William Cuthbert, in favour of the pursuer, the said *poor* Ann Wilson or Richards, dated 15th April 1863, with interest on said sum, from said 3d day of August 1855 until payment."

The defender pleaded, *inter alia*, that the pursuer had no title to sue. The assignation was not granted until the year 1863; but in 1858 the estates of William Cuthbert (the cedent), were sequestrated under the bankruptcy statute, and although in 1861 he had been discharged, this was done without payment of a composition, and a discharge so obtained had not the effect of reinvesting the bankrupt in his estate. Besides, the trustee had never been discharged, and the sequestration process was still in dependence.

The Lord Ordinary (Jerviswoode) pronounced the following interlocutor:—

"*Edinburgh, 1st February* 1866.—The Lord Ordinary having heard counsel and made avizandum, and considered the Closed Record, Productions, and whole Process, Finds that the I O U, founded on by the pursuer against the defender, is addressed by the latter to William Cuthbert, and that therefore the same could not be transferred to the pursuer by mere delivery thereof to her by the said William Cuthbert: Finds that the said William Cuthbert was sequestrated as a bankrupt on or about the 31st of May 1858, previous to the date of the assignation (No. 10 of process), granted by him on the 18th April 1863, in favour of the pursuer: Finds that, in these circumstances, the I O U, and any debt thereby acknowledged to be due to the said William Cuthbert by John R. Cuthbert, the granter thereof, had been carried by virtue of the sequestration to the trustee on the estate of the said William Cuthbert, and that the said assignation was and is, consequently, ineffectual as a title to the pursuer to insist as in right of the said I O U in the present action: Therefore sustains the first plea in law for the defender—dismisses the action and decerns: Finds the pursuer liable to the defender in the expenses of process, of which allows an account to be lodged, and remits the same to the auditor to tax and to report."

The pursuer reclaimed.

Couper, for her, argued:—1. The pursuer avers that this I O U was handed to her by the creditor in it long previous to his sequestration for an onerous cause. She is therefore entitled to a proof of the circumstances under which the transference took place. Such inquiries have been allowed in regard to deposit receipts and bank cheques. 2. When the formal assignation was granted in 1863, the sequestration was practically at an end; the bankrupt was discharged, and although the trustee was not, he intimated that he did not intend to sue for payment.

Pattison and Burnet, for the defender, replied:—An I O U is not transferable by delivery, and parole proof on the subject is inadmissible. Accordingly, this action is expressly laid upon a written assignation; but the party who granted it had no power to do so. The debt had passed by the sequestration which was still in dependence. Although the trustee resigned and has since died, the Bankruptcy Act provides a mode of appointing a new trustee. But the defender is not bound to take steps for that purpose.

The Lord President—It appears that on 3d August 1855, the defender granted an I O U to William Cuthbert, his brother and partner in business. It also appears that William Cuthbert became bankrupt in 1858, and a trustee was appointed. The present pursuer raises this action founded upon that I O U and an assignation by William Cuthbert, the creditor in it, dated in 1863. The defender says, among other defences, that the party who has right to this I O U is the trustee on the sequestrated estate. The pursuer shows no title of an earlier date than 1863. She says she was in possession of it from a much earlier date, but there is no writing to prove this. The defender says that the I O U, if due at all, belongs to the sequestrated estate, and that the pursuer has therefore no title to sue. One answer made to this is that in the circumstances this sequestration has no effect; that the bankrupt has been discharged without a composition, and that the trustee is dead. But the sequestration still subsists. *Ex facie*, therefore, the estate is the creditor. The question is whether we are in a position, without the estate being represented here, to deal with this demand against the defender. I think not, unless we have some evidence that the estate is not or does not claim to be the creditor. It was perhaps possible to have put that in shape. The trustee was alive when this action was raised, and it is a pity that he was not called as a defender. Then, is anybody to be brought here now to represent the estate? Either party might remove the difficulty by asking the appointment of a new trustee, but who is to do that—the defender or the pursuer? The defender says it is for the pursuer to put herself right—that obtaining the appointment of a new trustee would be attended with expense—and that he does not wish to lose more money than he has already done. I think that, being here as a defender, he is not bound to incur that expense in order to help the pursuer, and I don't understand that the pursuer proposes to do anything to remove the difficulty. In these circumstances, I think the Lord Ordinary's interlocutor, in so far as it sustains the first plea and dismisses the action, is sound. I don't think it necessary to give any opinion as to his other findings.

Lords Deas and Ardmillan concurred.

Lord Curriehill absent.

The interlocutor of the Lord Ordinary, in so far as it sustained the first plea in law for the defender, and dismissed the action with expenses, was adhered to, with additional expenses.

Agent for Pursuer—R. P. Stevenson, S.S.C.

Agent for Defender—William Mason, S.S.C.

Wednesday, Nov. 7.

M.P.—KER'S TRUSTEES *v.* WELLER AND OTHERS (*ante*, vol. i. p. 188).

Assignation—Trust—Marriage-Contract—Alimentary Provision. A person in his mariage-contract conveyed an estate to trustees, the leading purpose of the trust being to pay over the rents to himself during his life, and these payments were declared to be alimentary only. He afterwards conveyed, for an onerous cause, the estate and all his interest in it to another. Held—(1) that the first conveyance being for the benefit of the party himself, he was entitled to grant the second; (2) that the second was in competition preferable to the first; and (3) that the declaration as to the alimentary character of the payments was ineffectual, having been made by a person as to his own property.

The late Robert Ker of Argrennan died in 1854, leaving a trust-deed by which he directed his trustees to convey the estate of Argrennan to his

eldest son, Robert Ker, junior, on his attaining the age of twenty-five years; but there was a declaration in the deed that in the event of his said son marrying or otherwise conducting himself so as not to merit the approbation of the trustees, the provisions made in his favour should only belong to him in liferent; and it was declared that a regular minute should, in that event, be entered in the sederunt-book of the trustees, expressing their disapprobation.

On 18th June 1861, about a fortnight before the son attained twenty-five years, the trustees entered in their sederunt-book a formal minute expressing their disapprobation of his conduct, and their resolution to restrict his right to a liferent. This minute of restriction was held to be formal and binding by a previous judgment in this case, affirmed by the House of Lords.

The question now before the Court had therefore reference only to the rents of the estate.

These were claimed—(1) by Major Thomas Montagu M. Weller, sole accepting trustee under an antenuptial contract of marriage betwixt Robert Ker, junior, and his wife, dated and intimated to the trustees in 1858; and (2) by Walter Justice (and his assignees, the Caledonian Insurance Co.), to whom Robert Ker, junior, had in 1860 granted, for onerous causes, a disposition and conveyance of the estate, and all his right and interest therein.

By the antenuptial contract of marriage Robert Ker, junior, conveyed to the trustees therein named, "All and Whole my entire right and interest, present and future, under the said trust-disposition and deed of settlement, and codicils thereto, of my said deceased father; and in particular, without prejudice to the said generality, all my right and interest in the said estate of Argrennan and others described in the said trust-disposition and settlement, as follows:—*videlicet*, All and Whole [*Here follows description of land and estate of Argrennan*], with the interests, rents, and proceeds thereof, which may become due to me under the said deed of settlement, or out of the said estates, and to all other estates or effects which belonged to my said father, which I am or may become entitled to in any manner of way." The first and second purposes of the trust were to pay the expenses of the trust and the husband's debts then due. The third purpose was in these terms:—"That my said trustees shall make payment to me, during the subsistence of the said intended marriage with the said Elizabeth Hester Rosetta M'Alpine, and in the event of my surviving her, to me thereafter, during the remainder of my life, half-yearly, or at such times and in such manner as my said trustees shall find most suitable, of the free balance which shall arise after payment of all public burdens, taxes, expenses, debts, and other burdens upon the annual accounts of their intromissions with the funds and estate hereby conveyed." And the fourth purpose was—"In the event of my predeceasing the said Elizabeth Hester Rosetta M'Alpine, for payment to her during all the days of her life of the foresaid liferent annuity of £400 sterling, payable at the terms, in the manner, and with the penalties and interest before specified." The marriage-contract contained a declaration—"That the said balances payable to me, and the said jointure payable to the said Elizabeth Hester Rosetta M'Alpine, in the event of her surviving me, shall be strictly alimentary, and shall not be liable for my or her debts or deeds, nor subject to the diligence of my or her creditors, and that the same shall not be arrestable on any account whatever, and that it shall not be in my or her power to dispose thereof by anticipation, or to deprive ourselves of the benefit thereof by mortgage charge, burden, sale, assignation, or otherwise, in the way of anticipation, but that the same shall be reserved for my and her own personal maintenance, and as an alimentary provision allenarly."

The disposition and conveyance in favour of Mr Justice, after narrating Mr Ker, senior's, trust-deed and the marriage-contract, thus proceeded:—"Also considering that Walter Justice, Esq., of No. 6 Bernard Street, Russell Square, London, solicitor, has agreed to purchase from me, at the price of £2000 sterling, the said lands of Argrennan and others, and all my right, title, and interest, present, future, and contingent therein, and rents thereof, and the whole rights, interests, household furniture, silver plate, and other moveables belonging to me now, and which may in future belong to or be claimable by me under the said trust-disposition and settlement of my said father, and codicils thereto, and also under the said marriage-contract or settlement respectively, and all claims and demands belonging or competent to me now, or which may hereafter belong or be competent to me against the respective trustees named in and acting under the said several deeds; and that I have agreed to sell the said lands and others absolutely and irredeemably to the said Walter Justice for the price aforesaid, which I consider just and adequate; and now seeing that the said Walter Justice has instantly advanced and paid to me the said sum of £2000 sterling, of which I do hereby acknowledge the receipt, renouncing all exceptions to the contrary, and of which I discharge him; therefore I, the said Robert Ker, do hereby sell, dispone, assign, transfer, and convey to and in favour of the said Walter Justice, and his heirs and assignees whomsoever, absolutely, heritably, and irredeemably, not only All and Whole [*Here follows description of lands and estate of Argrennan,*] with all my right, title, and interest, present, future, and contingent therein: But also All and Whole the entire rights, claims, and interests to which I am now entitled, or to which I shall be entitled when I shall have attained twenty-five years of age as aforesaid, or at any future time, in and to the residue and remainder of the estates heritable and moveable, real and personal, of my said deceased father, under his said disposition and deed of settlement and codicils, including the household furniture, silver plate, and other moveables in the mansion-house of Argrennan, which belonged to my said father, and all my contingent or future rights and interests in and to the foresaid provision of £14,000, and all interest to become due thereon: And also all my rights, interests, estates, benefits, and advantages in the whole estates, sums of money, provisions, and others to which I have now or may hereafter have right by and under my said marriage-contract or settlement, with the whole interests, rents, and proceeds respectively of the said lands and several rights, interests, estates, and others above conveyed by me, which are now or may hereafter become due to me under the said disposition and deed of settlement, and codicils thereto, and marriage-contract or settlement, or out of the said estates, rights, and others above conveyed."

The Lord Ordinary (Kinloch), after hearing parties in the competition, pronounced the following interlocutor:—

Edinburgh, 17th January 1866.—The Lord Ordinary having heard parties' procurators in the competition between the claimant Captain Thomas

Montagu Martin Weller, trustee under the marriage-contract of Robert Ker, junior, and Elizabeth Hester Rosetta M'Alpine or Ker, his wife, and the claimants Walter Justice and the Caledonian Insurance Company—Finds that the said Walter Justice, and the said Insurance Company in his room, are entitled, by virtue of the deed executed in favour of the said Walter Justice by the said Robert Ker, junior, bearing date 28th July 1860, and to the extent of the interest constituted by said deed, to be ranked and preferred to the rents, interests, and annual profits of the trust-estate of the deceased Robert Ker in the hands of the raisers, in preference to the said Captain Weller as trustee foresaid; and appoints the cause to be enrolled in order that effect may be given to this finding.

"W. PENNEY.

"*Note.*—It is now settled in the present process that Robert Ker, junior, is, under his father's settlements, only entitled to a liferent of the trust-estate in the hands of the raisers.

"By his antenuptial contract of marriage with Miss M'Alpine, dated 18th September 1858, Mr Robert Ker, junior, made over his interest in this trust-estate to the claimants, Captain Weller and others, as trustees for the trust-purposes specified in the deed. The first purpose of the deed is payment of trust-expenses, and of certain debts then owing by Mr Ker, junior, to an extent not exceeding £2000. The next purpose is 'That my said trustees shall make payment to me during the subsistence of the said intended marriage with the said Elizabeth Hester Rosetta M'Alpine, and, in the event of my surviving her, to me thereafter, during the remainder of my life, half-yearly, or at such times and in such manner as my said trustees shall find most suitable, of the free balance which shall arise after payment of all public burdens, taxes, expenses, debts, and other burdens upon the annual accounts of their intromissions with the funds and estate hereby conveyed.' Provision is also made for the payment by the trustees, out of the estate conveyed, of a jointure to Mrs Ker, in the event of her surviving her husband, of £400 per annum, and of certain sums to the children of the marriage.

"The marriage-contract and assignation contained in it were intimated to the raisers, the trustees of Mr Ker's father, on 6th and 7th December 1858.

"Nearly two years after this date, being on 28th July 1860, Mr Robert Ker, junior, executed a deed in favour of the claimant Walter Justice, by which, on the narrative of a certain sum advanced to him, he conveyed to Mr Justice the whole of his rights in his father's trust-estate, and the whole of his rights under the antenuptial contract with his wife, and the whole of his claims, either against his father's trustees or the trustees in this antenuptial contract.

"The question now is, whether Captain Weller, as trustee in the antenuptial contract, or Mr Justice, by virtue of this last-mentioned deed (the Caledonian Insurance Company being Mr Justice's assignees), is entitled to be preferred to the rents and annual profits of old Mr Ker's trust-estate in the hands of the raisers.

"It appears to the Lord Ordinary that Mr Justice is entitled to prevail in this competition. He has had expressly assigned to him all Mr Robert Ker's rights in the trust-estate of his father, so far as Mr Ker could competently assign such rights. The Lord Ordinary perceives no legal objection to Mr Ker assigning his liferent interest in that estate. It was a right held by him absolutely, and for his own behoof. Though he assigned his rights in his father's trust-estate to his marriage-contract trustees, the object of the trust was, during his own life, simply to have the balance of the yearly proceeds paid over to himself personally. He was absolute proprietor of the sum so to be paid to him. No right is, under the marriage-contract, given to any other person in this yearly payment. The Lord Ordinary cannot therefore doubt that the right to it was validly assigned to Mr Justice. Mr Ker's whole right of claim for it, whether against his father's trustees or against the trustees in the antenuptial contract, was conveyed to Mr Justice. If the marriage-contract trustees uplifted the sum from the raisers, it would just be for the purpose of paying it over to Mr Justice as Mr Robert Ker's assignee. It appears, therefore, to the Lord Ordinary, that these marriage-contract trustees are not entitled to intervene, to the effect of preventing Mr Justice from drawing the amount directly from the raisers.

"It is true that the marriage-contract contains a clause declaring that this yearly payment to Mr Ker, junior, should be strictly alimentary, and not capable of being disposed of by him to his own prejudice. But the Lord Ordinary holds it settled that no one can effectually make such a declaration as to his own property. No one can tie up his own hands by conveying his estate to trustees, and declaring that the rents drawn by them, and paid over to him, shall be alimentary, and protected against his own deeds. As already said, Mr Ker is the only person legally interested in this yearly payment under the marriage-contract. His wife's jointure, falling to her on his decease, is likewise declared alimentary as to her. But no right is given to her to the yearly payment to be made to Mr Ker during his lifetime, which is kept separate as his own property. The Lord Ordinary therefore cannot consider it protected against Mr Justice's deed. The parties might have otherwise proceeded; but the Lord Ordinary cannot do for them what they have not done for themselves.

"It was strongly pleaded for the marriage-contract trustees that, at the date of the marriage-contract, it was conceived that Mr Robert Ker, junior, was entitled to the fee of his father's estate, which was conveyed to the trustees as a security for the provisions to the intended wife and children; and that this security having failed, the trustees are entitled to retain the rents and profits accruing to Robert Ker under his liferent, as a substitute security. In other words, what they contend is, that, in place of paying these rents and profits over to Mr Robert Ker, or Mr Justice as his assignee, they are entitled to accumulate them in their own hands, in order to answer the provisions due at Mr Robert Ker's death to his wife and children.

"The Lord Ordinary could not accede to this view. It certainly appears true that, at the date of the marriage-contract it was conceived that Mr Robert Ker would have the fee of his father's trust-estate vested in him; and it was not anticipated, that his right would be reduced to a liferent by the act of the trustees, performed under the authority of his father's trust-disposition. But the marriage-contract does not make a specific conveyance of the fee more than the liferent, or the reverse. It simply conveys whatever right Mr Robert Ker might actually possess. It conveys 'All and Whole my entire right and interest, present and future, under the said trust-disposition and deed of settlement, and codicils thereto,

of my said deceased father; and in particular, without prejudice to the said generality, all my right and interest in the said estate of Argrennan, &c., with the interests, rents, and proceeds thereof which may become due to me under the said deed of settlement, or out of the said estates, and to all other estates and effects which belonged to my said father, which I am or may become entitled to in any manner of way.' So standing the conveyance, the trust is expressly for Mr Robert Ker's own behoof, so far as the rents and proceeds during his own life are concerned. The Lord Ordinary can find no sufficient ground on which to hold that the trustees are entitled to convert what is a trust for Mr Robert Ker's individual behoof into a trust in security of Mrs Ker's jointure. The terms of the trust-deed form the law of the case; it is in vain to appeal to any authority beyond. The only security for Mrs Ker's jointure lay in the fee of the estate, as subsisting after Mr Robert Ker's death. If this security has failed in consequence of the trustees depriving Mr Robert Ker of the fee, and restricting his right to a liferent, the failure is perhaps to be regretted; but it cannot be remedied by rearing up a trust not contained in the deed itself. The Lord Ordinary can only effectuate the deed as it stands. He cannot make a new deed for the parties. "W. P."

Major Weller, the marriage-contract trustee, reclaimed.

D. F. MONCREIFF and GIFFORD, for him, argued: (1) The marriage-contract trustees, according to the terms of the contract, were entitled to uplift the rents in preference to any assignee of Mr Robert Ker. The contract gave them a claim upon these rents for expenses of trust-management, which claim was preferable even to the rights of Mr Robert Ker himself. (2) It was expressly declared by the contract that the rents were to be strictly alimentary, and not to be liable for Mr Robert Ker's debts, and the trustees had a right, as representing the interests of his wife, to uplift the fund, and to prevent it being carried off by his creditors. (3) Their rights under the marriage-contract to the fee of the estate having been swept away by the minute by which Mr Robert Ker's interest was limited to a liferent, they were entitled to receive the rents, and out of them to accumulate a fund out of which the provision to the widow of Mr Robert Ker might be paid in the event of his death.

PATTISON and MACDONALD, for Mr Justice, replied:—(1) The right of the marriage-contract trustees to uplift the rents was controlled by the obligation to pay them, when so uplifted, to Mr Robert Ker himself, and if they were to be paid to Mr Ker or his assignee, the trustees could show no interest to claim them in this process for that purpose, seeing that the judgment of the Court preferring the assignee to them would be a sufficient exoneration of the trustees in reference thereto. (2) The trustees had not condescended on any expenses as forming a subsisting claim against the rents in the hands of the raisers, but their right to payment of any expenses found to be due to them out of the fund was not disputed. (3) Mr Robert Ker could not make an alimentary provision in his own favour, and whether he could or not, the marriage-contract trustees had no title to insist on its being applied to aliment either Mr Robert Ker or his wife; and (4) The contention of a right to accumulate the rents to form a provision for the widow was quite inconsistent with the deed itself, and the alteration of circumstances as regarded the fee of the estate, could never entitle the trustees to retain the rents, or to dispose of them otherwise than the deed itself authorised.

MILLAR appeared for the raisers, the late Robert Ker's trustees.

The Court adhered to the Lord Ordinary's interlocutor.

At advising,

The LORD PRESIDENT—The question now raised in this process has reference to Mr Robert Ker, junior's, liferent interest in the lands of Argrennan, he having been found not entitled to the fee. The marriage-contract trustee maintains that the conveyance in the marriage-settlement is sufficient to entitle him to uplift the rents during the lifetime of Mr Ker. He says that, the objects of the conveyance having been in other respects defeated, he is entitled to have the rents set aside as a fund which is to be a security for payment of the widow's jointure; and he says, in the second place, that whether that be so or not, he is entitled in this competition to receive the rents in the first instance, and that any claim which Mr Ker's assignee has against him must be made good against the trust. The Lord Ordinary has decided in favour of the assignee Mr Justice. In regard to the matter mainly before the Lord Ordinary—I mean the right of the marriage trustees to have this fund accumulating—I cannot say I have much difficulty. I think the grounds stated by the Lord Ordinary for holding that there is no such right are sufficient. It appears to me that the conveyance in the marriage contract was for the benefit of Mr Ker himself. The rents were to be paid to him and not accumulated as a security. But then it is maintained that the trustees are to draw and pay them over to Mr Ker or his assignee, if he shows a good title. In regard to that, so far as it has reference to the rents that have become payable, I think the contention ought not to be sustained. There is no meaning or advantage in having these rents paid to the trustees and then paid over to Mr Justice. Major Weller has shown no sufficient interest to ask that this should be done. It appears to me that these rents were truly the subject which the Lord Ordinary has dealt with. I so read his interlocutor. If it is to be contended in this process that Mr Justice and his assignees are entitled to a conveyance of the liferent itself, they may be heard on that point before the Lord Ordinary. In that view I think the interlocutor should be adhered to.

Lords Deas and Ardmillan concurred.

Lord Curriehill absent.

The DEAN OF FACULTY asked that it should be stated in the judgment of the Court that the decision only affected the rents which have already accrued, and that the claim of the trustees to payment out of the rents of the expenses of the trust and of the litigation which they had been involved in should be reserved.

PATTISON, for the respondents, moved for expenses since the date of the Lord Ordinary's interlocutor.

The following interlocutor was pronounced:—

"The Lords having advised the reclaiming note for Major (formerly Captain) Thomas Montagu Martin Weller, No. 232 of process, and heard counsel for the parties, Refuse the reclaiming note, and Adhere to the interlocutor reclaimed against, without prejudice to Major Weller, as trustee under the marriage-contract of Robert Ker, junior, insisting in any claim he may be able to instruct for expenses of management of the trust under said marriage-contract, either as a charge upon the fund now *in medio* in the present process, or upon the

subsequent rents, interests, and annual profits of the trust-estate of the deceased Robert Ker: Find neither party liable to the other in expenses of process hitherto incurred and not already decerned for.

"DUN. M'NEILL, *I.P.D.*"

Agent for Raisers—Willam Waddell, W.S.
Agent for Major Weller—William Sime, S.S.C.
Agent for Mr Justice, &c.—Thomas Ranken, S.S.C.

M'LACHLANS *v.* GARDNER (*ante.* vol. i. p. 259).

New Trial. Motion for a rule on the ground that a verdict was contrary to evidence refused, the sole question before the jury being one of credibility. Observations as to the principles on which new trials on that ground should be allowed.

This was a motion for a rule. In an action of damages at the instance of the widow and children of a fireman at Solesgirth Colliery, near Kirkintilloch, who was killed there on 6th June 1865, the issue, whether the death was caused through the fault of the defender, was tried before the Lord President and a jury on 9th and 10th April 1866. The jury by a majority of nine to three found for the pursuers, and assessed the damages at £100 to the widow, and £5, £10, and £20 to the three children respectively.

The defender having moved for a rule,

W. M. THOMSON was last week heard in support of the motion.

The Court to-day refused the motion.

Lord DEAS said—I think we ought not to grant this rule. The whole question for the jury was whether the accident happened in consequence of one of the spokes being broken or being insufficiently secured. There are four witnesses who swear that it was broken, and if it was, that was sufficient to account for the accident. On the other hand, seven witnesses swear as distinctly that it was not. The jury have believed the four against the seven. It was a question of credibility peculiarly within the province of the jury. Such a question is not to be determined by numbers; and if it is not, it is not possible to suppose a more obviously jury question. Even if I were disposed to lean to the side of the seven instead of that of the four witnesses, I don't think that would be a sufficient ground for granting a rule. But I am not prepared to say that I believe the seven instead of the four. Two of the seven were deeply interested in the matter. It was the duty of one of them to repair the spoke when it broke, and it was the duty of another to see that he did so. The means of knowledge of the seven were not greater than those of the four; and, besides, there is a circumstance of real evidence which affects my mind considerably. If the accident did not happen in consequence of a broken spoke, there is no other way suggested in which it did happen. On the whole, therefore, had I been a juryman, I think I would rather have inclined towards the opinion of the majority of the jury.

Lord ARDMILLAN—There are two classes of cases in which we are asked to allow new trials. In the one class, where juries draw inferences from admitted or clearly proved facts, and the Court are very clear that the jury has gone wrong, we generally, when a strong case is made out, allow a new trial. But where the case is one of antagonistic evidence, and the sole question is the credibility of human testimony, I am always very slow to interfere with the opinion of the jury who saw and heard the witnesses, and observed their demeanour in the witness box. I would require a very strong case for that. I think this case belongs to the latter class. I also agree with Lord Deas that it is a strong circumstance in this case that no other explanation of the accident is suggested, while the want of a spoke is sufficient to account for it. I don't say what verdict I would have returned had I been on the jury. I think the question was one of great nicety.

Lord PRESIDENT—I must confess that at the trial I concurred with the opinion of the minority of the jury; but the case was a very nice one, and as your Lordships agree that the motion for a rule should be refused, I am not prepared to dissent.

Agents for Pursuers—Macgregor & Barclay, S.S.C.
Agent for Defender—George Wilson, S.S.C.

Thursday, Nov. 8.

M.P.—HILL'S TRUSTEES *v.* HILL AND OTHERS.

Trust—Bequest of Interest—Vesting—Intestacy—Accretion. A person by his trust-deed appointed a sum of money to be distributed in 1878, and the intermediate interest accruing to be paid to his brother, who survived him, but died in 1864. Held that the bequest of interest had vested in the brother by his survivance, and his executor preferred thereto in competition with the truster's heirs *ab intestato*, and the persons among whom the money was to be ultimately distributed, the latter claiming right to it *jure accretionis*.

By trust-disposition and deed of settlement, dated 6th November 1860, the late David Hill of Hillgarden conveyed his whole heritable and moveable means and estate to certain trustees for the purposes therein mentioned. These purposes, so far as necessary to be here narrated, were as follows:—"*First*, In respect that the main object of this trust is to form a clear capital trust-fund of £6500 sterling, to be disposed of under the management of my trustees in manner under written, and that over and above the said Coupar-Angus heritable properties, the disposal whereof is hereinafter provided for, I declare and enjoin that my brother Robert shall provide funds to my trustees for paying all my just and lawful debts, my deathbed and funeral expenses, and the expense of the executry, including the stamp of the inventory of my personal estate, leaving the other expenses of this trust to be paid out of the first and readiest of the funds under my trustees, and the legacy-duties to be paid by the respective legatees, or retained by my trustees off their legacies: *Second*, My trustees shall make over to my brother Robert the lease of Hallyards for the whole remaining years thereof, and also my whole crop, stocking, household furniture, and moveables thereupon, and my other moveable means and estate wherever situated, and also my heritages, except what is hereafter specially disposed of, at the sum of £3500 sterling, which he shall be required to pay over to my trustees as soon after my death as he and they arrange, and at least within six months thereof; and as this sum, with £3000 I now have in the bank, will form a capital of £6500, which will be the full money fund under the trust, I direct this amount of capital to be disposed of in manner following, viz.:—My brother Robert shall have the whole interest of £6000 thereof until the youngest