that in the case of *Ashley* v. *Magistrates of Rothesay*, 11 Macph. 709, an appeal to Quarter Sessions was entertained apparently without objection; and in the case of *Irvine and Others* v. *Magistrates of Dundee*, now before us, an appeal was also taken and considered.

The Early Closing Act of 1887 has been referred to by the Lord Ordinary, and I only mention it by way of showing what a very different question might have arisen under that Act. That Act admittedly does not apply to this case, because here the Magistrates were dealing with a community of above 50,000 inhabitants; but if it had applied a different question would have arisen. In the first place, the Statute of 1887 expressly alters the schedule of the Act of 1862 in regard to the hours of closing by taking out "the hour of eleven at night" and substituting for that part of the schedule the words "and do not keep open house or permit or suffer any drinking on any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight of the clock in the morning, or after such hour at night of any day not earlier than ten and not later than eleven as the licensing authority may direct." Next, in defining the licensing authority it defines the licensing authority in burghs to be the magistrates of the burgh, and in counties to be "the justices of the peace of a county," not in General Session, but "in Quarter Sessions assembled within their districts of jurisdiction respectively." Now, that may be read as indicating that it was intended that the resolution to alter the hour of closing from eleven to ten under that Act was to be a proceeding quite separate from consideration of the renewal or granting of certificates at the ordinary Licensing Court. For observe, in the one case the magistrates alone—not the justices in Quarter Sessions—are to be the licensing authorities in burghs who are to determine the question, and in counties, not the justices of the peace in general meetings (who are the licensing authority in the first instance), but the justices in Quarter Sessions, are to be the parties to decide whether the hours are to be reduced from eleven to ten. I only refer to that Act to show how different its terms are from those in the Home Drummond Act and the Act of 1862. Under these Acts, as I read them, the magistrates could only alter the hours of closing when applications for certificates were under consideration at the Licensing Court, and with special reference to the individual certificates. Under the Early Closing Act of 1887, as I read it, the magistrates in burghs and the justices in Quarter Sessions assembled in counties are for the first time empowered to resolve upon early closing by a general resolution, which need not be come to at the Licensing Court or with reference to any particular application.

I am therefore of opinion that although, as I assume, the Magistrates at the general meeting acted within their powers, an appeal to Quarter Sessions against their decision was competent and should have been entertained, and that we should find accordingly.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Sol.-Gen. Dickson, K.C.—Wilson, K.C.—Hunter. Agent—James Purves, S.S.C.

Counsel for the Defenders and Respondents the Magistrates of Glasgow—Salvesen, K.C.—Cooper. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders and Respondents the Town Clerk and Depute Town Clerk of Glasgow—Shaw, K.C.—T. B. Morison. Agents—Campbell & Smith, S.S.C.

Friday, February 20.

SECOND DIVISION.

BAIRD'S TRUSTEES *v.* BAIRD'S TRUSTEES.

Succession—Fee or Liferent—Repugnancy.

In his trust-disposition and settlement a testator directed his trustees to "divide and apportion" the residue of his estate between his two daughters. He then directed and appointed the trustees to hold the daughters' shares for their liferent alimentary use allenarly, and to pay to each the annual interest, rents, and proceeds of her share half-yearly during their respective lives, with a power to the trustees of making certain specified advances out of capital. The deed further provided that on the death of each of the daughters her share was to go to her issue, if she had any, in fee equally, subject to a power of apportionment in the daughter, but that if the daughter did not leave issue the fee was to go to the daughter's own nearest heirs, with a limited power in the daughter of burdening her share with an annuity not exceeding £100 in favour of her husband.

Held that the daughters had a liferent only of one-half each of the residue, and not a fee thereof subject to defeasance in the event of their having issue.

John Baird, architect in Glasgow, died on 18th December 1859, leaving a trust-disposition and settlement, dated 20th January 1859, and a codicil thereto dated 14th July 1859. By the trust-disposition and settlement he conveyed his whole means and estate, heritable and moveable, to trustees for the purposes specified. With regard to the residue of the trust-estate the trust-disposition and settlement provided as follows:—"With regard to the residue of my means and estate or of the prices and produce thereof, I direct my trustees to divide and apportion the same equally between my said two daughters Flora Baird and Agnes Ann Baird: And I direct and appoint my trustees to hold the shares of my said daughters respectively for their

liferent alimentary use allenarly, and to pay to each of them the annual interest, rents, and proceeds of her share at two terms, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas after my decease, and so forth half-yearly during their respective lives: Declaring always that the said shares of my said daughters, and the rents, interest, and produce of the same shall be exclusive of the *jus mariti* and right of administration of any husbands they may respectively marry, for whose debts and deeds the same shall not be liable, and that the receipts of my said daughters, without the consent of their respective husbands, shall be sufficient exoneration to my trustees: With power nevertheless to my trustees to pay to each of my said daughters upon their attaining the age of twenty-five years, out of her share of the residue of my estates, the sum of Seven hundred pounds: But in the event of both or either of my said daughters getting married before they attain the age of twenty-five years, I direct my trustees to pay to each of them on their marriage the sum of Two hundred pounds for her outfit: Which sum of two hundred pounds shall be deducted, without interest, from the foresaid sum of Seven hundred pounds directed to be paid as aforesaid: And upon the death of each of my said daughters I direct my trustees to pay, assign, and dispone her share of the residue of my estates, and that in such proportions as she may fix by any writing under her hand, to her child or children, and failing such writing, then equally among them, or share and share alike if there be more than one child, and that to the daughters on their respectively attaining majority or being married, whichever of these events shall first happen, and to the sons upon their respectively attaining majority, and failing children; then my trustees shall pay, assign, and dispone her share to her own nearest heirs: With power nevertheless to each of my said daughters, in the event of her marriage, to burden her share of the residue of my estates with an annuity to her husband not exceeding One hundred pounds in amount: Which annuity it is hereby declared shall be purely alimentary and shall not be liable for his debts or deeds nor subject to the diligence of his creditors. . . . And declaring also that the sums hereby provided to my said children are in full satisfaction of all claims of legitim or executry competent to them by or through my decease in any manner or way: Declaring that it shall be in the power of my trustees, upon the marriage of each of my daughters, to make over her share of the residue of my estates to any trustees who may be appointed in her contract of marriage, provided the conveyance of such share is in accordance with the purposes of this trust."

The testator was survived by his two daughters Flora and Agnes Ann, afterwards Mrs Jackson. Miss Flora Baird died unmarried on 27th June 1902. She left a trust-disposition and settlement, dated 9th August 1877, and two holograph codicils, dated respectively 7th June 1897 and 11th June 1902. By her trust-disposition and settlement she conveyed to trustees, for the purposes therein mentioned, 'All and Sundry the whole estate, heritable and moveable, which may belong to me at the time of my decease, with the writs, titles, and vouchers thereof.' The only purpose of Miss Flora Baird's trust-disposition and settlement which need be mentioned here was a direction to hold the residue of her estate for behoof of her sister Mrs Jackson in liferent, for her liferent alimentary use allenarly and her children in fee, the fee not to vest until the period of payment arrived. There was no direct reference in Miss Flora Baird's settlement to her father's testamentary writings or to her interest thereunder.

On Miss Flora Baird's death a question arose as to her rights in a one-half share of the residue of her father's estate, and a special case was presented for the opinion and judgment of the Court.

The parties to the special case were—(1) John Baird's testamentary trustees; (2) Miss Flora Baird's testamentary trustees; (3) the other daughter, Mrs Jackson, who was Miss Flora Baird's heir *ab intestata;* (4) Mrs Jackson's children.

The second and fourth parties contended that on a sound construction of John Baird's trust-disposition and settlement one-half of the residue of his estate vested in Miss Flora Baird, and was carried by her trust-disposition and settlement to her trustees. The third party contended that on a sound construction of John Baird's trust-disposition and settlement Miss Flora Baird took no more than a liferent of one-half of the residue, and that on her death without issue the fee of the share of residue liferented by her was carried by the destination-over in John Baird's trust-disposition and settlement to the third party as Miss Flora Baird's nearest heir.

The questions of law were—"(1) Did one-half of the residue of Mr Baird's estate vest, under his said trust-disposition and settlement and codicil, in Miss Flora Baird in fee, and, if it did so vest, was it carried by Miss Flora Baird's trust-disposition and settlement to her trustees? or (2) Had Miss Flora Baird a liferent only of one-half share of the residue of the said Mr Baird's estate, and did said share pass, under the said Mr Baird's trust-disposition and settlement, on her death to the third party as her nearest heir?"

Argued for the second and fourth parties —The case here fell within the rule that an initial unqualified gift in fee, followed by provisions importing a liferent in the person named as fiar with a fee to the issue of such person, was to be construed as a gift in fee to the person named subject to defeasance in the event of the person's death leaving issue—*Logan's Trustees* v. *Ellis*, February 7, 1890, 17 R. 425, 27 S.L.R. 322; *Mackay* v. *Mackay's Trustees*, June 8, 1897, 24 R. 904, 34 S.L.R. 683. The words "to hold for behoof of" had been held to import a gift in fee—*Greenlees' Trustees*

v. *Greenlees*, December 4, 1894, 22 R. 136, 32 S.L.R. 106; *Gillies' Trustees* v. *Hodge*, December 7, 1900, 3 F. 232, 38 S.L.R. 150. The words here, "divide and apportion," even more clearly imported a gift in fee. As therefore Miss Flora Baird had died unmarried the fee which had vested in her subject to defeasance became absolute on her death, and passed to her testamentary representatives.

The third party was not called upon.

LORD YOUNG—I indicated in the course of the exposition of the case by the learned counsel that a liferent only of one half each of the residue of the estate is conferred on the daughters of the testator. The question depends on the true construction and meaning of the third purpose of the trust-disposition and settlement, which begins thus—"With regard to the residue of my means and estate, or of the prices and produce thereof, I direct my trustees to divide and apportion the same equally between my said two daughters Flora Baird and Agnes Ann Baird." Now that does suggest, if the deed had contained no more, that the testator intended the residue of his estate to be equally divided between the two daughters, and one half paid over to each of them in fee. I think that the words which I have just read would have imported a fee if there had been nothing else in the deed. But then the deed goes on—"And I direct and appoint my trustees to hold the shares of my said daughters respectively for their liferent alimentary use allenarly." That, I think, makes the meaning of the testator clear that he intended his daughters to have a liferent only of one half each of the residue, and that he presumably intended his trustees to pay them the interest on their respective shares as it accrued, and accordingly he does so direct them in these terms—"And to pay to each of them the annual interest, rents, and proceeds of her share at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas after my decease, and so forth half-yearly during their respective lives; declaring always that the said shares of my said daughters, and the rents, interest, and produce of the same, shall be exclusive of the *jus mariti* and right of administration of any husbands they may respectively marry, for whose debts and deeds the same shall not be liable, and that the receipts of my said daughters, without the consent of their respective husbands, shall be sufficient exoneration to my trustees." I think that these provisions are inconsistent with the notion that the testator intended his trustees to hold the fee for his daughters. The deed then goes on, in words which also appear to me to be inconsistent with the notion of a fee being intended to be given to the daughters, "With power nevertheless to my trustees to pay to each of my said daughters upon her attaining the age of twenty-five years, out of her share of the residue of my estates, the sum of £700. But in the event of both or either of my said daughters getting married before they attain the age of twenty-five years, I direct my trustees to pay to each of them on her marriage the sum of £200 for her outfit; which sum of £200 shall be deducted, without interest, from the foresaid sum of £700 directed to be paid as aforesaid." Then follow these provisions:—"And upon the death of each of my said daughters I direct my trustees to pay, assign, and dispone her share of the residue of my estates, and that in such proportions as she may fix by any writing under her hand, to her child or children, and failing such writing then equally among them, or share and share alike if there be more than one child, and that to the daughters on their respectively attaining majority or being married, whichever of these events shall first happen, and to the sons upon their respectively attaining majority, and failing children, then my trustees shall pay, assign, and dispone her share to her own nearest heirs: With power nevertheless to each of my said daughters, in the event of her marriage, to burden her share of the residue of my estates with an annuity to her husband not exceeding £100 in amount."

Now, I think that this is simply a case in which, looking to the intention of the testator as expressed in the words he has used—and to what we are judicially satisfied was his meaning as expressed in the words he used—it is, I say, simply a case in which he intended each of his daughters to get a liferent allenarly of one half of the residue of his estate, and that on the death of each the share liferented by her was to go to her children if she left any, and failing children to her own nearest heirs. I am of opinion that we should answer the questions accordingly.

LORD TRAYNER—I reach the same conclusion. If the direction to divide and apportion, with which the clause here in question begins, had stood alone, it might, on a liberal construction, have amounted to a gift of the fee of one-half of the residue to each of the daughters. But taking this direction with its context, it does not in my opinion amount to a gift of fee. I think it is really a direction to divide, apportion, and set aside one-half share of the residue for each of the daughters in liferent allenarly and her issue in fee. If there had not been a destination-over in the event of the daughter leaving no issue, I think that the argument for the implication of a fee in the daughter would have been very much stronger, but I think that the destination-over to the daughter's own nearest heirs, and the limited power of burdening her share with an annuity in favour of her husband, are inconsistent with the notion that the fee of the share had vested in her.

LORD MONCREIFF—I am of opinion that a right of fee did not vest in Miss Flora Baird, but only a right of liferent. The testator, in the clause of the deed which gives rise to the present question, with respect to the residue of his means and estate, directs

his trustees "to divide and apportion the same equally between my said two daughters Flora Baird and Agnes Ann Baird." If the deed had stopped there I think there would have been no question. I do not doubt that a fee of one-half of the residue would have vested in each of the daughters if there had been nothing else in the clause than the words I have quoted. But I think that what follows shows very clearly that the testator had no intention that his daughters should have a right of fee. For the deed goes on to appoint the trustees to hold the shares of my said daughters for their liferent alimentary use allenarly, and to pay to each the annual interest, rents, and proceeds of her share half-yearly during their respective lives, with a power to the trustees of making advances out of capital within certain narrow limits which are specified. Then on the death of each of the daughters her share is to go to her issue, if she has any, in fee, equally, subject to a power of apportionment in the daughter, but if a daughter does not leave issue no power of testing on the shares is conferred on the daughters; on the contrary, the fee is destined, failing children, to the daughter's own nearest heirs, with a limited power in the daughter of burdening the share for the benefit of her husband. All these are indications of intention which in my opinion clearly show that a right of fee was not intended to be conferred on the daughters. Each case is to be determined according to its own circumstances. I agree with what Lord M'Laren said in the case of *Mackay's Trustees*—"Of course there may be cases where the primary gift is so qualified in expression as to show that no higher right is meant to be given than is more fully explained in the sequel, and no rule can be laid down which will dispense with the necessity of carefully considering the effect of all the clauses and provisions bearing on the right conferred." The deed in that case was very different from the deed before us, and the Court there held that the restrictive directions as to the daughters' shares of residue had reference to one event, and to one event only, namely, the marriage of the daughter, and consequently that the share of a daughter who had died unmarried had vested in her in fee *a morte testatoris*. I think that the provisions of the deed here are such as to make it impossible for us to reach a similar conclusion.

LORD JUSTICE-CLERK—I concur.

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

Counsel for the First, Second, and Fourth Parties — Smith, K.C. — Tait. Agents — Forrester & Davidson, W.S.

Counsel for the Third Party—Wilson, K.C.—R. C. Henderson. Agents—Melville & Lindesay, W.S.

Saturday, March 7.

BILL CHAMBER.

[Lord Pearson.

BARNS GRAHAM *v.* BOWIE.

Bankruptcy — Sequestration — Bankrupt's Petition Presented after Presentation of Creditor's Petition—Procedure—Recal—Expenses.

After a petition for sequestration had been presented in the Bill Chamber by a creditor and an interlocutor granting warrant to cite had been pronounced, the debtor (before the expiry of the *inducice* in that petition) presented a petition for sequestration in the Sheriff Court. Neither Court was informed of the proceedings in the other Court, and awards of sequestration under both petitions were granted, the award upon the debtor's petition being granted immediately and being consequently first in date. The creditor presented a petition for recal of the sequestration awarded on the debtor's petition. The Lord Ordinary *recalled* as craved and *found* the petitioner in the debtor's petition and the trustee elected thereunder personally liable, conjunctly and severally, in the expenses of the petition for recal.

On 13th December 1902 Mr Barns Graham, proprietor of the estates of Craigallian and others, presented to the Lord Ordinary on the Bills a petition for the sequestration of James Bowie, tenant of certain farms belonging to the petitioner, the rents of which were unpaid and formed the debt for non-payment of which sequestration was craved. A caveat had been lodged on 11th December on behalf of the debtor against any order being pronounced in this petition, but on a hearing being fixed for 15th December the caveat was withdrawn, and on that day the usual order was pronounced. Intimation of the petition was duly made to the bankrupt on 16th December, the *Gazette* notice inserted, and evidence of notour bankruptcy taken before a commissioner.

Before the expiry of the *inducice* in this petition, viz., on 22nd December, the debtor, James Bowie, with the concurrence of one of his creditors, John Morgan, presented in the Sheriff Court at Paisley a petition craving immediate sequestration of his estates, and also for the appointment of an interim judicial factor to preserve the assets. The Sheriff was not informed of the existence of the prior petition, and he on 22nd December awarded sequestration of Bowie's estates, and appointed John Wishart, accountant, Glasgow (the person suggested in the petition) to be judicial factor *ad interim* on the estate till the election and confirmation of a trustee thereon, and also ordered the first meeting of creditors to be held on 6th January 1903 for electing a trustee.

Two days after this award of sequestration in the Sheriff Court, viz., on 24th