Simpson, from whom the present defender's title was derived, was entitled to a share of the fee of the property in question, although he had been born after the death of the testator. The destination was one of heritable property to a class, and that class included John Simpson—*Carleton* v. *Thomson*, July 30, 1867, 5 Macph. (H.L.) 151, opinion of Lord Colonsay, 155; *Hickling's Trustees* v. *Garland's Trustees*, August 1, 1898, 1 F. (H.L.) 7.

Argued for defenders Mrs Marshall and Mrs Fraser—They adopted the arguments of the defender John King as regards the pursuer's contention, but they further argued that John Simpson, the person from whom John King's title was derived, had no right to a share of the property in dispute, because the beneficiaries entitled thereto must be fixed at the date of the testator's death, and John Simpson was born three years thereafter. The words in the codicil were to dispone "on my death" to the issue of his daughters. The class must therefore be fixed as at that date, and a *post natus* was not entitled to share—*Ross* v. *Dunlop*, May 31, 1878, 5 R. 833. There was no hardship in this, because the codicil only dealt with the Helensburgh property and left the trust-disposition in other respects unchanged, and under the trust-disposition grandchildren "to be lawfully born" were included in the provisions. The first of the two deeds being differently expressed was an argument in favour of the view that in the case of the property dealt with by the codicil the testator intended that the issue alive at his death, and they alone, should get the fee. It was the duty of the trustees to give effect to the intention of the truster, that being the ruling consideration — Opinion of Lord Cowan in *Wood* v. *Wood*, January 18, 1861, 23 D. 338.

Argued for pursuer—(1) The defenders had not a good title on which to found prescription. The precept was contained in the codicil, which left the estate on the testator's death to the testator's daughters in liferent and to the issue of his daughters equally *per stirpes* in fee. The notarial instrument which was said to give infeftment was in favour of the testator's daughter in liferent and four persons *nominatim* stated to be her children equally among them in fee. It was admitted that these four persons were not the whole issue of the daughter alive at the date of the testator's death. There was thus a discrepancy between the precept of sasine and the instrument of sasine following thereon. This was a fatal defect and vitiated the title. (2) Even if the title were held to be *ex facie* valid, thirty years' prescriptive possession had not followed upon it before the possession was interrupted by the service of the summons. In calculating the prescriptive period the *dies inceptus* or any part thereof must not be included. No one disputed that prescription ran *de momento in momentum*, but the point of time to start from was the midnight of the day of registration—*Frew* v. *Morris*, March 12, 1897, 34 S.L.R. 527. The Act 1617, cap. 12, described the years of prescription as following on the "date" of infeftment, and date in legal phraseology never applied to any period less than a day. The marking on the back of the notarial instrument was a jotting by a clerk, and it would be unsafe to hold that that by itself settled the question of the court hour of registration. The safe and customary plan was to count the period of prescription as commencing at midnight of the day of registration. In other words, in reckoning the prescriptive possession the date upon which sasine was given must be excluded—*Lindsay* v. *Giles' Trustees*, February 7, 1844, 6 D. 771. That being so, prescription had been interrupted by the service of the summons. (3) If there had been any possession at all of the subjects by the defenders, that possession had been interrupted by the pursuer's claim in 1886 and the arrangement following thereon in 1888. A dispute had then arisen and had been followed by dispossession of all parties and the installation of the trustees and their factor pending the settlement of the dispute. If a heritable subject was claimed by two different persons, and they agreed that another should occupy that subject pending the settlement of the dispute, it would be ridiculous for either of the disputing parties to maintain that he had possession of the subjects during that period. That was just the case here. The defender King was a party to the agreement of 1888, and could not now ignore it on the ground that he was a singular successor. Possession to found prescription must be peaceable, exclusive, and continuous—Rankine on Landownership, 3rd ed., pp. 35, 37, and 54—and in the face of the dispute in 1886 no such possession had occurred here. (4) Although the pursuer's father had accepted the assignation from the trustees he did so in ignorance of his rights, and no prejudice had been sustained by the defenders. The pursuer was therefore not now barred from insisting in his claim.

LORD JUSTICE-CLERK—The interlocutor of the Lord Ordinary disposes of a number of questions which were laid before him, but on the reclaiming-note the discussion practically came to be limited to the two points, (1) whether the present action of

reduction was too late, in respect that by possession for the prescriptive period the title in question had become unchallengeable, and (2) whether one child received no share, being born after the death of the testator.

As regards the time which elapsed between the date of the title and the date of the service of the summons, the defenders maintain that they have proved that the deed was recorded by a certain hour of a certain day, viz., 7th May 1868, and that the summons was not served till a later hour on 7th May 1898. To this it is answered that the defenders have failed to prove that the recording took place at the hour contended for by them. The answer appears to me to be successful. The only evidence of the exact hour of recording the deed is contained in an unauthenticated note written on the back of the deed, and which presumably was not written by any person in authority, but only by the solicitor's clerk who handed in the deed. Such a marking cannot prove that such was truly the time of recording.

But it is further objected that the running of prescription is to be counted, not from the moment of time on the day of recording, but by the days following on this date. That, as it appears to me, is the sound view, and the day itself is a *dies non* in the computation.

Even if these views were unsound, I am further of opinion that here the defenders are unable, in endeavouring to set up this plea of prescription, to show that there has been possession peaceably without any lawful interruption. That is, I think, clearly shown by the fact that so far back as 1888, in consequence of the pursuer's challenge, the trustees, with the consent and approval of the parties having adverse interests, made an arrangement by which that proportion of the rents which was in dispute should not be paid over to any beneficiary but retained in their hands pending the settlement of the controversy. Thus the proceeds of that share which was in dispute could not be enjoyed by anyone, but were of consent to be kept in neutral hands until the final adjustment of the rights of parties. Therefore there was not that possession which could validate the defenders' right of prescription.

Upon the second question I entirely agree with the Lord Ordinary in holding that the testator by his second destination expressed no intention to abrogate the express provisions of his principal settlement to the effect of excluding children to be born, and limit his gift to those alive at his death. I adopt what his Lordship says on that matter.

I would move your Lordships to adhere to the interlocutor of the Lord Ordinary.

LORD TRAYNER—I think the Lord Ordinary has rightly determined the questions raised in this case.

The first point is, what was the effect of the destination in Mr Melville's codicil, and when did the right conferred by that destination vest. I say the codicil, for it is certainly the deed which alone can be looked at as regulating the succession to the property in question. It altered the original provision in the trust-settlement, which is (in this question) no longer of any account. Now, the direction to the trustees under the codicil was that on the death of the testator they should convey these subjects to his daughters in liferent allenarly, and "to the issue of my said daughters equally between them *per stirpes* in fee." It is too plain for argument that the fee vested *a morte*, and that is not disputed. But to whom was the fee destined? The defenders say to the issue of the daughters alive at the testator's death, and to them only, which excludes the testator's grandchild John Simpson born after the testator's death. I think that view is neither in accordance with the testator's intention nor the proper construction of the destination as it is expressed. The testator's intention was to benefit the issue of his daughters, and John Simpson falls within that class. The direction to the trustees to execute the conveyance "on my death" points out merely the time when the conveyance was to be granted, not the persons in whose favour it was to be granted. No conveyance, of course, could be granted at the appointed time in favour of John Simpson *nominatim*, because he had no existence, but a conveyance could quite well be granted in accordance with the terms of the testator's direction, under which John Simpson would take benefit when he did come into existence, for a conveyance to Mrs Simpson in liferent and her issue in fee would constitute a fiduciary fee in the liferentrix for behoof of her whole issue, or it would create a fee in any of her children named in the conveyance for their own behoof, and a fiduciary fee for any of the same class who afterwards were born. That makes a case quite distinguishable from the cases of *Wood* and *Ross* relied on by the defenders. Accordingly, I have no doubt that the property liferented by Mrs Simpson was divisible into five parts when the fee came to be disposed of, and that the trustees were acting *ultra vires* when they conveyed the fee in four parts. This would be conclusive of the case were it not for the further question which the defenders raise as to prescription. They contend that the title made up by them on the assignation granted by the trustees, having been possessed on for more than thirty years, cannot now be challenged.

I agree with the Lord Ordinary in thinking that the defenders' title, such as it is, is a habile title to found a prescriptive right. But do the conditions necessary to support the plea of prescription exist here. The possession necessary on a habile title to give the prescriptive right must be for thirty years (in this case) "continually and together following and ensuing the date of their said infeftments, and that peaceably without any lawful interruption made to them therein" (Act of 1617, c. 12). The defenders' infeftment is dated 7th May 1868, and the present action was served on 7th May 1898. I am of opinion that the defenders' possession was judicially interrupted by the service of

the summons in this case. I admit that prescription runs *de momento in momentum* from the time when it commences. But its commencement—the first day of the prescriptive period—is the day immediately "following and ensuing" the date of the infeftment. The date of the defenders' infeftment, as I have said, is the 7th May 1868, and the thirty years thereafter did not expire until midnight of the 7th May 1898, before which the summons was served. It is said, however, by the defenders that the summons was not served until the afternoon or evening of the 7th May 1898, whereas their infeftment was recorded on 7th May 1868 between 10 and 11 o'clock a.m. Of this averment there is no proof. There is a marking endorsed on the notarial instrument of that day and hour as indicating the day and hour when the notarial instrument was delivered to the keeper of the register for registration. But the marking is not official; it is not attested by any signature, and the one thing which we have as evidence of the registration is the keeper's certificate that the notarial instrument was recorded on the 7th May 1868. But if the certificate had said that the deed was recorded between ten and eleven o'clock of that day, it would not have made any difference in my opinion. The certificate of the hour of recording would be useful in any question of preference arising between deeds registered on the same day, but in the matter of prescription it is not of the same or indeed of any importance. Prescription runs from the "date" of the infeftment, and that I take to be the day of the infeftment irrespective of the hour of that day. I am therefore of opinion, as I have said, that prescription was here interrupted judicially before the prescriptive period had run. There is another ground on which I should reach the same result. On 1st December 1886 the pursuer made the claim which he is now seeking to enforce, which the defenders disputed, but the parties agreed that pending the settlement of the dispute the rents of one-fifth of the subjects should be retained by the trustees of Mr Melville. It may be that this intimation of the pursuer's claim did not amount to an interruption of the running of prescription, but I think the agreement come to when the claim was made at least forms a bar to the defenders pleading prescription after that date. The agreement in effect was, that the rights of parties should be ascertained as at the 1st December 1886, and the agreement was acted on. The one-fifth of the rents was retained by the trustees, and this action was brought when it was found after certain negotiations that the claim made by tho pursuer could not be extrajudicially arranged. It is true that Mr King was not a party to the agreement, as he had then no right to any part of the property. He pleads that as a singular successor he is not bound by it. But he knew of the claim and the arrangement; he was a party to it as one of Mr Melville's trustees, and he bought part of the property in this knowledge. I cannot regard him, therefore, as in the position of a singular successor who acquires on the faith of the record and with no further knowledge.

LORD MONCREIFF—I agree in the result at which the Lord Ordinary has arrived, and also in the various grounds on which his judgment is based.

The only question for our consideration is, whether the pursuer is barred from challenging the disposition under which undoubtedly David Melville Simpson, who was entitled to a share in his own right, and who was also heir in heritage of Alexander Simpson as heir of conquest, received only one-fourth share instead of two-fifth shares of the property.

To deal first with the plea of prescription, I am of opinion that it is ill-founded, and that upon two grounds. First, the reclaimers had not peaceable and uninterrupted possession of this one-fifth share in dispute for the period of thirty years, because from 1886 the rents effeiring to the said share were, by agreement of all parties interested, retained in the hands of a neutral party to meet the result of the pursuer's challenge.

Apart from this, I am disposed to think that the currency of prescription was interrupted by the service of the summons in this case on 7th May 1898. I agree with the Lord Ordinary that the thirty years began to run at midnight on 7th May 1868, and did not expire until midnight on 7th May 1898. This is the safer and broader view, and the present case affords a very good example of the convenience of adopting that rule, as to the application of which there can be no mistake; because if the computation were to be made from hour to hour, or from minute to minute, we should in the present case, after an interval of thirty years, have to allow proof as to the precise hour or minute at which the deed was recorded.

The expression *de momento in momentum* as used by Erskine (iii. 7, 34) means no more than this, that every moment of the years of prescription is to be counted; it does not (as I understand it) mean that the years of prescription necessarily begin to run from the moment or minute or hour that infeftment is completed.

As to the plea (which was not seriously pressed in argument) that the pursuer is barred in respect of his father having accepted a disposition in these terms, I think it is sufficient to say, that as no prejudice was sustained by the reclaimers, the pursuer is not now barred from insisting in the objection that his father got less than he was entitled to.

I also agree that on a sound construction of the settlement the *post natus* is entitled to a share.

LORD YOUNG was absent.

The Court adhered.

Counsel for Pursuer—Salvesen, Q.C.—Hunter. Agent—W. Kinniburgh Morton, S.S.C.

Counsel for Defenders Mrs Marshall and Mrs Fraser—W. Campbell, Q.C.—M'Clure. Agent—R. Addison Smith, S.S.C.

Counsel for Defender John King—Guthrie, Q.C.—Moffatt. Agent—R. Addison Smith, S.S.C.

Tuesday, January 23.

FIRST DIVISION.

[Lord Low, Ordinary.

LYALL AND OTHERS *v.* CARNEGY.

Fishing—Salmon-Fishing—Bye-Laws of Commissioners—Jurisdiction—Act 1696, *c.* 33—*Salmon-Fisheries Act* 1862 (25 *and* 26 *Vict. c.* 97), *sec.* 6, *sub-sec.* 1, *and sec.* 29.

An action raised in the Court of Session by the proprietors of salmon-fishings against the proprietor of a dam-dyke for the purpose of having the defender ordained (1) to make the dam water-tight, and (2) to construct a salmon-pass or ladder capable of affording a free passage for salmon, *dismissed* as incompetent, the Court holding that as these conclusions amounted merely to the enforcement of a bye-law made by the Fisheries Commissioners, under the authority of the Fisheries Act of 1862, the only competent remedy was that provided in section 29 of that Act, viz., by summary petition to the sheriff at the instance of the District Fishery Board.

By the Act 1696, c. 33, it is provided— . . . "And in respect that the salmon-fishing in this Kingdom is much prejudged by the height of the mill-dams that are carried through the rivers where salmon are taken, His Majesty, with consent of the Estates of Parliament, ordains a constant slop in the mid-stream of each mill-dam dike, and if the dike be settled in several grains of the river, that there be a slop in each grain (except in such rivers where cruives are settled), and that the said slop be as big as can conveniently be allowed, providing always the said slop prejudge not the going of the mills situate upon such rivers."

By sec. 6, sub-sec. (6), of the Salmon Fisheries Act of 1862 it is provided that the Commissioners shall have power to make general regulations with respect to . . . the construction and alteration of mill-dams so as to afford a reasonable means for the passage of salmon."

Section 29 provides that—"In the event of any person refusing or neglecting to obey any bye-law made by the Commissioners or any regulation made by the District Board, the clerk may apply to the sheriff by summary petition in ordinary form praying to have such person ordained to obey the same, and the sheriff shall take such proceedings and make such orders thereupon as he shall think just."

The following bye-law in regard to mill-dams was made by the Commissioners under the Act of 1862, and embodied in the bye-law in Schedule D of the Salmon Fisheries Act of 1868:—"Every new dam and every portion of any dam that may require to be renewed or repaired after this time shall be made and maintained water-tight, or as nearly so as possible, so that no water that can reasonably be prevented shall run through the dam. . . . (6) . . . There shall be a salmon-pass or ladder on the down stream face of every dam, weir, or cauld capable of affording a free passage for the ascending fish at all times when there is water enough in the river to supply the ladder." . . .

Section 37 of the Salmon Fisheries Act 1868 (31 and 32 Vict. cap. 123) provides that "any proprietor of a fishery shall be held to have a good title and interest at law to sue by action any other proprietor or occupier of a fishery within the district, or any other person who shall use any illegal engine or illegal mode of fishing for catching salmon within the district."

An action was raised by Mr David Lyall and others, upper proprietors of salmon-fishings upon the North Esk, against Miss Carnegy of Craigo, Forfarshire, also an upper proprietor of salmon-fishings, and proprietor of the Craigo Dam-Dyke on the North Esk.

The summons concluded for declarator "that the defender is bound to repair the said dam-dyke, and maintain it water-tight, or as nearly so as possible, so that no water that can reasonably be prevented shall pass through the said dam-dyke, and to construct and keep in proper condition a salmon-pass or ladder on the down-stream face of said dam-dyke capable of affording a free passage for the ascending fish when there is water enough in the said river to supply the said ladder: And further, it ought and should be found and declared, by decree foresaid, that the said dam-dyke is in a state of disrepair, and is not water-tight, and that large quantities of water percolate through said dyke, and that the said dyke is not so constructed as to afford a reasonable means for the passage of salmon, and that the salmon pass or ladder which has been inserted by the defender or her authors in the down-stream face thereof is incapable of affording a free passage for the ascending fish when there is water enough in the said river to supply the said ladder: And the defender ought and should be decerned and ordained by our said Lords to repair said dyke, and maintain the same in a water-tight condition, or as nearly so as possible, and to construct and keep in proper condition a salmon-pass or ladder on the down-stream face of the said dam-dyke capable of affording a free passage for the ascending fish at all times when there is water enough in the said river to supply the said ladder, and that at the sight and to the satisfaction of a man of skill to be appointed by our said Lords."

The pursuers averred that the dam-dyke in question formed an insuperable obstacle to the passage of salmon except when the river was in high spate. "(Cond. 4) That the said pass is radically defective and insufficient either in original construction or