LORD M'LAREN—I concur with your Lordships in the view that there has been such an alteration of circumstances since the date of the Sheriff-Substitute's interlocutor that the defender ought not to be bound to sist a mandatary.

On the question of prescription it is to be kept in view that the Statute of 1579 enumerates various descriptions of debts, "house-maills, men's ordinaries, servants' fees, merchants' accounts, and others the like debts." It is enacted that these shall prescribe in three years, and that the creditor shall have no action unless he prove his case by the writ or oath of his debtor. I think it is evident that the statute has established a qualified presumption of payment, not an absolute presumption, but one having regard to the fact that people do not always preserve receipts or evidence of payment, and that it would not be fair to a debtor after the lapse of three years that he should be exposed to the risk of a dishonest claim being made against him for a debt which he had already discharged. In the interpretation of the statute one of the important questions has always been to determine whether a series of items shall be massed together and treated as one debt or shall be treated as separate debts. In the case of a current account, the items are treated as part of one debt, viz., the balance, and prescription runs only from the last date. The reason of this is, that in the case of a current account there is no presumption—certainly no strong presumption—of interim payment. The presumption is that payment has been made within three years from the date when the account was rendered. In the alternative case of house rents or aliment fixed at so much per year or per term, the practice is to make payment at each term, and accordingly each termly payment prescribes after three years from the date when it falls due. A debtor knows what his liability is, and the presumption is that he has settled for each term as it fell due, or at all events within three years after that date.

In considering under which of these two categories this case falls, I observe that some light is thrown upon the question by the citation from Mr Bell's Principles, where it is pointed out (sec. 629) that claims of relief by a party who has paid aliment fall to be treated as current accounts, and that prescription only runs in such cases from the last date of the account. I am not sure that in this passage the author means to enunciate a principle. He is merely stating the result of certain decisions. The presumption seems to rest on this, that there is not the same probability of payment in such cases as in those cases where there are agreements for termly payments, and if that is so, the principle appears to me to apply very strongly in the present case. Here there is no agreement alleged either as to the amount or the period of payment; there is only an undertaking to pay whatever might be advanced by the pursuer for the maintenance and aliment of the child. Accordingly, the undertaking appears to me to be of the same nature as these claims of relief, which have always been treated as current accounts. I am therefore of opinion that the plea of prescription as stated is not well founded, but applies only to the claim as a whole, the result being that prescription runs from the date of the last item in the account.

LORD KINNEAR was absent.

The Court recalled the interlocutors of the Sheriff-Substitute, dated 19th December 1890 and 30th January 1891: *Quoad ultra* repelled the 3rd plea-in-law for the defender, and remitted to the Sheriff to proceed with the proof.

Counsel for the Pursuer—Gunn. Agent—John Scott, Solicitor.

Counsel for the Defender—Wilson. Agent—A. W. Gordon, Solicitor.

Wednesday, May 13.

SECOND DIVISION.

HENRY-ANDERSON AND OTHERS (JOHNSTON'S TRUSTEES) *v.* JOHNSTON AND OTHERS.

Succession — Vesting — Settlement — Construction—Residue Disposed of "amongst those of my Relatives according to their Legal Rights."

A truster directed her trustees to pay half of the residue of her estate to her nephew on his attaining the age of twenty-five, and till then to hold it in trust and apply the income or one-half of the capital for his behoof. On his death before attaining that age without issue, his share was to go to the truster's brother and his children, to whom also the other half of her estate was to be conveyed on her death. By codicil the truster revoked the provisions in favour of her brother and his children, and with regard to the share of the residue in which they were interested under the settlement declared, "in the event of my death before executing a new settlement, such residue will be disposed of among those of my relatives according to their legal rights." Her heirs *in mobilibus* at the date of her death were her brother and nephew.

Held that the nephew's share vested *a morte testatoris*, and that the other half of the residue fell to be equally divided between the truster's brother and nephew.

Miss Margaret Johnston of Welton, Blairgowrie, died in Edinburgh on 14th July 1890. Her heirs *in mobilibus* at her death were her brother James Johnston and her nephew William Low Johnston. She left a trust-disposition and settlement by which she directed her trustees to convert her whole estate into money, and hold, apply,

and dispose of it in the following manner:—"One-half of the free rest and residue of my estate to my said nephew William Low Johnston, payable on his attaining the full and complete age of twenty-five years, but until he attains that age my trustees shall hold the capital in trust, and apply in such sums and in such way as they deem most expedient the annual interest, or a part thereof, for his maintenance and upbringing, but with power to said trustees, if they think proper, to advance to the said William Low Johnston, prior to his attaining said age, a part of the capital, not exceeding one-half, in starting him in business, or otherwise starting him in life, but which discretion will lie wholly with my said trustees, whom I hereby appoint to be tutors and curators to him until he attain said age of twenty-five years complete; but declaring, in the event of the said William Low Johnston dying without leaving lawful issue of his body before attaining the said age, his said share of my estate shall fall to the parties after named, being the children of my brother James Johnston, and the said James Johnston, and shall be divided among them in the same proportions as their own share is to be divided as hereinafter set forth, and the remaining half of said residue shall be held, applied, and disposed of by my said trustees to and for behoof of the children of my said brother James Johnston, and to himself, in the proportions following."

Upon 2nd July 1889 she executed this codicil—"I, the said Miss Margaret Johnston before designed, being about to depart to Denmark for a time, and not having time to make a new settlement of my affairs before leaving, but being desirous to alter some of the provisions in the foregoing trust-disposition and settlement, hereby cancel and annul the whole provisions therein contained in favour of my brother James Johnston, and also of his children *nominatim* in the said deed above written, and in lieu thereof I leave to the said James Johnston a sum of £100 sterling in full of all he can claim, and in the event of his challenging this codicil, this bequest of £100 will be held as null and void; and with regard to the residue of my estate, so far as the said James Johnston and his children were interested under the said trust-disposition and settlement, in the event of my death before executing a new settlement, such residue will be disposed of amongst those of my relatives according to their legal rights."

No other settlement of her affairs was ever made.

The trustees on her death accepted office, and entered upon the administration of the trust-estates, but in the meantime they did not accept the office of tutors and curators to William Low Johnston.

In these circumstances a special case was presented by (1) the trustees and executors under Miss Margaret Johnston's will; (2) James Johnston, her brother; (3) William Low Johnston, her nephew, and his mother Mrs Agnes Sutherland or Johnston, for the opinion of the Court on these questions—"(1) Did the half of the residue bequeathed to William Low Johnston by the said trust-disposition and settlement vest in him *a morte testatoris?* Or was vesting of the said half of residue postponed till William Low Johnston attained the age of twenty-five? (2) Does the other half of the residue fall to be equally divided between James Johnston and William Low Johnston? Or does it belong exclusively to James Johnston? Or does it belong exclusively to William Low Johnston?"

At advising—

LORD JUSTICE-CLERK—Mrs Margaret Johnston, whose settlement we are now considering, died in 1887 leaving a trust-disposition and settlement by which she directed her trustees to give one-half of her whole estate to her nephew William Low Johnston upon his attaining the age of twenty-five years, declaring that if he should die before attaining that age without leaving lawful issue, his share of the estate should fall to her brother James Johnston and his children. She also directed that the other half of the residue should go to James Johnston and his children. She also left a codicil dated in 1889 by which she annulled all provisions she had made in favour of her brother James Johnston and his children, and gave him in lieu thereof the sum of £100.

The first question we are asked to consider is, whether the one-half of the estate which has been admittedly left to William Low Johnston vested in him *a morte testatoris*, or whether it does not vest until he has reached the age of twenty-five? It was conceded on his behalf that if the settlement had stood as it was originally executed, vesting could not have taken place *a morte testatoris*, on account of the destination-over to his uncle James Johnston and his children. It appears, however, to me that the codicil, whatever else it may do, certainly takes that clause of destination-over out of the will and leaves the conveyance of that part of her estate as if it had been a simple bequest to William Low Johnstone. I am therefore of opinion that we should answer the first half of the first question in the affirmative.

Then there arises the second question as to the mode of disposing of the other half of her estate which by the original trust-disposition and settlement she had given to James Johnston and his children. There is no doubt that the cancelling of the bequest to James Johnston by the codicil put an end to the disposition in his favour in the original trust-deed. Miss Johnston had plainly the intention to make another will although she never did so. Having that intention she dealt with the matter thus in the codicil—"And with regard to the residue of my estate so far as the said James Johnston and his family were interested under the said trust-disposition and settlement, in the event of my death before executing a new settlement such residue will be disposed of among those of my relatives according to their legal

rights." Now that sentence is hardly intelligible by itself, and I think that in the hurry of preparing this deed before the lady left the country, some word must have got in or been left out which makes the sense different from what was intended. We must, however, take the words as we find them, and taking them so, I think they bear the interpretation that if she should die before she could make another settlement, the residue of her estate should be divided among her relatives according to their legal rights. Therefore, as I understand that her nephew William Low Johnston and James Johnston are the only persons interested who are relatives in the legal sense as regards succession, I think we should answer the first alternative of the second question in the affirmative.

LORD RUTHERFURD CLARK and LORD TRAYNER concurred.

LORD YOUNG was absent.

The Court were of opinion that the first and second questions stated in the special case fell to be answered in the affirmative.

Counsel for the First and Second Parties—D.-F. Balfour, Q.C. Agents—Watt & Anderson, S.S.C.

Counsel for the Third Party—Jameson—Ure. Agents—James Russell, S.S.C.

Wednesday, May 13.

SECOND DIVISION.

[Sheriff of Fife.

FOSTER *v.* RINTOUL.

Reparation — Damages—Culpa—Child Injured by Bicycle in a Street.

A cyclist rode a bicycle at the rate of six or seven miles an hour through a town when a number of people were standing or sauntering in the street. On overtaking a group of four persons he blew his whistle and they got out of his way with some difficulty. In consequence of the obstruction caused by these persons he did not see that a little girl of five years old was running down a cross street, and in the result she got in front of the bicycle and was knocked down and injured. In an action for damages by the child's father, *held* that the defender was in fault in not having his bicycle under such control that he could have stopped and so avoided the accident.

Upon 10th August 1890 while Richard Rintoul was riding a bicycle in one of the streets of Kirkcaldy he ran over and injured a little child about five years old.

Her father George Foster, potteryworker, residing in Kirkcaldy, raised an action in the Sheriff Court of Fife as tutor and administrator-in-law of his daughter for the injury done to her. Damages were laid at £30.

The pursuer averred that the defender was riding "in a culpable and reckless manner and at a furious rate." This the defender denied, and averred that the girl contributed to the accident by "culpably and recklessly" running against the defender's bicycle while he was riding at a reasonable rate.

Upon 1st October 1890 the Sheriff-Substitute (GILLESPIE) allowed a proof, and he thus stated the facts in his judgment on 29th October 1890:—"Finds in fact that about half-past eight o'clock in the evening of Sunday 10th August last the defender was riding a bicycle at a smart pace along Oswald Road; that there were a good number of people walking in twos and threes along the road; that as the defender was approaching the point where Oswald Road is joined to Park Road on one side and Mitchelstone Loan on the other there were four women or girls walking abreast in front of the defender, who sounded his bell, and they had just time to get out of the way, three of them stepping on to the footpath on the left hand, when the defender and his bicycle ran past; that almost immediately after, the pursuer's daughter Janet Foster, a child of five years old, was crossing Oswald Road from Park Road; that in consequence of the women above mentioned obstructing the view the defender did not see the child so soon as he probably would otherwise have done; that when he saw the child he endeavoured to stop and applied the brake, but that it was too late, and that the bicycle collided with the child who was knocked over, her right leg broken, and her face cut, the defender having also been thrown off and somewhat injured; that in the circumstances above mentioned the defender was riding too fast, particularly on approaching the opening of side roads from which persons might be crossing; and that he was thus to blame for the accident: Finds him liable in damages and *solatium*, which assesses at sixteen pounds: Finds him also liable in expenses," &c.

Upon 24th November 1890 the Sheriff (MACKAY) recalled the Sheriff-Substitute's interlocutor.

Authorities cited—*Fraser* v. *The Edinburgh Street Tramway Company*, December 2, 1882, 10 R. 264; *Grant* v. *The Glasgow Dairy Company*, December 1, 1881, 9 R. 182; *Martin* v. *Ward*, June 15, 1887, 14 R. 814; *Clark* v. *Petrie*, 6 R. 1076; *Williams* v. *Richards*, 3 C. & K. 81 (crossings).

The pursuer appealed.

At advising—

LORD JUSTICE-CLERK — This case is a very simple one, and there is very little possibility of difference of opinion about the facts. The defender was riding his bicycle along the narrow street of a village on a Sunday night when there were a number of the inhabitants standing or walking slowly about. He was going along at a pace of six or seven miles an hour, quite as high a rate of speed as could be used with propriety in such a street under any circumstances, and it appears