has observed, this is a distressing case, but I agree with him that it has not been proved that the injuries to the pursuer's son were caused by the fault of the defenders, and even if that had been proved I think the defenders have proved contributory negligence on the part of the boy.

Several grounds of fault were alleged on record, but at the discussion on the reclaiming note the only fault founded on was that the car which ran over the pursuer's son was a badly constructed car, and that the improper construction consisted of its having what is known as a "reverse" stair, which the pursuer alleged obscured the view of the driver of the car on the occasion in question, and prevented him from seeing the pursuer's son as he might otherwise have done, and so avoided the accident.

The pursuer maintains that the kind of stair which ought to be substituted for that on the car in question is one which has been adopted in the other cars on the defenders' system, and which, while more convenient for heavy traffic and in emergencies, is not so safe or convenient for passengers ascending or descending. It is further to be noticed that the difference in the amount of obstruction to the vision of the driver presented by these two styles is not great.

The pursuer's case with regard to this matter is founded upon expert evidence regarding what has been called in the evidence the "blank angle," throughout which a person leaving the kerb would be invisible to the driver of the car. I do not think this expert evidence is satisfactory, because, as pointed out by the Lord Ordinary, it proceeds upon two wrong assumptions. But apart from this I am of opinion that mere theoretical evidence as to the goodness or badness of the construction of a car is not of nearly the same weight as the evidence to be drawn from experience in determining whether the construction of a car is consistent with public safety or not. Now the eight cars fitted with reverse stairs have been in use on the Goldenacre route for some seventeen years, and no accident has ever occurred in connection with them owing to the drivers' view of persons on the street being obstructed, nor has any difficulty been experienced by men working the traffic nor any complaint made by anyone. The man who was driving the car when the accident happened had been fourteen years in the employment of the Tramways Company as a driver, and he states that he never in practice found the stair an obstruction of his view so as to endanger the public, and he prefers the older construction of car to the newer one. Further, these cars were originally approved of by the Board of Trade Inspector, and they have been regularly licensed every year by the Local Authority, who are the Corporation of Edinburgh.

In this state of matters I think it impossible to say that the construction of the car in question was not reasonably safe so far as the public were concerned, but it was urged for the pursuer that under the regulations and bye-laws made by the Board of Trade for the use of cable traction on the Edinburgh Corporation Tramways, and dated 28th November 1905, it was provided that "every carriage used on the tramways shall comply with the following requirements, that is to say—(*e*) It shall be so constructed as to enable the driver to command the fullest possible view of the road." Now in my opinion this provision cannot be read literally. If it were so, stairs would require to be abolished altogether as a means of access to and egress from the roofs of cars, and something of the nature of a fixed iron ladder or some such contrivance substituted therefor, for there is no doubt that stairs of any kind do obstruct the driver's view more or less. Accordingly this provision requires construction, and in my opinion does not impose upon the Tramways Company any greater duty than that imposed at common law, on the footing that the stairs are to be used, and that is that they are to be so constructed as not materially to obstruct the view of the driver. I think this requirement was satisfied by the construction of the car in the present case. I am therefore of opinion that no liability rests on the defenders in respect of fault in the construction of the car in question.

With regard to the matter of contributory negligence, I agree with the opinion expressed by Lord Low.

LORD DUNDAS was sitting in the Extra Division.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Wilson, K.C.—Kemp. Agent—Francis S. Cownie, S.S.C.

Counsel for the Defenders (Respondents)—Watt, K.C.—Munro. Agents—Macpherson & Mackay, S.S.C.

Wednesday, May 26.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

ARMOUR AND OTHERS *v.* GLASGOW ROYAL INFIRMARY AND OTHERS.

Repetition—Title to Sue—Trust—Discharge — Approbate and Reprobate — Residuary Legatee having Granted Discharge Seeking Repetition from Payee of a Bequest Paid though Void from Uncertainty.

By a codicil to his will a testator directed his trustees to dispose of the residue of his estate "for such purposes of a religious, charitable, or educational character, or partly among my own relatives as may be specified in any writing under the hand of my . . . wife." He was survived by his

wife, and under a deed of direction executed by her in virtue of the power of the codicil the trustees paid certain sums to the testator's four grandchildren, who granted the trustees a full discharge of all claims competent to them against the trust estate, and also a legacy to an infirmary. The grandchildren being the heirs *ab intestato*, some years after the payment of the legacy to the infirmary brought an action against the infirmary and the trustees for the repetition thereof, on the ground that the clause in the codicil was void from uncertainty, and that the residue, being undisposed of, fell to them as heirs *ab intestato*. The infirmary and the trustees both maintained that the money had been properly paid, and resisted the claim. *Held* (*aff.* Lord Skerrington) (1) that in the circumstances the pursuers had a good title; (2) that the clause purporting to dispose of residue was void from uncertainty; (3) that the residue fell to the pursuers as heirs *ab intestato;* and (4) that it was not necessary that the discharge by the pursuers in favour of the trustees should first be reduced.

On 4th August 1908, Jane Wright Armour, Balmoral Terrace, Glasgow, and others raised an action against the Glasgow Royal Infirmary and also against William Walker and others, the testamentary trustees of the late James Wright, calenderer, Glasgow, who died on 6th December 1891. In it the pursuers, who were the testator's four grandchildren and his heirs *ab intestato*, sought declarator (1) that the ninth purpose of a codicil to Wright's trust-disposition and settlement, dated 4th December 1891, was void from uncertainty; (2) that the residue therein dealt with fell to his heirs *in mobilibus ab intestato;* (3) that a deed of direction, dated 22nd June 1899, executed by his widow Mrs Elizabeth Storry or Wright under the said ninth purpose of the codicil, conferred no right on the Glasgow Royal Infirmary to receive payment from his trustees of a sum to endow a "James Wright Bed" in that institution; and they also sought repetition of the sum of £2000 from the Glasgow Royal Infirmary, being the sum which had been paid by the trustees to it, or alternatively, repayment of that sum to the said trustees.

The said codicil, dated 4th December 1891, provided, *inter alia*—"(*Ninth*) I direct my trustees to dispose of whatever remains of my estate for such purposes of a religious, charitable, or educational character, or partly amongst my own relatives as may be specified in any writing under the hand of my said wife, which failing, as may be appointed by any writing to be executed by the trustees acting at the time of her death under my said trust-disposition and settlement and these presents."

The amount of residue available for distribution under the said codicil was about £7000. Mrs Wright, in virtue of the power conferred on her by the said clause, executed two deeds of direction to the trustees acting under her late husband's trust-disposition and settlement, which were dated respectively 22nd June 1899 and 7th February 1900, and by which, *inter alia*, she gave provisions to the pursuers. She also directed that such sums as should be sufficient to found a bed to be called the "James Wright Bed" should be paid to the Royal Infirmary, Glasgow. In virtue of this direction the testamentary trustees paid £2000 to the Infirmary. They also paid the provisions to the pursuers, who accepted payment and granted to the trustees a full discharge of all claims competent to them against the trust estate, in each of which discharges the provisions of the said deeds of direction and the payments made to the grandchildren in terms thereof were expressly narrated.

The defenders, the Glasgow Royal Infirmary, pleaded, *inter alia*—"(1) In respect of the discharges granted by the pursuers in favour of the other defenders or their predecessors in office, (*a*) the pursuers have no title to sue, (*b*) these defenders are entitled to absolvitor. (3) The pursuers having accepted payment of provisions conceived in their favour under the ninth purpose of the said codicil dated 4th December 1891, and relative deeds of direction, are barred *personali exceptione* from challenging the effect of the said deeds. (6) Decree of absolvitor should be pronounced in respect (*a*) that the whole residue of the trust estate was validly and effectively disposed of by the truster under the provisions of his trust-disposition and settlement and relative codicils, and (*b*) that these defenders received payment of their legacy within the knowledge of the pursuers, and have *bona fide* expended the same upon the installation of 'The James Wright Bed.'"

The defenders, the testamentary trustees, pleaded, *inter alia*—"(1) In respect of the discharges granted by the pursuers in favour of these defenders or their predecessors in office, (*a*) the pursuers have no title to sue, (*b*) the defenders are entitled to absolvitor. (3) The pursuers having accepted payment of provisions conceived in their favour under the ninth purpose of the said codicil dated 4th December 1891, and relative deed of direction, are barred *personali exceptione* from challenging the effect of the said deeds. (6) Decree of absolvitor should be pronounced in respect (*a*) that the whole residue of the trust estate was validly and effectively disposed of by the truster under the provisions of his trust-disposition and settlement and relative codicils, and (*b*) that these defenders, within the knowledge of the pursuers and without challenge on their part, have paid away and distributed the whole of the said residue among parties in whose favour provisions were provided by the truster in his said trust-disposition and settlement and relative codicils."

On 11th December 1908 the Lord Ordinary (SKERRINGTON) decerned in terms of the declaratory conclusions of the sum-

mons, and ordained the Glasgow Royal Infirmary to pay to the defenders, the testamentary trustees, the said sum of £2000 with interest thereon as concluded for.

Opinion.—"The object of this action is to obtain repetition from the Glasgow Royal Infirmary of a payment of £2000 which they received out of the estate of the late Mr Wright. The action is peculiar in respect that it is brought, not by the testamentary trustees who paid the money, but by the four heirs *ab intestato* of the testator. In the ordinary case such an action could be brought only at the instance of the trustees. In the present case, however, the testamentary trustees have been called as defenders, and they concur with the Infirmary in maintaining that the money was properly paid, and that the pursuers are not entitled to insist on its repayment. In these circumstances I think that the pursuers have a good and sufficient title to maintain this action to the effect of demanding that the money shall be repaid to the trustees.

"The first question is as to the validity of a clause in the codicil of 4th December 1891, by which Mr Wright directed his trustees to dispose of the residue of his estate for such purposes of a religious, charitable, or educational character, or partly among his own relatives, as might be specified in any writing under the hand of his wife, which failing, of his trustees. It is, I think, clear from numerous recent decisions that this clause is void from uncertainty. It follows, in my opinion, that the deed of directions executed by Mr Wright's widow, in terms of this power, is also invalid, and that the defenders the Infirmary had no right to receive, and have no right to retain, the sum of £2000 which was paid to them by Mr Wright's trustees in obedience to this deed of directions.

It was, however, maintained by both sets of defenders, viz., the trustees and the Infirmary, that the action could not be insisted in so long as certain discharges granted by the pursuers in favour of the trustees stand unreduced. These discharges were granted by the pursuers in favour of the trustees in respect of the payment by the trustees of certain bequests made to the pursuers by Mrs Wright in the said deed of directions. I agree that these discharges preclude the pursuers from holding the trustees personally liable in respect of the latter having given effect to the directions of the deed under which the pursuers themselves took benefit; but I cannot see how these discharges prevent the trustees (or what is the same thing in the present case), the pursuers, from demanding repetition of a payment which was made in error and which the Infirmary had no right to receive. The discharges were not intended to operate as a gift from the pursuers to the Infirmary.

"The defenders further plead that the £2000 received by the Infirmary has been *bona fide* expended in the installation of a bed called 'The James Wright Bed.' The averments in regard to this are somewhat vague, but it was not maintained that the money was not still in the hands of the Infirmary. Even if the capital had been spent, I do not think that this would be a good defence. The pursuers do not claim repetition of the income.

"Accordingly I propose to pronounce a decree in terms of the first, second, and third declaratory conclusions of the summons, and to decern against the defenders, the Glasgow Royal Infirmary, for payment to the other defenders, the trustees of the late James Wright, of the sum of £2000 sterling, with interest from the date of citation, and with expenses."

The defenders reclaimed, and argued—(1) The pursuers having taken the provisions conferred upon them by the codicil and deed of directions, were barred by the doctrine of approbate and reprobate from maintaining that any of the provisions given under these deeds should be refused effect. (2) As the trustees were alleged to have allotted to the Infirmary what was due to the pursuers, it was against them that proceedings should have been taken, as they were the true debtors—*Boulton* v. *Beard*, February 24, 1853, 3 De. G. M. and G. 608. The Infirmary had had no dealings with anybody but the trustees, and if the money had been paid in error it must go back to the trustees. But before the trustees could be sued, the discharges would have to be reduced. This could only be done if these had been granted under essential error induced by the trustees—*Stewart* v. *Kennedy*, March 10, 1890, 17 R. (H.L.) 25, 27 S.L.R. 469. As there were no averments relevant to the reduction of the discharges, their validity could not be impugned in this process. *Watt* v. *Rogers' Trustees*, July 18, 1890, 17 R. 1201, 27 S.L.R. 904, was special, there being in that case an averment of collusion between the trustees and the beneficiary who was sued.

Argued for the pursuers—(1) This was not a case of approbate and reprobate—Bell's Prin., sec. 1939. (2) The Infirmary had possession of money belonging to the pursuers, and must repay it. The pursuers were entitled to sue the Infirmary directly —*Watt* v. *Rogers' Trustees* (*cit. sup.*). The discharges were granted by the beneficiaries in favour of the trustees; the Infirmary could not found on them as operating a gift from the pursuers to it. Moreover, the discharges had been granted *sine causa* by persons in ignorance of their legal rights, and were therefore reducible—*Dickson* v. *Halbert*, February 17, 1854, 16 D. 586; Bell's Prin., secs. 583 and 584. *Fleming* v. *Brown*, February 6, 1861, 23 D. 443, was also referred to.

LORD JUSTICE-CLERK—I think the Lord Ordinary is right.

LORD LOW—I agree.

LORD ARDWALL—I agree.

The Court pronounced this interlocutor—

"Adhere to the interlocutor reclaimed against, and decern: Find the defenders

the Glasgow Royal Infirmary liable in expenses since said 11th December 1908, and remit the account thereof to the Auditor to tax and report: *Quoad ultra* find that the defenders the trustees of the deceased James Wright are not entitled to charge any expenses connected with the reclaiming note against the trust funds of the said deceased James Wright."

Counsel for Reclaimers (Defenders) — Blackburn, K.C. — Moncrieff. Agents — Webster, Will, & Company, S.S.C.

Counsel for Respondents (Pursuers) — Cullen, K.C. — Ingram. Agent — Henry Robertson, S.S.C.

Thursday, May 27.

FIRST DIVISION.

BAXTERS *v.* BAXTER'S TRUSTEES.

Succession—Liferent Interest—Party Born after Date of Deed—Right to Payment in Fee—Date of Valuation of Share—Entail Amendment (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 84), *sec.* 17.

The Entail Amendment (Scotland) Act 1868, section 17, provides that it shall be competent to constitute by trust or otherwise a liferent interest in moveable estate in favour only of a party in life at the date of the deed (in the case of a testamentary deed, the death of the grantor), and where any moveable estate shall, by virtue of any deed dated after the passing of the Act, be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable estate shall belong absolutely to such party.

A testator who died in 1871 directed his trustees to apportion his estate among his children, declaring that the shares should not vest in them or their children (his grandchildren) but that they should only receive the interest, the fee of a share on a grandchild's death to be paid to his or her issue (testator's great grandchildren). The funds, however, were to be held by the trustees as one *cumulo* fund. Certain of his grandchildren, born after his death and having attained majority, founding on the Entail Amendment (Scotland) Act 1868, claimed payment of their shares in fee.

Held (1) that the Act applied, and that they were entitled to payment—*Shiell's Trustees* v. *Shiell's Trustees*, May 26, 1906, 8 F. 848, 43 S.L.R. 623; and *MacCulloch* v. *M'Culloch's Trustees*, November 24, 1903, 6 F. (H.L.) 3, 41 S.L.R. 88, *distinguished;* and (2) that the valuation of their shares fell to be made as at the date of payment.

The Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. cap. 84), section 17, enacts—"From and after the passing of this Act it shall be competent to constitute or reserve, by means of a trust or otherwise, a liferent interest in moveable and personal estate in Scotland in favour only of a party in life at the date of the deed constituting or reserving such liferent, and where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the passing of this Act (and the date of any testamentary or *mortis causa* deed shall be taken to be date of the death of the grantor, and the date of any contract of marriage shall be taken to be the date of the dissolution of the marriage), be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such party, and where such estate stands invested in the name of any trustees, such trustees shall be bound to deliver, make over, or convey such estate to such party. . . ."

On 21st November 1908 Miss Evelyn V. Baxter and Captain N. E. Baxter, the children, who had attained majority, of the late John Henry Baxter of Gilston, Fife, *first parties;* Charles W. Baxter and Ralph F. Baxter, his remaining children, who were still in pupillarity, and their tutors and curators, *second parties;* and Edward G. Baxter of Teasses, Largo, Fife, and others, trustees of the late Edward Baxter of Kincaldrum, Forfarshire, father of the said John Henry Baxter, *third parties*, brought a Special Case for the determination of the first and second parties' rights in the estate of the said Edward Baxter of Kincaldrum, their grandfather.

By his trust-disposition and settlement the late Edward Baxter of Kincaldrum, who died on 26th July 1871, directed his trustees to "set aside, divide, and apportion the whole residue and remainder of my said means and estate . . . and that among the whole of my children . . . in the following proportions. . . . Declaring that the shares of my said means and estate set apart to my said children other than the said William Edward Baxter, and any accretions to such shares, shall not vest in them or their children (my grandchildren). . . . And I accordingly appoint my trustees to pay to my said children . . . during their respective lives the interest, dividends, and yearly profits of their said respective shares or portions of the said residue . . . so divided and set apart. . . . Declaring that in case any of my children . . . shall die, whether before or after me, leaving lawful issue, then such issue shall be entitled to payment of the interest of their deceased parents' shares of my said means and estate and all accretions thereto, and shall also be entitled to the interest of all subsequent accretions as in the room of their deceased parents. . . . Notwithstanding of the rights of my sons other than the said William Edward Baxter being hereby restricted to a liferent merely, yet I do hereby specially authorise and empower my trustees . . . to pay such son or sons the fee of one-