Lord Benholme—The real question is, at what price could this man produce steam-power? There is not here merely the evidence of scientific witnesses required; we must also take into consideration what the peculiar circumstances of the case enabled the pursuer to do. To these peculiar circumstances I think scarcely sufficient weight has been given. To both parties in this cause the results have been most disastrous, and I deplore a litigation which should have ceased after the report by the man of skill.

Lord Neaves—Your Lordships did not regard a mere inspection by a man of skill as sufficient, and therefore a proof before further answer was allowed. This proof has not in any way been a fortunate business for either party. If anything, the indulgence to the defender we have shown may have been too great, but, on the whole, I concur with your Lordship's views, as in the circumstances best calculated to dispose of the question at issue.

The following interlocutor was then pronounced:—

"Find it is established that the defender entered into the agreement libelled, and that he failed to implement the same: Find that the pursuer has failed to establish any sum as the minimum cost of producing the steam power which he undertook to furnish, Therefore recall the judgment in so far as the merits are concerned: Find that the appellant is liable to the respondent in the sum of £5, in respect of his having violated the agreement libelled: Find no expenses due in this Court: Adhere to the judgment complained of in so far as it decides the question of expenses in the Court below, and decern."

Counsel for Pursuer and Respondent—J. P. B. Robertson. Agents—Gillespie & Paterson, W.S.

Counsel for Defender and Appellant—Millar, Q.C., and Smith. Agents—J. B. Douglas & Smith, W.S.

Wednesday, December 18.

FIRST DIVISION.

LANG *v.* ERSKINE

Process—Appeal—50 *Geo. III. c.* 112, § 36—16 *and* 17 *Vict. c.* 80, § 24.

The 36 section of the Act 50 Geo. III, c. 112, provides, *inter alia*, that Bills of Advocation from the Sheriffs and other inferior judges shall be allowed in respect to an *interim* decree for a partial payment, provided leave is given by the inferior judge.

The 24th section of the Act 16 & 17 Vict. c. 80, provides, *inter alia*, that it shall be competent to take to review of the Court of Session any interlocutor of a Sheriff giving *interim* decree for payment of money; and the enactments of 50 Geo. III. c. 112, are, so far as inconsistent with this enactment, repealed.

Held (after consultation with the Second Division) that it is competent to appeal against an interlocutor of the Sheriff giving *interim* decree for payment of money, without leave from the Sheriff.

Act. Balfour. Agents—Muir & Fleming S.S.C. *Alt.* Gloag. Agents—Ronald, Ritchie & Ellis, W.S.

Friday, December 20.

FIRST DIVISION.

SPECIAL CASE—ALLAN AND DAVID HUTCHISON.

(Heard before Seven Judges.)

Vesting—Service—Heir of Line—Heir of Conquest—Substitute—Conditional Institute—Disponee.

A party disponed the fee of his heritable estate to the heirs of his own body equally, share and share alike, whom failing, to his brothers A, B, C, D equally, and died without heirs of his body. A service was expede in their favour, but B died before it was carried through, without issue and intestate. *Held* that his share of the property went to the heir of conquest.

The question in this case was whether a certain property went to the heir of line or the heir of conquest. The facts will be found stated in the opinion of the Lord President, who delivered the judgment of the Court.

Argued for David Hutchison, that a right vested in Robert Hutchison before his death. There was no conveyance of a fee, constructive or otherwise, to the granter of the deed himself, and it operated as a divestiture of him because he did not convey to himself as institute, and he continued to hold in spite of, not in consequence of, it. The deed, as soon as it came into operation by the death of the granter, acted as a direct disposition to the disponees, and no service was necessary: the beneficiaries under it took as disponees, not as heirs. If there be a *nominatim* disponee, who dies before the granter, the next substitute takes as direct disponee; a conveyance to non-existing persons, and a conveyance to predeceasing persons, have equally little influence in controlling the destination. It has been suggested that a conveyance to heirs of the body must be held by implication to be a conveyance to the father himself, in order to get rid of the difficulty of the fee being *in pendente* during the non-existence of those heirs, but there is no necessity for such a construction here.

Argued for Allan Hutchison, that no right had vested in Robert Hutchison at the time of his death; the granter of the deed was himself the institute as fiar, the others being merely substitutes.

Authorities—*Colquhoun* v. *Colquhoun*, July 8, 1831, 9 S. 911, Lord Craigie's opinion; *Fogo* v. *Fogo*, Aug. 18, 1843, 4 D. 1063, 2 Bell, 195; Ross' Leading Cases, ii, 36; *Gordon of Carlton* v. *His Creditors*, M. 14,366-14,368; *Mackenzie* v. *Mackenzie*, Session Papers, F.C., 1818-19, No. 190; *Peacock* v. *Glen*, June 22, 1826, 4 S. 742; Bell's Principles, 1834-39; Menzies, p. 795; Montgomery Bell's Lect. p. 1022; *Anderson* v. *Anderson*, June 22, 1832, 10 S. 696, note p. 701; Bell's Illustr., ii, 425-8.

At advising—

Lord President—The facts of this case admit of being very shortly stated. John Gilmour by *mortis causa* deed disponed the fee of his heritable estate to "the heirs of my own body, equally among them, share and share alike; whom failing, to and in favour of David Hutchison, Robert Hutchison, Allan Hutchison, and James Hutchison, my brothers uterine, equally among them, share and share alike, and their respective heirs"