is wrong. 1. The Apportionment Act, 4 and 5 Will. IV. c. 22, does not apply to anything except leases and instruments in writing, executed after the date of that Act. This is the proper construction of the 2d section. *Re Markby*, 4 My. & Cr. 484; 1 Williams' Exec. 709. As, therefore, the rents claimed in this action are mostly not payable under any lease or instrument whatever, but the tenants merely hold their farms by having their names entered in the rental book of the landlord, the statute is inapplicable. The case of *Blaikie* v. *Farquharson*, 11 D. 1456, is wrong, and cannot be supported. 2. The statute does not apply as between heirs of entail and executors. It has been decided in England that the statute does not apply to the case of leases granted by a tenant in fee, or proprietor. *Browne* v. *Amyot*, 3 Hare, 173; *Per* Maule, J., in *Beer* v. *Beer*, 12 C. B. 60; 1 Williams' Exec. 694. An English tenant in tail in England is assimilated in this respect to a tenant in fee. Coote's Landlord and Tenant, 701; Hayes' Introd. to Conveyancing. The question is—whether a Scotch heir of entail comes within the class of proprietors or of liferenters? It is well known that the theory of the Scotch law is, that the whole fee is in the heirs of entail. The heir has full power as fiar, except only where he is fettered. Ersk., iii. 8, 29. *Per* Lord Brougham in *Lang* v. *Lang*, M'L. & Rob. 893. The interest of the heir of entail is not an interest terminable by his death, but transmits to the next heir. Thus the widow has her terce, and the husband has his courtesy. So an analogy may be drawn from the decisions on the Forfeiture Act for treason, especially from the case of *Gordon of Park*, decided by Lord Hardwick, as to which see Kames' Elucidations, p. 381, *et seq.*, where all the English Judges who were consulted held that a Scotch estate tail was an estate of inheritance. See also *Earldom of Perth Peerage*, 2 H. L. Cas. 865. 3. The statute does not apply to cases where the rent is payable by convention—that is, not at the day when it is due, but at a postponed period.

Solicitor-General (Bethell) and *Rolt* Q.C., for the respondents, were not called upon.

The LORD CHANCELLOR CRANWORTH said he had no doubt that the interlocutor of the Court below was right, and that this was not so much a question of construction of the statute, as whether it was one of the evils which the statute was intended to remedy, and he thought it was. Without giving any formal reasons, his Lordship then immediately moved that the interlocutor be affirmed, with costs.

Interlocutor affirmed, with costs.

Appellant's Agents, Mackenzie and Baillie, W.S.—*Respondents' Agents*, Bell and M'Lean, W.S.

MAY 8, 1855.

THOMAS LANG and JAMES INNES LANG, *Appellants*, *v.* JOHN BROWN and ARCHIBALD FERGUSON, *Respondents.*

Arbitration—Submission—Prorogation—Oversman—*A submission was made to two arbiters with power to appoint an oversman, and the award by the arbiters or oversman to be made within a time limited. The arbiters decided some points after the time limited, and had devolved the other points on the oversman.*

HELD (reversing judgment), *That there was no power to separate the award into parts, and that the oversman had no power to prorogate the submission, so as to extend the time for the arbiters to decide their part.*

OPINION, *It requires an express contract to leave one part of the matter to be decided by arbiters and the other part by an oversman.*[1]

This was a reduction of a decree arbitral dated 28th May 1847, pronounced in a submission which was dated 19th January 1843. By it, the parties—viz. John Brown for himself and his absent son, Thomas Lang, Archibald Ferguson, and James Innes Lang—"do hereby submit and refer all demands, claims, disputes, questions and differences, depending and subsisting between them, on any account, occasion or transaction whatever, in connection with said vessel or otherwise, including their respective claims to the expenses of said proceedings, to the amicable decision, final sentence and decree arbitral to be pronounced by Robert Dow Ker and John Denniston, merchants, both of Greenock, arbiters mutually chosen by the parties, and, in case of their differing in opinion, to any oversman to be appointed by them, which they are hereby authorized to do."

The submission was kept alive by regular prorogations executed by the arbiters from time to time, the last of which was dated 18th and 20th December 1845, and was in the following terms:—"We, the within designed Robert Dow Ker and John Denniston, the arbiters within

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[1] See previous report 15 D. 38; 25 Sc. Jur. 37. S. C. 2 Macq. Ap. 93: 27 Sc. Jur. 369.

named, hereby prorogate and adjourn the within submission, and the period for deciding the matter referred, until the day of next; and we appoint this minute to be recorded in terms of the clause of registration contained in said submission. In witness whereof, this minute of prorogation," &c.

Under this prorogation, the submission was kept alive till 21st December 1846.

On 10th November 1846, and while the submission therefore was still current, the arbiters issued and signed notes deciding all the points on which they were agreed. The notes, after setting forth the various matters decided, concluded in the following terms:—"Direct the clerk to prepare an interim decree arbitral on these principles, to be subscribed by the arbiters, and issued on the requisition of either of the parties, if no representation be lodged against these notes, within fourteen days after the date of intimation: Appoint Mr. Andrew Lindsay, merchant in Greenock, to be oversman in the submission; and in respect the arbiters differ as to the remaining subjects in dispute between the parties—viz., the claim of damages for defamation, made by Mr. Lang against Mr. Brown, and the expenses of the parties in the submission—devolve the same on the oversman; and direct the clerk to prepare and submit to the arbiters for signature a minute of nomination and devolution accordingly."

On the 10th and 16th of the same month, the following formal minute of devolution was executed by the arbiters:—"We, Robert Dow Ker and John Denniston, arbiters named in the within submission, having agreed upon and decided all the points submitted, excepting the claim made by the submitters Thomas Lang and James Innes Lang, or one of them, against the submitter John Brown, for alleged defamation; as also the question of expenses in the submission, on which two points we differ in opinion; and being empowered in that event to choose an oversman, do hereby, in exercise of that power, nominate and appoint Andrew Lindsay, merchant in Greenock, to be oversman, and refer the said two points on which we differ, to his determination, and devolve the submission on him to that extent, with all the powers competent to the office of oversman; and we consent to the registration hereof along with the said submission. In witness whereof, we subscribe this minute."

No representation was lodged by either of the parties against the findings contained in the notes of 10th November 1846.

On 18th December 1846, three days before the submission would have expired if not prorogated, the oversman executed the following prorogation:—"I Andrew Lindsay, merchant in Greenock, oversman named and appointed by the arbiters in the within submission, conform to minute of devolution dated 10th and 16th November 1846, hereby prorogate and adjourn the said submission, and the period for deciding the matter referred, to the day of next; and I appoint this minute to be recorded in terms of the clause of registration contained in said submission. In witness whereof, this minute of prorogation," &c.

A formal decree arbitral in terms of the arbiters' notes of 10th November 1846, being the deed under reduction, was extended and executed by them on 28th May 1847.

Various grounds of reduction were urged, but the only grounds material to be considered at this stage were, that the decree arbitral was executed after the expiry of the submission; and that the oversman's prorogation being necessarily limited to the points which had rendered that devolution necessary, was ineffectual to keep it alive.

The case was argued before all the judges owing to the First Division being equally divided. The majority of the Court held that the devolution (notwithstanding the limitation of its terms) empowered the oversman to prorogate the whole submission, so as to give validity to the formal award, executed by the arbiters in terms of their notes more than a year after the last prorogation pronounced by them.

The pursuers appealed, pleading that there ought to be a reversal, because—1. The notes issued by the arbiters were not in themselves equivalent to a decree arbitral, and the decree arbitral actually issued, being pronounced subsequent to the expiry of the submission, was invalid. 2. The attempt to divide the submission into two portions, one of which was to continue with the arbiters, and the other to proceed before the oversman, was incompetent, and the result in point of law was, that *quoad* the arbiters their powers came to an end by the devolution. 3. In any view, the prorogation by the oversman could not keep the submission alive, so far as regarded the points reserved by the arbiters, and excluded from the devolution to the oversman. Bell on Testing Deeds, p. 35, 36, and cases there referred to; Morrison, 17,029, reported by Forbes, Feb. 13, 1711; *Short* v. *Hopkin*, M. 16,867; *Gray and M'Nair*, 3 S. 322: 5 W. S. 305.

The *respondents* in their *printed case*, supported the judgment, arguing—1. The interlocutor appealed against ought to be affirmed, because the decree arbitral of the 24th and 28th May 1847, was merely the formal embodiment of the award of the arbiters, finally made up and pronounced in November preceding, while the submission was in full subsistence, independently altogether of the subsequent prorogation by the oversman. 2. The interlocutor ought to be affirmed, because, even supposing it were to be held that it is essential to the efficacy of a decree arbitral, not only that the substance of it be contained in a minute or notes duly authenticated and issued by the arbiters, but also extended and given out in a complete and formal shape during the term

of the submission, this must be held to have been done in the present instance, in respect that by the prorogation of the oversman, on 18th December 1846, the submission was kept alive for a full year thereafter. *Forrester* v. *Gourlay*, M. 645; *L. Alter* v. *L. Affleck*, M. 646; *Earl of Crawford* v. *Alexander Bruce*, M. 649; *Colonel Erskine* v. *Lady Mary Cochrane*, M. 649.

Sir F. Kelly, and *Brown*, for the appellants.—It was not competent for the arbiters to divide the submission into two parts, one of which was to go on before themselves and the other before the oversman. The submission was an entire thing, and could not be thus split up, so as to allow the arbitrators to decide some points and refer the rest to an oversman, without an express power to that effect.—*Tollett* v. *Saunders*, 9 Price, 612. There was nothing different in this submission from the ordinary form. It was, no doubt, intended that the arbiters should give out interim decrees from time to time; but that is not equivalent to a power to retain one part of the submission for their own decision, and devolve the remainder on the oversman. But even assuming they had this power, had the arbiters decided that part which they proposed to reserve to themselves? All they did was to issue notes, which were nothing more than a proposed draft which they might alter and vary before final approval; but they never did deliver it in its final state till after the expiration of the last prorogation. The parties might have lodged representations against the notes, and the arbiters might have altered them at any time before the formal execution of the decree.—*Ramsay* v. *Robertson*, 1783, Mor. 653; *Gray* v. *M'Nair*, 5 W. S. 305. The notes, therefore, could not amount to a decree arbitral when they were left in the hands of the clerk; nor was it competent for the arbitrators to convert them into a decree after the lapse of the prorogation. The only cases which favour such a doctrine are old cases, decided at a time when the notion prevailed that the statutory solemnities of the Statute 1681 did not extend to decrees arbitral. It was, however, otherwise settled by *Short* v. *Hopkin*, Mor. 16,867. It is plain that, if informal decrees are to be made valid at any time after the lapse of the prorogation, there can never be a case where a decree will be set aside for informality; yet it was so in *Runciman* v. *Craigie*, 9 S. 629. The only remaining point is, therefore, whether, supposing it competent to the arbiters to devolve part of the submission on the oversman, it was competent for the latter to prorogate the submission *quoad* that part reserved by themselves. The terms of devolution are express, that the submission is devolved "to that extent" only, *i. e.*, as to those points not reserved by the arbiters. As the power to prorogate is only incident to the power to decide, the oversman could only prorogate the submission *quoad* those points which had been devolved upon him for decision. He had no more power to prorogate that part of the submission retained by the arbiters than any stranger. It follows, therefore, that the decree arbitral pronounced by the arbiters after the lapse of their last prorogation, and during a prorogation of the oversman, which could not extend beyond his own part of the submission, was entirely void.

Solicitor-General (Bethell), and *Miller*, for the respondents.—Every analogy is in favour of the first point, viz., that it was competent for the arbiters, even after the expiration of the prorogated period, to draw up their decree in solemn form. They had quite agreed upon their decision when they issued the notes, for the decree afterwards extended embodied nothing beyond what the notes contained, and all that was wanting was a mere formality. It is every day's practice in the Court of Chancery to draw up decrees long after they are pronounced from minutes made at the time. So a Judge may put his signature to a bill of exceptions even after he has ceased to be a Judge.—*Smith* v. *M'Kay*, 13 S. 323. Many old cases confirm this view as regards decrees arbitral.—*Forrester* v. *Gourlay*, Mor. 645; *L. Alter* v. *L. Affleck*, Mor. 646; *E. Crawford* v. *Alex. Bruce*, Mor. 649; *Col. Erskine* v. *Lady Mary Cochrane*, Mor. 649. Some of those cases are subsequent to the passing of the Statute 1681. The only authority relied on by the other side is *Gray* v. *M'Nair;* but in that case the decree arbitral had been delivered out without the consent or authority of the arbiters, which is not the case here. As to the second point, assuming that the decree arbitral was not duly executed within the proper time as respects their own prorogation, still the prorogation of the oversman was sufficient for that purpose. The power was clearly given to the arbiters to devolve upon the oversman those points as to which they could not agree; and it was equally clear that power was given "to the arbiters or oversman" to prorogate the submission at pleasure. The submission being an entire thing, could not be prorogated by halves. It must either be prorogated in whole or not at all, just as a process must be either entirely awake or entirely asleep. There was no power given to prorogate in part. Therefore the prorogation by the oversman covered the period within which the decree arbitral was issued, and thus rendered such decreet valid.

LORD CHANCELLOR CRANWORTH.—My Lords, this is one of those unfortunate questions which you have to look at with a merely technical eye, and to view in such a manner as would apparently defeat what is the substantial justice of the case. But however disagreeable a duty that may be to perform, I shall never cease to think that it is the duty of a Court of Justice to administer the law strictly, and to see that the rules of law are complied with. And I think it becomes me to impress upon your Lordships the conviction, that although an attention to those

rules may inflict hardship in a particular case, yet that your Lordships would be inflicting infinitely greater hardship on Her Majesty's subjects in general, if you were not to have the rules of law certain, so that they may be clearly acted upon.

Now what is said in the present case is this :—That certain differences were referred to two arbitrators, with a power to them, if they disagreed, to appoint or call in an umpire, as we should term it in England, or an oversman, as they term it in Scotland. And it was part of the terms of the reference that the award that should be made, whether by the arbitrators or by the oversman, should be made within a particular time ; that there was a power of extending the time—a power of prorogation, as it is called in Scotland ; but that that power was not exercised, and that no award was made until after the time had elapsed within which the parties, according to the terms of the reference, were to make it. So that the award, which has in point of fact been made, is a nullity.

My Lords, in considering questions as to the validity of awards, or decrees arbitral, as they are called in Scotland, we must never lose sight of this consideration, that when we are determining upon questions of this nature we are merely determining on the construction to be put upon the contracts of parties, because every award has its force, not by virtue of the award itself, but by virtue of the previous contract of the parties giving it effect. And what we have to consider, therefore, is, whether the award which was then made is an award which the parties agreed should be binding on them.

Now in the more ordinary and general terms of a reference or submission to arbitration, the way in which the parties generally submit the matter is this. They submit all matters in difference to two arbiters, one generally named by each party, and in case of their difference to an umpire, who is either fixed on by the parties themselves, or chosen by the arbiters ; and when that is the form of the submission, I take it to be clear, as a matter of substance and not of form, that all that the arbiters have to do would be this :—They would hear the parties, and if they agreed they would make an award ; if they did not agree, they would state their disagreement, and refer the whole question to the umpire. But if they took upon themselves to decide half of the matter, and referred the other half to the decision of the umpire, I take it to be quite clear that that would be bad. That is not what the parties agreed to ; they never agreed to leave one half of the question to be decided by two people, and the other half by a third. There might be very substantial reasons against entering into such an agreement. They might well feel, that it was only by looking to the whole of the case that a substantial award could be made. That must be the construction put on the terms of a reference such as I have suggested, and that I take to be the decision of the Court of Exchequer in the case of *Tollett* v. *Saunders*, referred to by Sir F. Kelly. But this being sometimes inconvenient, it is of course competent to the parties (as every word contained in the submission is but a contract between them) to vary the terms of submission if they think fit, and to stipulate, not that all matters in difference shall be referred to two arbiters, and that those arbiters, in case of disagreement, shall refer it to an umpire, but that all matters in dispute shall be referred to two arbiters, and that they shall decide all matters that they can agree upon, and that if there be anything upon which they cannot come to an unanimous decision, and cannot concur in their award, the matter upon which they do not concur shall be left to the settlement of an umpire. That is a contract that parties may enter into, and it is a common form of contract. It may be also that parties may stipulate, if they think fit, not merely on the terms which I have last suggested, but that the arbiters may, from time to time as they differ, refer each subject to the oversman, retaining concurrently their jurisdiction over each subject. That is likely to be, in ordinary cases, very inconvenient, because, without saying that it is absolutely illegal, a concurrent jurisdiction, to be exercised over a part of a subject matter by one tribunal, and over another part of a subject matter by another tribunal, must be attended with very great difficulties. But I believe that that is a course which is sometimes adopted, particularly with regard to railway contracts, upon which questions are arising from day to day.

Having made these general observations, what we are now to consider is, what is the particular contract which these parties have entered into, and what is the mode in which it has been performed, or attempted to be performed? In the first place, there is this provision in the deed of submission. The parties begin thus :—They agree to submit all differences. What the precise question was we have never heard explained. It was something about a ship. But they agree "to submit all differences depending and subsisting between them on any account, occasion, or transaction whatever, in connection with said vessel or otherwise, including their respective claims to the expenses of said proceedings, to the amicable decision, final sentence, and decree arbitral to be pronounced by Robert Dow Ker and John Denniston," the two gentlemen who were chosen by the parties, "and in case of their differing in opinion, to any oversman to be appointed by them, which they are hereby authorized to do." Now, if it had stopped there, I should be clearly of opinion that all the power that was delegated was a power to the arbitrators to decide, if they could decide ; if they could not so decide, to say so, and then to appoint an oversman, and to let him decide. But it goes on to say—"and whatever the said arbiters or

oversman shall determine in the premises by decree arbitral or decrees arbitral, interim or final, to be pronounced by them" within a certain time.

Now, I think the inference which both parties would draw from that, and which has been drawn by the Court below, is an inference irresistible, that the meaning was, not that the arbiters should be bound to decide everything themselves, or to transfer everything to the umpire, but that they might make interim awards, one or more, deciding on certain matters, and leave the other matters, if they could not agree on them, to be decided by the umpire. That is the common sense, and I think it has been rightly assumed to be the correct interpretation of the submission. The arbiters proceeded, and decided certain of the matters, and on the 16th November 1846 they drew up a note wherein they set forth a number of conclusions which they state they had arrived at. They mention different sums of money, and they direct their clerk to prepare an interim decreet, to be issued on the requisition of either of the parties, if no representation be lodged against these notes within 14 days after the date of intimation; and then they appoint Mr. Lindsay to be the oversman, and as they differ about the remaining subjects in dispute, they refer those to the oversman, and direct the clerk to prepare a minute of nomination and devolution accordingly.

Such a deed was accordingly prepared, and in this deed they state what they have done, and then they nominate and appoint Andrew Lindsay to be the oversman, refer the two points on which they differ to him, and devolve the submission on him to that extent.

Now what is the position in which the parties then stood? With regard to those matters which they had devolved on the oversman they were *functi officio*—they left them to him to decide. How did they stand in regard to the rest of the matters? As to the first matter raised, viz., that they had already decided, and made an award on that subject by the note which they so drew up, that was a point not very strongly pressed. And all the Judges having been consulted, only two of them came to the conclusion that the note or minute which they had so drawn up, and which the arbiters directed their clerk to put into proper form, might be taken as being a decision. I think that, both upon principle and upon authority, it is impossible to say that that was a decision either in form or in substance. And the decisions of the Courts in Scotland for the last century and a half have determined that upon the ground of the act of 1681, which requires a certain form of instrument in the case of decrees arbitral. In point of form that was not—what is of more importance, in point of substance it was not—an adjudication. The arbiters did not mean to adjudicate; they studiously left it open to themselves to alter it if they should think fit. They direct it to be drawn up and prepared in proper form, unless the parties, on having the notes, should, within 14 days, shew cause to the contrary, as we say in England. It is quite clear that at the moment they signed these notes they did not mean it to be an adjudication. Therefore the doubt expressed by Lord Lyndhurst in the case which has been referred to, would not present itself to the minds of the parties here. There the parties had drawn up something which was meant, on the face of it, to be an award, but which wanted the form of an award, and his Lordship said it was contrary to his English notions to say that it was not an award. The same doubt would not have occurred here. It was intended to leave it open, probably to be adopted, certainly not of necessity, but only in case the parties did not come before them in 14 days, and satisfy them that some alteration ought to be made. Therefore I think that part of the case is clearly disposed of.

Then arises the other important question, on which the Judges in Scotland have differed, a majority of eight, I think, being of opinion one way, and four or five the other way, namely—whether, although these notes were not valid as an award, yet when these notes so made in November were put into form in the following month of May, the decision in May 1847 did not become a valid award. Now I think that entirely depends upon whether or not there was a valid prorogation, because, if this was not a valid prorogation, if the time for making the award expired in December 1846, and this award was made in May 1847, I cannot accede to what was pressed by the Solicitor-General, that you must tack the one to the other, and take that which was done in May, after the time had expired, as an embodying of something which had been previously done. I think that would be an application of that doctrine which no authority could warrant. The question, therefore, is, whether there has been a valid prorogation.

Now I consider it to be clear, that the power of prorogation by the oversman is confined to the matters referred to him. And that, I conceive, disposes of the whole question. I think this is a conclusion necessarily resulting from the nature of the office he fills. When the arbitrators differ on any point, and this point is referred to the oversman, the submission must be read just as if he had been named as the sole referee, and as if the points referred to him were the only matters in dispute. The submission did not mean to give him any power to determine whether it would or not be right for the arbiters to prorogate the time for making this award. The power of prorogation is incidental and auxiliary to deciding the matters referred, and it is a power which the parties are bound to exercise in discretion, just as much as any other parts of the contract. These consequences flow from the nature of the case, and they are illustrated by the document to which I have referred, the document whereby the arbiters appoint Mr. Lindsay

as oversman, and refer the two points on which they differ to his determination, with all the powers competent to the office of oversman. The moment that instrument is executed, I take it that the oversman is in exactly the same position as if there were no other matters in difference but those which were referred to him, as if he had been originally appointed solely to carry out the terms of the reference contained in the submission. What he did was this: He executed a valid instrument of prorogation, in which, after reciting his appointment, he prorogated and adjourned the said submission, (that is, as far as he was concerned, for with regard to no other part of the submission had he any authority,) and the period for deciding the matters referred to him, to the day of . Therefore the state of the case is this: The submission is to be read as if it was a submission of the two matters in dispute only to Andrew Lindsay, with power to him to prorogate. He accepts the reference, and does prorogate. That gives him full power to make his determination within the time to which his prorogation extends. But how does it affect any other matters? Evidently not at all. It would be out of the four corners of the instrument of submission, and beyond what is there included or intended to be included. The right of prorogation is a discretionary right, to be exercised as the interests of the parties may require, and it is a right to be exercised with reference to those matters that are before the party by whom that discretion is to be exercised.

My Lords, I come therefore to the opinion, that in this case there was no power whatever in the oversman to prorogate, and that, in point of fact, he never did prorogate. I come to that conclusion, which is decisive of the case; and even if there could be a valid devolution to the oversman, yet while the matter is not so devolved, he is not finally to decide it. There appears to me to be great weight in what is said by Lords Fullerton and Ivory on the subject, that the functions of the arbiters cannot be in operation as to part of the matters in dispute, while those of the oversman are in operation as to the rest. I give no decided opinion as to that. I do not say that there cannot be such a state of things, but that there cannot be such a state of things without an express contract that such a state of things should exist. It is clear that there is nothing of the sort in the present case.

My opinion, therefore, is—1*st*, That until the final decree of the arbiters, in May 1847, the matters then adjudicated upon had not been so decided as to preclude them from altering their decree if they thought fit; and that therefore the notes of November 1846 were not a valid decree. And, 2*dly*, That the oversman had not, by the submission or the devolution, the power of prorogation, save as to the matters referred to him; so that there was no prorogation of the decree of the arbiters after November 1846, and therefore the decree of May 1847 could not be valid. I come to this conclusion upon purely technical grounds. We are deciding the case on a mere matter of form; but after the observations I took the liberty of addressing to your Lordships at the commencement, I trust your Lordships will have no hesitation in adopting the conclusion at which I have arrived, that this interlocutor appealed from must be reversed.

Interlocutor reversed.

Appellants' Agents, J. and H. G. Gibson, W.S.—*Respondents' Agents*, Murray and Beith, W.S.

MAY 10, 1855.

HERCULES SCOTT and Others, *Appellants*, *v.* GEORGE SCOTT and LORD BENHOLME and Others, *Respondents*.

Legacy—Disposition and Settlement—Trust Deed—Construction—Nearest Relations—Full and half blood—*A testator, after conveying his property, heritable and moveable, to trustees, directed the residue, after fulfilment of the trust purposes, to be paid to his nearest relations then alive. He left no issue, and no relations, but children of two full brothers, and children of a sister uterine. Throughout his settlement his sister uterine was spoken of simply as his sister, and her children as his nephews and nieces.*

HELD (affirming judgment), *That the nephews and nieces by the half blood were entitled to participate in the residue equally with the nephews and nieces of the full blood.*[1]

The pursuers appealed against the judgment—1. Because the appellants and James Robert Scott, as the children of the testator's brothers german, or such of them as shall be alive at the

[1] See previous report 14 D. 1057; 24 Sc. Jur. 649. S. C. 2 Macq. Ap. 281: 27 Sc. Jur. 372.