ferred to makes any difference to that conclusion. On the former occasion I felt that a case of contributory negligence had been made out, and here I must again come to the same conclusion, and, that being so, I feel constrained, in spite of the inconvenience of ordering a third trial, to give my opinion that this verdict cannot stand.

LORD M'LAREN—The Court granted a new trial when we last had occasion to review the evidence. The pursuer has gone to trial, and so far as I am able to judge, the evidence in the second trial is an exact repetition of the evidence in the first. Of course there are variations, because people will not repeat the same story in the same words at an interval of a year. But in my judgment there are no such differences as would amount to a material variation of the condition of this question of fact. It follows that as the pursuer has not strengthened her case in any way, the defenders are entitled to have the verdict set aside. It is unfortunate, perhaps, that in a case of this kind the Court has not the power, or at least has not exercised the power, of directing a verdict to be entered for the defender, but it seems to me that a trial conscientiously conducted on the part of the jury can only lead to one result—that pointed out by your Lordships who have spoken. It is unnecessary to consider whether there was any fault on the part of the engineman in the speed, or as to the signalling, because every man who uses a road is bound to take precautions for his own safety. When I say bound, I mean that it is a moral duty, and is one which must be discharged as a condition of any claim which may lie against a third party. Now, if the deceased had looked in the direction from which the train was coming he would have seen the train, and would either not have attempted to cross the line in advance of the train, or if he made the attempt and was run over, that would be an error of judgment on his part for which he and not the railway company was responsible. Unwilling as we are to continue the re-trial of cases indefinitely, I agree with your Lordship that we have no alternative but to set aside this verdict.

LORD KINNEAR concurred.

The Court set aside the verdict and granted a new trial.

Counsel for the Pursuer—Watt, K.C.—Munro. Agents — Paterson & Salmon, Solicitors.

Counsel for the Defenders—Guthrie, K.C. —Grierson. Agent—James Watson, S.S.C.

Wednesday, December 7.

FIRST DIVISION.

ANDERSON'S TRUSTEES *v.* ANDERSON.

Succession—Vesting—Liferent or Fee—Liferent with Power of Apportionment among Children—Directions to Trustees Inconsistent with Gift of Fee.

A testator in his settlement directed his trustees to divide the residue of his estate into four equal shares, to be held or paid by his trustees in accordance with his directions. With respect to one share he directed his trustees to "hold" it "for behoof of" a son, to invest it in their own names for his behoof, and to pay the income to him during his survivance, with power to them (in the event of the son's marriage, or if for any other reason they thought it expedient) to advance to him from the capital of the share a sum not exceeding £2000, and with power to the son to provide, with consent of the trustees, an annuity for his widow out of the income of the share, and to apportion by deed *inter vivos* or by testament the share among his children, to take effect upon his decease. It was further provided that, in the event of the son dying unmarried, the share should be divided equally among his surviving nearest of kin *per stirpes.* The son survived the testator and married.

Held (1) that the fee of the share was not given to the son, and (2) that the trustees were bound to hold during the lifetime of the son the share of the estate held by them for his behoof.

William Anderson of Hallyards, in the county of Peebles, died on 3rd March 1879, leaving a trust-disposition and settlement dated 19th January 1877, which was recorded 14th March 1879. By it he conveyed his whole estate, heritable and moveable, to Sir Charles Bowman Logan and others as trustees for, *inter alia,* the following purposes—"(*Third*) I direct that the whole free residue and remainder of my said estate, heritable and moveable, real and personal, above conveyed, or the realised value thereof . . . shall, as soon as conveniently may be after my death, be divided by my said trustees into four just and equal shares, corresponding to the number of my present surviving children, which several shares shall continue to be held by my said trustees, or paid, applied, or disposed of by them in manner hereinafter directed. (*Fourth*) I direct my said trustees as soon as conveniently may be after the foresaid division, to pay, assign, or dispone one of said just and equal fourth shares to my elder son. . . . (*Fifth*) I direct my said trustees to hold another of said just and equal fourth shares of said residue for behoof of my younger son David Brown Anderson, Writer to the Signet, and they shall cause the amount thereof to be transferred to and invested in their own names for his

behoof, and they shall pay over to him during his survivance the free interest, dividends, or annual profits thence arising, and his receipt therefor shall be a valid and effectual discharge to my said trustees for the payment of said interest, dividends, or profits; but with power to said trustees (in the event of the marriage of my said son to the satisfaction of my said trustees, or if for any other reason they may judge it expedient and prudent to make such advances) to advance to him from the capital of said share held by them for his behoof a sum or sums not exceeding in whole the sum of £2000 sterling, to meet expenses needful and proper to be incurred upon his marriage or for the other purposes above referred to; with power also to my said son to make, with consent of the said trustees, provision for a suitable annuity or jointure for his widow out of the income of said share, and also, in the event of there being children procreated of his said marriage, to convey, assign, or bequeath by deed *inter vivos*, or by testament, to take effect upon his decease, said share of my said means and estate in such proportions amongst said children as he may judge proper, and in the event of the said David Brown Anderson dying unmarried the said fourth share held for his behoof as aforesaid, or the proceeds thereof, shall, in so far as the same may not have been advanced to him as aforesaid, be divided equally among his surviving nearest of kin *per stirpes*. (*Sixth*) I direct my said trustees to hold another of said just and equal four shares of said residue for my eldest daughter . . . in liferent, for her liferent use allenarly and the children of her late and any future marriage in fee; and I direct my said trustees to cause the amount of said one-fourth share to be transferred to and invested in their own names for behoof of my said daughter and her children as aforesaid, and my said trustees shall draw the interest, profits, or dividends accruing upon said investments as the same may respectively become due, and make payment thereof to my said daughter during her survivance. . , ." Ry the *seventh* purpose he directed the remaining share to be set apart for his younger daughter, for her liferent use allenarly and her children in fee in terms similar to the terms of the *sixth* purpose (*supra*).

The residue of the testator's estate amounted to £90,000.

In 1900 David Brown Anderson married, and with the consent of the trustees he provided by postnuptial contract for a jointure to his wife out of the income of the trust estate. The trustees also, in virtue of the power conferred upon them, advanced to him a sum of £2000. At the date of this case he had no children and his wife still survived.

Questions having arisen with regard to the rights conferred by the third and fifth purposes of the said trust-disposition and settlement this special case was presented to the Court. The parties to the case were (1) the trustees acting under the trust-disposition and settlement, (2) the two daughters of the testator and the widow and children of the deceased son of the testator, and (3) the said David Brown Anderson, the testator's younger son. The second and third parties were the whole heirs *in mobilibus* of the testator.

The first parties maintained that they were bound to hold the third party's share of residue during his survivance, in terms of the trust-disposition and settlement. In the event of this contention heing upheld they had further contentions as to the dlsposal of this share of residue in certain contingencies, but the Court declined to consider these.

The second parties were interested in the further contentions of the first parties which were not considered.

The third party maintained that the share of residue held by the first parties for his behoof vested in him *a morte testatoris*, subject to defeasance in the event of his dying unmarried, which was the only case in which an ulterior right was conferred on his next-of-kin, and that, as that event could not occur now, the said share had vested in him absolutely, and he was entitled to payment.

The following question of law was, *inter alia*, submitted to the Court—"(1) Are the first parties bound to hold during the lifetime of the third party the share of the testator's estate at present held by them for his behoof, or is he entitled to receive payment of the same now?"

Argued for the first parties—The question in the case was whether the testator had conferred a fee or not. If he had it was admitted that he could not restrict the enjoyment of a fully vested fee—*Miller's Trustees* v. *Miller*, December 19, 1890, 18 R. 301, 28 S.L.R. 236. There might, however, be words of original gift, with an effectual direction to hold in trust added—*Dalglish's Trustees* v. *Bannerman's Executors*, March 6, 1889, 16 R. 559, 26 S.L.R. 424; *Lindsay's Trustees* v. *Lindsay*, December 14, 1880, 8 R. 281, 18 S.L.R. 199. Here the testator had not conferred a fee. This was shown in the provision itself, for the trustees were to hold and to invest in their own names; there was nothing about paying to the third party the capital; it was only the income which was to be paid; there was power to make advances from capital, but that only to a limited extent, and there was a destination-over to an arbitrarily selected class of heirs in the event of the third party dying unmarried. If the whole deed were looked to, this became even clearer, for the testator had given a fee to his eldest son and a liferent to his daughters, and the bequest to the third party in no way resembled the former and closely resembled the latter. The case really was similar in principle to *Douglas's Trustees*, November 6, 1902, 5 F. 69, 40 S.L.R. 103; *Peden's Trusteee* v. *Peden*, June 27, 1903, 5 F. 1014, 40 S.L.R. 741; *Reid* v. *Reid's Trustees*, June 21, 1889, 1 F. 969, 36 S.L.R. 722; *Muir's Trustees* v. *Muir's Trustees*, March 19, 1895, 22 R. 553, 32 S.L.R. 370. In both *Ballantyne's Trustees* and *Greenlees' Trustees*, *cit. inf.*, there was a clear gift of a fee, and

Ballantyne's Trustees was a doubtful authority since the *dicta* in *Bowman* v. *Bowman*, July 25, 1899, 1 F. (H.L.) 69, 36 S.L.R. 959.

Argued for the third party—The third party was entitled to have his share of residue now paid over to him. The bequest came between that to the elder son, where an undoubted fee was given, and that to the daughter, where undoubtedly only a liferent was conferred. It could not have been intended to give a liferent only, for where that was intended the testator used clear language. Probably therefore a fee in some way fettered had been intended, and this was consistent with the language used. To "hold for behoof of" was equivalent to an out-and-out gift—*Ballantyne's Trustees* v. *Kidd*, Feb. 18, 1898, 25 R. 621, 35 S.L.R. 488; *Greenlees' Trustees* v. *Greenlees*, Dec. 4, 1894, 22 R. 136, 32 S.L.R. 106. No restriction on the gift was imposed by the power to the trustees to advance or the power given the beneficiary to convey to his children. There might be some doubt as to what the qualifications were intended to amount to, but that doubt could not affect the fee which had been given. The testator could not tie up a fee so as to deprive the beneficiary of the enjoyment of it—*Miller's Trustees, cit. sup.*; *M'Culloch's Trustees*, November 24, 1903, 41 S.L.R. 88, L.R. [1904], App. Cas. 55; *Yuill's Trustees* v. *Thomson*, May 29, 1902, 4 F. 815, 39 S.L.R. 668. The only thing which could entitle the trustees to withhold payment would have been the provision for the contingency of the beneficiary dying unmarried, but the possibility of that contingency was gone. Dying unmarried meant dying without ever being married. Compare the construction of a provision as to dying without issue—*Steel's Trustees* v. *Steedman*, December 13, 1902, 5 F. 239, 40 S.L.R. 202. In interpreting a statute it had been held that a widower was a married man, *i.e.*, a man who had been married—*Kennedy's Trustees* v. *Sharpe*, November 21, 1895, 23 R. 146, 33 S.L.R. 89. The English cases supported this construction—Jarman on Wills (5th ed.), vol. i, p. 487; *Dalrymple* v. *Hall*, L.R. (1881), 16 Ch. D. 715; *in re Sergeant*, L.R. (1884), 26 Ch. D. 575; *Blundell* v. *De Falbe*, 1888, 57 L.J., Ch. D. 576.

LORD ADAM—The question in this case arises out of the trust-disposition and settlement left by the late Mr William Anderson of Hallyards. Mr Anderson left a trust-disposition and settlement by which he appointed certain trustees. He also left two sons and two daughters. The parties to this case are the trustees appointed by Mr Anderson, of the first part, the two daughters of the second part, and Mr David Brown Anderson, who is the younger son of the testator, of the third part.

The question arises out of the clause by which the testator directs the disposal of the residue of his estate, and that question is whether Mr David Brown Anderson, the party of the third part, has on the proper construction of the settlement, and more especially of the fifth clause of the settlement, an absolute right to the fee of the share bequeathed to him, and if he has such a right of fee, whether or not he has right to immediate payment. The first parties, the trustees, say that that is not the nature of the right given to Mr David Brown Anderson, but that what is given to him is only a liferent and certain other advantages or powers which it is in the option of the trustees to confer upon him.

Now, in the clause dealing with residue the testator directs that the whole of the residue and remainder of his estate "shall, as soon as conveniently may be after my death, be divided by my said trustees into four just and equal shares, corresponding to the number of my present surviving children, which several shares shall continue to be held by my said trustees, or paid, applied, or disposed of by them in manner hereinafter directed." That is the ruling clause as to the residue. It is to be divided by the trustees into four shares, and these shares are to be held or paid according to the manner he directs—that is to say, some are to be paid, some are to be held; and accordingly in the next clause, which deals with the share given to his eldest son, there is a direction—"As soon as conveniently may be after the foresaid division, to pay, assign, or dispone one of said just and equal four shares to" his elder son William Anderson. Now, there is no question that that clause confers a fee upon William Anderson. But then we come to the fifth clause, which is the one we have materially to do with, and by it he directs his trustees "to hold another of said just and equal fourth shares of said residue for behoof of my younger son David Brown Anderson, Writer to the Signet." The direction there is not to pay, but to "hold for behoof of." It was said by the Solicitor-General—and I do not dispute the observation—that a direction simply to hold for behoof of a particular person, with no further direction or with no further limitations or qualifications, and no further disposition of the fee, would and may in certain cases amount to a gift, though it is only said to be "for behoof of." I do not dispute that at all, but I dispute altogether the mode of construction of this clause which the learned Solicitor-General submitted, namely, that having got the leading words "to hold one-fourth of the residue for behoof of my younger son David Brown Anderson," we have to stop there and say—without looking at the qualifications and limitations contained in the clause—that that means an absolute gift in this case, and that, being an absolute gift, all the qualifications and conditions annexed to it are to be considered as mere qualifications and conditions of an absolute gift already given. I do not think that is a proper mode of construing a will. I think you must take the whole clause from first to last, and having considered the whole clause with all its conditions and qualifications, then say whether, when the testator used the words that the trustees were to hold a one-fourth share for behoof of David Brown Anderson, he thereby meant to hold it for his behoof in fee, or to hold it for his behoof as subsequently directed and pointed

out in the clause. Now, if that be the proper way to consider the case the question is, looking to the construction of this will, what was the intention of the testator? Was the intention, taking the whole clause into consideration, to confer an absolute fee on his son David Brown Anderson, or was it to give him the life interest and other powers thereby conferred, and no more?

The testator further goes on to direct that the trustees are to take and invest his share in their names for his behoof, and then this is what they are to do—"They shall pay over to him during his survivance the free interest, dividends, or annual profits thence arising, and his receipt therefor shall be a valid and effectual discharge to my said trustees in payments of said interest, dividends or profits." That is nothing but a direction to pay the interest or income of the estate. It was said, too, that that is inconsistent with a direct right of fee being given to Mr Anderson because, if so, he had a right to demand the whole capital and the direction to pay the interest would be quite superfluous.

But then there is another power to the trustees. In the event of the marriage of the son to their satisfaction, "or if for any other reason they may judge it expedient and prudent to make such advances" they have power to advance to him from the capital of the share held by them for his behoof, a sum not exceeding £2000 sterling to meet expenses needful and proper to be incurred upon his marriage. Now, that again is entirely inconsistent with his having a right to the whole capital. It is provided that his share is to be held for his behoof in the sense expressed here—that the trustees if they think proper may advance £2000.

Then there is a power given to the son to provide with the consent of the trustees for his widow in the event of his marriage. The same observation applies to this provision. That is not an absolute power of disposal of the estate, and is inconsistent with the fee being intended to be given. Then there is the power of apportioning his share among his own children; but that is a very different power from a power of absolute disposal to anybody he wished. It is a limited power, and again is inconsistent with the right in fee being given to him.

And then we have another clause, which is that, in the event of Mr David Brown Anderson dying unmarried, the one-fourth share held for his behoof, or the proceeds thereof, shall be divided "equally among his surviving nearest of kin *per stirpes*." Now, it is impossible to deny that on the construction of that clause in certain events there was an equal division of the fee to be given to selected beneficiaries, namely, not the heirs *in mobilibus*, which the law would settle, but his nearest of kin *per stirpes* which is a selected class.

As to the true meaning of the word "unmarried," whether it means if he should die unmarried, or whether it means if he should never have been married, on the construction of this deed I do not think it is at all material what meaning we give the word, because we are trying to find the intention of the testator, and it appears to me quite obvious that in certain events contemplated by the testator the fee of this estate was not given to his son but was given to his next-of-kin *per stirpes*. That is a clear destination-over, and is quite inconsistent with David Brown Anderson having a right of fee *a morte testatoris*.

Accordingly, on the construction of this deed I think it is evident that the intention of the testator was not to give the fee to David Brown Anderson but to give the trustees the duty to hold and to administer the estate in terms of the third and fifth clauses. I am therefore of opinion that we should answer in the affirmative the first alternative of the first question, to the effect that the first parties are bound to hold during the lifetime of the third party the share of the testator's estate at present held by them for his behoof.

LORD M'LAREN—The question relates to the construction of the fifth purpose of Mr Anderson's will, under which he deals with the interest of one of his sons. I think it proper to begin by attending to the terms of the third purpose, in which the testator indicates the general scheme of his settlement, which is, that his whole estate is to be divided by his trustees "into four just and equal shares corresponding to the number of my present surviving children"; but then he proceeds, "which four shares shall continue to be held by my said trustees, or paid, applied, or disposed of by them in manner hereinafter directed." Here I think is a plain announcement that although his estate is to be divided into four shares, the testator does not intend that each of these four shares shall be dealt with in the same manner, but that you are to look to the special directions to see in what way the general intention in favour of each member of his family is to be carried out.

Now, with the aid of the prefatory statement in the third purpose, I think no one who goes on to read the fifth purpose, in which the trustees are directed to hold a certain "share for behoof of" the testator's younger son David Brown Anderson, could fall into the error of supposing these words stated completely the purpose of the testator in regard to his son, but would consider that these words are merely an announcement of the subject which he was going to dispose of, and would look for the precise destination of that share to the directions which are given to the trustees in regard to this share which they are to set apart for behoof of David Brown Anderson. It was contended by the third parties that these words "for behoof of my younger son" are sufficient to vest him in the capital of his share in the events which have happened; but there are at least two perfectly legitimate modes of interpreting these general words. The one would be that the son would get just the particular interest thereafter provided for him, and no more; and

the other would be that he is to get all the particular benefit provided for him, but if there be any case unprovided for, then this general intention would take effect in his favour. Now, when we look to the language of the fifth purpose to see which of these constructions of the general language at the beginning is the true one, I can have no doubt that the testator intended to qualify the bequest, because at the very beginning the testator's first direction is to pay Mr David Brown Anderson the income of the share. That would be a very strange way of carrying out a purpose to give the legatee the capital. In so far as the argument of the third parties is founded on the cases of *Miller's Trustees* and *Yuill's Trustees*, I think it proceeds on a misapprehension of the scope of the rule of construction there introduced, because these cases had only reference to administration, and all that was laid down was, that if from the language of the deed it is clear that a fee is given, any attempt to limit the enjoyment of the fee would be futile. But then that principle is qualified, in the opinion of Lord President Inglis, by saying that when there are trust purposes to be served, which cannot be secured except by continuing the trust administration, the rule cannot be applied, and the qualification stated in that eminent Judge's decision is confirmed by the decision of the House of Lords in *MacCulloch* [1904], A.C. 55, where, while the principle of *Miller's Trustees*, 18 R. 301, and *Yuill*, 4 F. 815, was affirmed, it was held that the principle could not be applied to the case of a son in whom the right of fee had vested, because the son was not entitled in face of the opposition of the daughters to insist upon an immediate division of the estate. I do not doubt that, if all parties were agreed, the estate might be divided, but even in the matter of administration any of the beneficiaries who desired that the estate should be administered by the trustee would, according to the case of *MacCulloch*, be entitled to have the trust kept up. But then the case of the third party is further put upon the ground that while a liferent is in the first place given to Mr Anderson there are superadded such extensive interests in the fee that, when combined with the liferent, they constitute the equivalent of an unqualified fee. Now, as I had occasion to point out in a case which was discussed last week, although the doctrine has been laid down by the highest authorities that a liferent with an unqualified power of disposal and no ulterior destination may amount to a fee, no case has actually occurred in which all these theoretical conditions have been fulfilled, and in which by the mere force of the words themselves a qualified right has been held to be an unqualified right. It is not surprising that there should be no such case, because if a testator means to give an unqualified right it is very easy for him to say so, and if he means substantial qualification, then such qualification would receive effect through the intervention of a trust. Now, it seems to me that under this trust Mr Anderson has an absolute right to nothing more than the sum of £2000, which the trustees are empowered to advance to him, and with regard to all the rest of the capital the directions are perfectly plain that Mr Anderson is to receive the income for life, and that the fee is to go to his children if he marries, subject to a power of division among them to be exercised by will or deed.

What is to happen in case Mr Anderson should have no issue, or should die without leaving any children surviving him, is a question which I think we can hardly usefully consider at the present time. It may be that if in that case he disposed of the estate to third parties it might be held that under the general words at the commencement of the fifth purpose he would have an interest in the fee sufficient to enable him to dispose of it. That has been held in other cases—chiefly cases of provision in favour of ladies with a power to settle; but this is a question which we are unable to determine in the absence of those who may have an adverse interest.

I am clearly of opinion with your Lordship that the testamentary directions must be carried out according to the plain meaning of the language used, and that this is not a case where any artificial or arbitrary rule of construction ought to interfere with the testator's intention, and that the question must be answered in favour of the first parties.

LORD KINNEAR—I agree with your Lordships for the reasons you have stated.

The LORD PRESIDENT was absent.

The first alternative of the first question was accordingly answered in the affirmative.

Counsel for the First and Second Parties —Campbell, K.C.—Munro. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Third Party—The Solicitor-General (Dundas, K.C.)—Blackburn. Agents—Dundas & Wilson, C.S.

Thursday, December 8.

FIRST DIVISION.

[Sheriff Court of Ayrshire at Ayr.

YOUNG'S TRUSTEES *v.* GRAINGER.

Burgh—Ruinous Buildings—Title Given by Decree of Sheriff—Action for Rent by Lessor under Long Lease—Burgh Police Scotland) Act 1892 (55 *and* 56 *Vict. c.* 55), *secs.* 196, 197, *and* 200.

Certain ruinous buildings in a burgh were sold by public auction by order of the Sheriff under section 200 of the Burgh Police Act 1892, and a decree in terms of section 197 of the Act was pronounced by the Sheriff declaring the purchase duly completed, and authorising immediate possession of the sub-