sufficient to clear up the doubt which I expressed in the course of the discussion upon that point. It may be so, but counsel could not point me to any statutory provision which rendered butter margarine simply because it contained less than 10 per cent. of butter fat. The only definitions of margarine to which I was referred involve its containing other ingredients than butter fat. The only section in any of the Acts which I have been able to find that bears any reference to ten per cent. of butter fat is section 8 of the Food and Drugs Act 1899. But without explanation I cannot see why butter containing less than ten per cent. of butter fat should *eo ipso* become margarine, and that is certainly not the necessary result of this provision.

The Court refused the bill.

Counsel for the Complainer — Millar Craig. Agent—John N. Rae, S.S.C.

Counsel for the Respondent—D. Wilson. Agents—M'Neill & Sime, S.S.C.

COURT OF SESSION.

Thursday, June 2 and 16

FIRST DIVISION.

BAILLIE'S TRUSTEES *v.* BAILLIE'S TRUSTEE AND ANOTHER.

Process — Special Case—Competency — No Proper Contradictor.

A special case was raised to determine whether, under the trust-disposition and settlement of a testator, the person who was entitled to succeed on the death of a liferentrix, who was still alive, was the person who at the date of the testator's death was his heir-male, or was the person who would be heir-male at the date of the practical opening of the succession when the liferentrix died. The parties to the case were the testator's trustees, the trustee of the heir-male at the date of the testator's death, and the heir-male at the time of the presentation of the case.

Held that the case was incompetent as there was no proper contradictor, the heir-male at the death of the liferentrix being uncertain.

Succession—Vesting—Direction to Convey on Occurrence of Certain Event—"Whom Failing."

A testator left a trust-disposition and settlement, by which he conveyed, *inter alia*, a certain heritable estate to his trustees, and directed them to hold it for the liferent use of his widow, and "on the death of the survivor of me and my said wife my trustees shall dispone and convey my whole foresaid heritable estate to" G. B., "my nephew, . . . whom failing to the heirs of his body, whom failing to my own heirs-male and the heirs of their body." G. B. survived the testator but predeceased the liferentrix, dying unmarried.

Held, in a special case brought on the death of the liferentrix, that the person entitled to the estate was the heir-male at the date of the death of the liferentrix, and not the trustee of G.B. (the heir-male at the date of the testator)—by the Lord President, Lord Kinnear, and Lord Salvesen, because (1) there was no expression in favour of G.B., except the direction to the trustees to convey to him on the death of the liferentrix whom he had not survived; and by the Lord President and Lord Kinnear, because (2) the conveyance which the trustees were bound to make was a conveyance containing the destination in the trust-disposition, and in a destination of Scottish heritage the expression "whom failing" meant that it was necessary to invoke the destination in order to see who was to take after the party first called at the date when the succession opened.

Sir Mark J. M'Taggart Stewart and others, the trustees of the late Sir William Baillie of Polkemmet, Bart., acting under his trust-disposition and settlement dated 10th April 1889, *first parties;* Robert Selmon Whiting, solicitor, Melbourne, the sole acting trustee and executor of the late Sir George Baillie, of Melbourne, Bart., *second party;* and Sir Gawaine George Stuart Baillie, Baronet, and Dame Isabel Wilkie or Baillie, widow of Sir Robert Alexander Baillie, Baronet, sole curator to the said Sir Gawaine, appointed under the trust-disposition and settlement of the said Sir Robert, *third parties*, presented a special case for the opinion and judgment of the Court of Session.

Sir William Baillie of Polkemmet, in the county of Linlithgow, Baronet (hereinafter called the testator), died on the 21st day of July 1890, survived by Dame Mary Stuart or Baillie, his wife, who at the date of the case was still living, but without leaving issue. The testator left a trust-disposition and settlement dated 10th April 1889, and recorded in the Books of Council and Session 7th August 1890, by which he assigned and disponed to Mark John M'Taggart Stewart, Esquire of Southwick (afterwards Sir Mark John M'Taggart Stewart, Baronet), and others, in trust, all and sundry his lands and other heritable and moveable estate, and all moveable and personal estate which should belong to him at the time of his death, in trust for the purposes therein written.

The second purpose of the said trust-disposition and settlement was in the following terms:—'My trustees shall from and after my death hold my estate of Polkemmet . . . for the liferent use of Dame Mary Baillie, my wife, in the event of her surviving me, and they shall pay to her during her lifetime the free annual proceeds of said estate and of

minerals therein, and allow her to occupy the mansion-house, offices, and policies."

The third and fourth purposes of the trust provided for the trustees, on the death of the survivor of the truster and his wife, raising from his heritable estate two sums of £2000 for the purposes therein expressed.

The fifth purpose of the trust was in the following terms:—"On the death of the survivor of me and my said wife my trustees shall dispone and convey my whole foresaid heritable estate to George Baillie, now in Australia, my nephew, eldest son of the late Thomas Baillie, my brother, whom failing to the heirs of his body, whom failing to my own heirs-male and the heirs of their body, whom failing to my own nearest heirs whomsoever, excluding heirs-portioners, but under burden of the heritable debts and burdens affecting said estate at the time of my death, and money to be charged by my trustees on said estate as before directed, and any other sums required for payment of legacies which I may hereafter bequeath by codicil hereto or by any other writing under my hand."

The testator's nephew George, afterwards Sir George Baillie, Baronet, survived the testator, and died on 2nd April 1896 unmarried. The said Sir George Baillie was at the testator's death his nearest heir-male, and succeeded him in the baronetcy. He left a last will and testament, dated 22nd October 1894 appointing the said Robert Selmon Whiting and Dundas Hamilton, also of Melbourne, trustees and executors of his will, to whom he devised and bequeathed all his real and personal estate whatsoever and wheresoever upon trust for the purposes therein expressed.

The said Robert Selmon Whiting was at the date of the case the sole acting trustee and executor of the said deceased Sir George Baillie.

The said Sir George Baillie was succeeded in the baronetcy by his younger brother and heir Sir Robert Alexander Baillie, Baronet, who died on 16th October 1907, leaving a trust-disposition and settlement dated 24th June 1898, under which he nominated and appointed his wife, the said Dame Isabel Wilkie or Baillie, to be tutor and curator to such of his children who should be in pupilarity or minority at the time of his death, and during their respective pupilarities and minorities. Their eldest son, the said Sir Gawaine George Stuart Baillie, Baronet, a minor, was at the date of presenting the case the heir-male of the testator.

When the case was first presented, Dame Mary Stewart or Baillie, the liferentrix, was still alive, and the reason for bringing the special case was thus stated—"Questions have arisen in the administration of the estate of the said Sir George Baillie, Baronet, the determination of which depend upon the date of vesting of the said estate of Polkemmet under the said trust-disposition and settlement."

The second party maintained that on the death of the testator, the testator's heritable estate vested in Sir George Baillie under the fifth purpose of the testator's trust-disposition and settlement, before quoted, subject to the liferent conferred on the testator's widow by the second purpose thereof, and under the burdens referred to in article 5 of said trust-disposition and settlement. The first and third parties, on the other hand, maintained that the vesting of any right to the fee of the heritable estate under the fifth purpose of the testator's will was postponed till the death of the testator's widow, and that the testator's heirs-male, called in the said purpose next after the said Sir George Baillie and the heirs of his body, fell to be ascertained at the date of the death of the testator's widow.

The *questions of law* were—"(1) At the death of Sir George Baillie, had right to the fee of the testator's heritable estate vested in him? (2) Is the vesting of any right to the fee of said heritable estate postponed until the death of the testator's widow?"

The case was heard and taken to avizandum on 18th May 1910.

On 26th May 1910 the parties were heard by the desire of the Court on the competency of the special case.

Argued for the second party—The case was competent. The second party could competently have raised an action of declarator that the testator's heritable estate had vested in Sir George calling as defenders the testator's trustees and the then heir-male. A present question had arisen and the testator's trustees and present heir-male were the proper contradictors and represented the interest of future heirs-male. Reference was made to *Smith* v. *M'Coll's Trustees*, December 14, 1909, 47 S.L.R. 291; *Provan* v. *Provan*, January 14, 1840, 2 D. 298; *Harveys* v. *Harvey's Trustees*, June 28, 1860, 22 D. 1310; *Scott* v. *Scott*, July 17, 1852, 14 D. 1057; *Cairns' Trustees* v. *Cairns*, 1907 S.C. 117, 44 S.L.R. 96; *M'Caig* v. *Maitland*, January 5, 1887, 14 R. 295, 24 S.L.R. 219; *Mackenzie's Trustees* v. *Mackenzie's Tutors*, July 1, 1846, 8 D. 964.

Counsel for the first and third parties also intimated that they concurred with the second party in wishing to have the question decided.

At advising on 2nd June—

LORD PRESIDENT—The question raised by this special case is whether under the trust-disposition and settlement of the late Sir William Baillie the person who is entitled to succeed on the death of a liferentrix who is still alive is the person who at the date of the testator's death was his heir-male, or is the person who will be heir-male at the date of the practical opening of the succession when the liferentrix dies.

After hearing the case it occurred to your Lordships that there were grave difficulties in giving a judgment upon such a question, and we allowed counsel to be heard upon that point.

In the case of *Smith* v. *Kidston and Others* (*Dugald M'Coll's Trustees*), 47 S.L.R. 291, at 295, I said this—"I do not think that

your Lordships have ever been in the way of giving people decrees merely for the purpose of enabling them to have a marketable right unless it was certain that the proper contradictors were in Court." I had already pointed out that if a person was in the position of being able to ask for a present conveyance, he was of course entitled to get it and to have the mouth of any contradictor shut who said he was not to get it. But if he was not in that position I laid down the law in that way in that case, and in that opinion Lord Kinnear and Lord Dundas concurred. As, however, the matter was said to be of importance here I have looked carefully into all the cases that were quoted to us, with the result that I have no doubt as to the soundness of the opinion which I then delivered. I find no case in which a decree has been granted where the proper contradictor was not in Court.

The only case on which very great reliance was placed in argument was the case of *Provan* v. *Provan* (1840, 2 D. 298). That case was distinguished by Lord Justice-Clerk Inglis in *Harveys* v. *Harvey's Trustees* (1860, 22 D. 1310), where the Court refused to grant a decree. There is no doubt that in *Provan's* case the proper contradictors were there. The settlement was in favour of a lady who was to be the liferentrix, and then at her death the estate was to be divided among her children and the issue of any children who might have predeceased. The children brought first an action of multiplepoinding, and then, when they were told that that would not do, they brought an action of declarator and they called some of their own children, that is to say, the grandchildren. Now your Lordships will notice that under that settlement the only persons who could succeed were either the pursuers (the children) or the others (the grandchildren), but that the precise share that each person would take would, in the event of its being held that vesting was postponed until the death of the liferentrix, be uncertain until the period arrived. But the estate could only go to the class, and that class was represented by people who were actually there and whose interest was precisely the same in quality, although not necessarily the same in quantity, as that of the person who would be able to vindicate the right when the time came. I have no doubt that in a case where members of a class are there to represent the class, when, in other words, it is a question between one class and another, the decision is good even although the precise members of the class cannot at the moment be ascertained, and I have no doubt also that such a decision would be *res judicata*.

But this is not a competition between a class and a class; it is a competition between a person who fills a certain character at one date and a person who may fill it at another; and I think it is perfectly impossible to hold that anybody can now represent the person who is going to be heir-at-law at the date of the death of the liferentrix. Who that person may be we at present cannot say.

The other cases cited to us are no exceptions to that rule. They may be divided into two classes. There is, first, the class of action brought to have it found that an entailed estate is burdened. *Mackenzie* [*Mackenzie's Trustees* v. *Mackenzie's Tutor*, 1846, 8 D. 964] was a case of that sort. Now there the proper contradictor is the person who declares that the estate is burdened, and the other person, who is called the heir-at-law, says that the estate is free. His interest in saying that the estate is free is precisely the same interest that every heir-at-law in his turn will have, because the same interest exists in all the heirs of entail to keep the estate free. Therefore, there, a judgment against one heir of entail is *res judicata* against all the rest.

The same thing has been held in actions which have to do, not with the burdening but with the *quantum* of an entailed estate, such, for instance, as an action of boundary with a coterminous proprietor. There it is quite certain that one heir of entail litigating with a coterminous proprietor will bind all the heirs of entail that follow, for the reason that his interest in vindicating the *corpus* of the entailed estate is precisely the same interest as that of all the other heirs that will come after him.

The second class of case is that class where it has been held that a substitute of entail, even although he was not and could not be a substitute in possession, was entitled to raise a declarator of irritancy to declare a contravention. But, there again, that is because he has the present vested right to protect the entail. Every heir of entail in the destination is entitled to protect the entail, and therefore that really falls within the same class of considerations as the consideration which makes one say that wherever a person is entitled to have an immediate conveyance he shall be entitled to have that declared. And that is so even when the effect of the decision may be to make matters *res judicata* against anyone coming forward later.

The case of *M'Caig* v. *Maitland* (14 R. 295) really comes nearer what the parties here want. But there the person who was held to have made the question *res judicata* against the other person who afterwards turned up was found entitled to an immediate conveyance. His immediate conveyance did not affect the whole of the estate, because some of the estate was to be kept up for the satisfaction of annuities. But, none the less, it was held that he was entitled to an immediate conveyance of all that was free, and that, of course, carried the rest—that is to say, in argument it carried the rest because he could not get an immediate conveyance unless at the same time the question was settled which would afterwards settle the right to the part burdened with the annuities. The precise point we have here was put by Lord Rutherfurd Clark in argument, and although the counsel who argued it said

that it would be *res judicata*, he had to admit that there was no authority.

Upon the whole matter I have come clearly to the conclusion that the dictum in *Smith* v. *Kidston* was right, and that as we could not find any person entitled to declarator, there being at present no proper contradictor—the only proper contradictor being a person as to whose existence there is at present absolute uncertainty—we cannot answer the question in the case.

LORD KINNEAR concurred.

LORD JOHNSTON—I think that the question of the competency of this case is ruled by the decision in that of *Harvey of Castle Semple* (22 D. 1310), between which and the present I can find no effective distinction. We are not indeed asked to determine whether, if Sir George Baillie were to execute a settlement, that deed would be effectual to carry the estate left by Sir William, but, what is practically the same thing, we are asked to determine whether a settlement executed by Sir George is effectual to carry that estate, when the only contradictor is a minor who may not be in existence at the death of Lady Baillie, and who therefore may not ultimately be the person having the interest to oppose.

I agree that the case has been prematurely raised, and cannot be entertained.

LORD SALVESEN had not taken his seat in the Division.

The Court dismissed the case as incompetent.

The liferentrix Dame Mary Stewart or Baillie having died on 7th June 1910, a new special case was presented, which was identical with the old, with the exception that a statement of the death of the liferentrix was added, a variation of the statement of the reason for the special case was made, namely, "a question has arisen as to who is entitled to said estate of Polkemmet under the said trust-disposition and settlement," and the second question of law was changed to "Is the said Sir Gawaine George Stuart Baillie now entitled to the fee of said heritable estate subject to the burdens imposed upon it by the testator?"

Argued for the first and third parties—There was no gift here other than a direction to convey on the death of the liferentrix; accordingly vesting was postponed to that date—*Bryson's Trustees* v. *Clark*, November 26, 1880 (8 R. 142, 18 S.L.R. 103). Reference was also made to *Thompson's Trustees* v. *Jamieson*, January 26, 1900, 2 F. 470, Lord Kyllachy at 483 and 484; 37 S.L.R. 346.

Argued for the second party—The strong presumption was that the term heir-at-law or heir-male in a testamentary deed meant heir-at-law or heir-male at the death of the testator—*M'Donald's Trustees* v. *M'Donald's Trustees*, 1907 S.C. 65, 44 S.L.R. 49, especially Lord Kyllachy's opinion, which really stated this party's argument. The destination in the will was effectual, not as a destination of Scottish heritage, but merely as pointing out to the trustees the person to whom the conveyance was to be made; its force was then spent, and the trustees were not bound or entitled to put the destination in the conveyance—*Marshall* v. *Marshall*, June 15, 1900, 2 F. 1023, 37 S.L.R. 775.

LORD PRESIDENT—The late Sir William Baillie of Polkemmet left a trust-disposition and settlement by which he conveyed his whole estate, including the estate of Polkemmet, to trustees. By the second purpose of this settlement the trustees were directed to hold the estate of Polkemmet, after the truster's death, for the liferent use of his widow. The settlement then, after providing that on the death of the survivor of the truster and his wife the trustees should raise certain portions on the estate for payment to certain people, proceeds as follows: "*Fifth*, on the death of the survivor of me and my said wife my trustees shall dispone and convey my whole foresaid heritable estate to George Baillie, now in Australia, my nephew, eldest son of the late Thomas Baillie, my brother, whom failing to the heirs of his body, whom failing to my own heirs-male and the heirs of their body, whom failing to my own nearest heirs whomsoever, excluding heirs-portioners, but under burden of the heritable debts . . . ."

George Baillie (afterwards Sir George Baillie) who was there mentioned survived the testator but predeceased the liferentrix Lady Baillie. He left behind him a will, and his executor under that will is the party to this case of the second part. Lady Baillie is now dead, and the heir-male of the truster at her death is a certain Sir Gawaine George Stuart Baillie, who is the son of a Sir Robert Baillie, a younger brother of the said Sir George Baillie. The question before us is whether the conveyance which the trustees are now bound to make, Lady Baillie being dead, ought to be made in favour of the executor of Sir George Baillie or in favour of Sir Gawaine George Stuart Baillie. The contention of the executor is that the expression "my own heirs-male" must necessarily be referred to the death of the truster Sir William Baillie, and that, accordingly, the fee of the estate vested in Sir George Baillie by survivance of the truster and was carried by his disposition. I think that that contention is quite unsupportable, and that the case may be decided on one or other of two grounds.

As a mere question of vesting, this case is, I think, really on all fours with the case of *Bryson's Trs.* v. *Clark* (8 R. 142), because here there is no gift whatsoever except the gift that is implied in the direction to convey; and I think that the dictum of Lord President Inglis in that case, that where this is so and where the conveyance is to be made to a person and failing him to certain other persons as substitutes or conditional institutes to him, then, if he does not survive the period of conveyance he takes no right under the settlement, has never been disturbed. In other words,

under this deed I should say that the heir-male of the truster is to be discovered at the time of the conveyance, that is to say, at the expiry of the liferent.

Further, I think there is another and quite distinct ground on which the same result may be reached. I cannot look upon the fifth purpose as anything but a direction in very specific terms as to the conveyance which the trustees are to make, and the conveyance which they are to make is to be a conveyance containing the destination given in that purpose. If that is so, that of course ends the question, because it is trite law that, taking this as a destination of Scottish heritage, the expression "whom failing" means that it is necessary to invoke the destination in order to ascertain who is to take after the party first called. After all, the meaning of a destination, if you go back to early law, is very simple. It is simply the agreed-on rule by which you are to discover who is the person who is entitled to demand an entry of the superior when the fee is no longer full owing to the death of the last vassal; and although this seems to have been forgotten in a great many of the discussions that have taken place upon the matter, it is almost the A B C of conveyancing. Accordingly there are hundreds of estates in Scotland where one particular series of heirs having been exhausted the estate has then reverted, under the standing destination, to another series of heirs, and nobody ever dreamt that those heirs should be sought for at any time except that at which the succession opened. Treating this, then, as a destination of heritage, I suppose no Scottish conveyancer could have any doubt whatever that Sir Gawaine, being the person who answers the description of heir-male of the late Sir William at the opening of the succession, is the person who must take. I will only add emphatically that I should wish to reserve entirely my opinion upon the soundness of the case of *Marshall* (2 F. 1023), because it seems to me to have decided what is new to me, namely, that it is wrong for trustees to insert in the conveyance by them the destination prescribed to them by the testator, and that they ought instead to insert a destination in other terms.

On these grounds I am for answering the first question in the negative, and the second in the affirmative.

LORD KINNEAR — I am entirely and clearly of the same opinion for the reasons that your Lordship has given, and I do not think it necessary to repeat them.

LORD SALVESEN — I am of the same opinion, but I prefer to base my opinion solely upon the decision in *Bryson's Trs.*, which I think is directly in point, and from which I cannot distinguish the present case. There is only one point which was said to constitute a distinction, namely, that the second conditional institute or substitute was named in *Bryson*, and is here not named. That does not seem to me to affect the question as to who is to take, or as to whether there has been vesting prior to the death of the liferentrix; and the dictum to which your Lordship in the chair has already referred seems to me to expressly cover a case of this kind. The Lord President says that when nothing is expressed in favour of a beneficiary except a direction to trustees to convey to him on the occurrence of a certain event and no sooner, and failing him to certain other persons as substitutes or conditional institutes to him, then if he does not survive the period he takes no right under the settlement. And then the Lord President adds, "I think this is settled law." Well, if that be so, I do not think there is any reason why we should go back upon the law so laid down, and I think *Bryson's* case decides this case.

LORD JOHNSTON was absent.

The Court answered the second question in the affirmative and the first in the negative.

Counsel for the First and Third Parties—Fleming, K.C. (in first case)—Macfarlane, K.C. (in second case)—Hon. Wm. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Second Party — Blackburn, K.C.—Pitman.

Thursday, June 23.

SECOND DIVISION.

[Lord Skerrington, Ordinary.

PLANTZA *v.* CITY OF GLASGOW.

Reparation — Negligence — Contributory Negligence — Street Obstruction Plainly Visible—Injury to Child of Five Years through Collision with Obstruction—Contributory Negligence of Child.

A workman engaged in repairing a street removed the lid of a hydrant and left protruding therefrom a bent pipe and a T-shaped water key. The pipe and water key were plainly visible. A child of five years was playing in the street, and his eye came in contact with the end of the water key and was injured.

In an action of damages at the instance of the child's father as his tutor and administrator-in-law against the employers of the workman, *held* that there was no fault on the part of the workman, and defenders assoilzied.

Opinions (*per* Lord Justice-Clerk and Lord Ardwall) that a child of five years could be guilty of contributory negligence, and that in the circumstances there was contributory negligence on the part of the child.

Jacob Plantza, as tutor and administrator-in-law of his pupil child Robert, raised an action of damages against the Corporation of the city of Glasgow.

A servant of the defenders, who was repairing a street in Glasgow and required water for the purpose, removed the lid of a