agreed on, and the question arises whether that was in consequence of the alterations on the model which were made by Spencer? I agree with Lord Ormidale that if the builders of the ship allowed such alterations as to change the carrying capacity which was guaranteed, that ought to have been put in writing. That is the very object of the provision I have quoted from the contract. I do not think it was intended that the alterations on the model should alter the carrying capacity, and these alterations were merely verbally agreed to, and at any rate I agree with the Sheriff-Substitute in holding that it is not proved that these alterations caused the deficiency. The parties laid down the law for themselves that there should be written contract only, and I am disposed to apply it strictly. I do not dispute the law that parties by their subsequent arrangements can alter a contract they have made, but the cases are rare. They are such as the *Bargaddie* case, referred to by the Sheriff-Substitute. I think this case falls under the other class of cases to which he refers. But admitting that the alterations on the model are the cause of the deficient carrying capacity, they did not even, according to the defenders themselves, cause a deficiency of more than 15 tons on the net registered tonnage.

On the question of the amount of damages we sit here as a jury, and should be unanimous. Therefore, though I should myself have been inclined to give more than £850, I concur with Lord Ormidale in fixing on that sum.

Lord Justice-Clerk — I concur, and have nothing to add.

The Court adhered.

Counsel for Pursuers (Respondents)—Balfour —Darling. Agents—J. & J. Ross, W.S.

Counsel for Defenders (Appellants)—Trayner —Dickson. Agents—Morton, Neilson, & Smart, W.S.

Friday, February 6.

FIRST DIVISION.

[Lord Young, Ordinary.

NEILSON AND OTHERS (FULTON'S TRUSTEES) *v.* FULTON AND OTHERS.

Succession — Vesting—Fee and Liferent — Intestacy where no Bequest of Residue.

A testator directed his trustees to divide the residue of his estate equally among his children, the sons' shares to be paid to them on majority, and those of the daughters, to the extent of £200, on marriage or majority, the remainder of the latter to be laid out by the trustees on heritable security, and the titles taken to each daughter in liferent, for her liferent use only, and to her child or children in fee. There was no reference to residue. The trustees invested the funds in heritable securities taken in their own names, and not in terms of the direction. A married daughter having died, but without issue and intestate, *held* (*rev.* Lord Young, Ordinary) that her interest in her share was a bare liferent (except to the extent of £200 as above), and that consequently the fee lapsed to the intestacy of her father, and in the absence of a proper residuary clause in his settlement fell to his next-of-kin *ab intestato*.

Opinion (*per* Lord Deas) that if the funds had been moveable they could not have reverted to the testator's intestate estate.

John Fulton died on December 27, 1844, being survived by four sons and six daughters. He left a trust-disposition and settlement dated 25th March 1820, by which he conveyed his whole estate, heritable and moveable, to the trustees therein mentioned, for the following purposes, viz., (1) To pay his debts, sickbed and funeral expenses; (2 and 3) To provide an annuity and liferent of a dwelling-house and furniture to his wife, who however predeceased him; (4) To sell, let, divide, or burden any portion of his property, as the trustees should deem beneficial for his family; (5) To pay a sum to his wife, furth of their share of his succession, for the education and upbringing of his children; (6) To hold his whole means and estate, rents, interest, profit, and produce thereof, and all sums which might be realised therefrom, in trust for behoof of his children, and to deposit the moneys in bank or invest them in heritable security; and (lastly) the testator declared with regard to the disposal of the residue of his estate—'So soon as any of my children shall attain the age of twenty-one years complete or be married, I appoint and ordain my said trustees, after deducting all charges and expenses incurred under this trust, to divide my said means and estate, with the rents, profits, and produce thereof, into as many equal shares as there shall be children then alive, and to pay one just and equal share thereof, or if my property be then unsold, to convey one just and equal share thereof, *omni habili modo quo de jure*, to and in favour of each of my children, as they respectively attain majority or are married . . . . But declaring that if at my death any of my children shall be twenty years of age, the shares of such child or children shall not be payable till the first term of Whitsunday or Martinmas which shall occur one year after my death; and that should any of them die before receiving their shares of my succession, leaving lawful issue, such issue shall have full right and title, equally, share and share alike, to their parent or parents' share of my succession under these presents, with full power and authority, however, to my said trustees to withhold payment of all or any of my children or grandchildren's shares until they attain the age of twenty-five years if their conduct seems to require that precaution; as also to lay out the shares of all or any of my daughters in the purchase of heritable subjects, or upon sufficient heritable securities, and to take the rights and title-deeds thereof to and in favour of my said daughter or daughters (as the case may be) in liferent, for their liferent use only, and to their child or children equally in fee, but so as the said liferent rights shall not be anyways transferable by the liferenters or their husbands, nor be subject to the *jus mariti* of such husbands, nor be affectable by his, her, or their debts, but that they may remain free and permanent alimentary funds to my daughter or daughters during

their lives, and that in case of any assignment, transference, or attachment of all or any part thereof the same shall *ipso facto* cease and continue non-exigible during the existence of such assignment, transference, or attachment; and I hereby declare that my said trustees and their foresaids shall be sole judges of the sufficiency of their reasons for exercising the discretionary powers vested in them by these presents; which foregoing provisions in favour of my children shall be in full satisfaction to them of all claims and demands competent to them over my property in consequence of my death."

By codicil dated 29th December 1837 Mr Fulton appointed additional trustees, and after declaring that the provisions contained in his trust-disposition in favour of his wife had lapsed in respect of her death, the deed proceeded—"In the fourth place, I direct and appoint that the division of the residue of my means and estate shall be made by my trustees, not 'into as many equal shares as there shall be children then alive,' but equally among my children, the issue of such of them as may happen to decease coming in the place of the parent; . . . . And I direct the shares that shall be appointed to my sons respectively to be paid, assigned, or disponed to them as soon after they shall have respectively attained majority as my said trustees shall find it to be convenient; and with regard to the shares that shall be appointed to my daughters respectively, the said trustees shall pay to each of them out of her share, upon her marriage or majority, the sum of £200 sterling, and the remainder of the share of each of them shall be laid out and the titles taken thereto to her and her issue, under the conditions particularly expressed in the said deed with reference to the shares of my daughters hereby referred to."

The trustees having realised the trust-funds and paid the testator's debts, &c., the residue for division equally among his ten children was found in 1853 to be £31,000, the share falling to each child being thus £3100. Three of the sons received their shares, that of the fourth, who had predeceased the period of division, being paid to his representatives; and the daughters' shares were, to the extent in each case of £2900, retained by the trustees for their behoof, the remaining £200 being paid to each in March 1853, in terms of the trust-deed. The daughters' shares were invested for them on heritable securities, but the titles were taken in names of the trustees, and the revenue was subsequently divided amongst them regularly twice a-year.

On 15th November 1878 one of the testator's daughters, Mrs Elizabeth Faulder, died intestate and without issue, and a multiplepoinding was raised by the trustees with regard to the disposal of her share, amounting, as above stated, to £2900.

Claims were lodged for (1) Walter Neilson and others, Mr Fulton's trustees, who claimed that the fund in question fell to be dealt with as part of the residue which fell to be invested for behoof of the testator's children and the issue of predeceasing children; (2) for Miss Marion F. Fulton and others, Mrs Faulder's next-of-kin; (3) for the trustees of Alexander Fulton and others, the next-of-kin of the deceased testator.

The Lord Ordinary (YOUNG) sustained the claim for Miss Marion Fulton and others, Mrs Faulder's next-of-kin, and ranked and preferred them accordingly.

Mrs Fulton's trustees reclaimed, and argued—On a sound construction of the trust-deed and codicils Mrs Faulder had only a liferent of her share (the fund *in medio*), and she having died without issue, that share lapsed into the residue of the testator's estate, to be disposed of by the trustees. The trust-deed and codicil, read together, gave a direction, not a mere power, to the trustees; and the clause of the deed quoted above was a proper residuary clause, and not a mere clause of division.

Argued for Mrs Faulder's next-of-kin—Upon a sound construction of the clause in the settlement disposing of the residue, their shares of residue vested in the beneficiaries *a morte testatoris;* the direction as to investment contained in the codicil, which had the effect of converting a fee into a bare liferent, so far as regarded daughters' shares, was not to take effect till their majority or marriage. Thus, if the testator had died while his daughters were in minority, they would for a certain period have been absolute fiars of their shares; if they died, therefore, after the investment was made, without issue, then the fee (on the authority of *Falconer* v. *Wright* and *Wilson* v. *Reid*) would revert to the daughter in whom it had last been vested, and consequently her next-of-kin would be entitled to it. Mrs Faulder's share had vested in her during life. She had a fee, which on her death without issue fell to her next-of-kin. The testator's trust-deed contained no proper residuary clause.

Argued for the testator's next-of-kin—Mrs Faulder's interest had been a mere liferent, and on her death without issue, there being no proper residuary clause in the deed, the fee of her share reverted to the testator's next-of-kin *ab intestato.*

Authorities cited—*Falconer* v. *Wright*, Jan. 20, 1825, 3 S. 455; *Wilson* v. *Reid*, Dec. 4, 1827, 6 S. 198; *Cumstie* v. *Cumstie's Trustees*, June 30, 1876, 3 R. 921; *Gibson's Trustees* v. *Ross and Others*, July 12, 1877, 4 R. 1038; *Lord* v. *Colvin*, July 15, 1865, 3 Macph. 1083.

At advising—

LORD PRESIDENT—The fund *in medio* in this multiplepoinding is the share of the estate of the late John Fulton which fell to his daughter Mrs Faulder, and the question depends on the construction of that part of Mr Fulton's settlement which directed the manner in which the shares belonging to his daughters should be dealt with by his trustees.

Mr Fulton died in 1844, his original settlement is dated so far back as 1820, and Mrs Faulder died in 1878, having been married, but leaving no issue, and intestate. It appears that the trustees did not quite follow out the testator's directions as to the investment of the daughter's shares; but that is a matter of small consequence if it is clear that Mr Fulton directed those shares to be invested in a particular manner, for according to a well-known rule of trust law, that which was directed to be done must be held to have been done.

Mr Fulton's settlement is in one respect a very simple one; it contains no special legacies, and no provisions except an annuity to his widow and

an appointment that his entire estate be divided among his children, which is made in the following terms—[*His Lordship here read the passages from the deed and codicil quoted above*].

The particular provision as to the manner of dealing with the shares of his daughters is introduced by the words "As also," leaving some doubt whether that connects with the words above "I appoint and ordain," or whether they connect rather with the words "with full power and authority." It is of no great consequence, but I incline to think they connect with the latter words, and that what follows would be therefore only a power and not a direction. But an alteration is made by the terms of the codicil of 1837, and it appears to me that by its operation the power of the trust-deed is altered to a direction—an injunction imperatively laid on. Now, what is it the trustees have to do? The share of each daughter is to be "laid out, and the titles taken thereto to her and her issue, under the conditions particularly expressed in the said deed," which are, that the titles shall be taken in favour of the daughters in liferent for their liferent use only, and to their children in fee. It is true that we have it stated on record that "The trustees did not invest the shares of daughters in the purchase of heritable properties, or upon securities appropriated to them individually. The trust-funds are invested on heritable securities, but the titles are taken in name of the trustees." But, as I have said, what was directed to be done must be held to have been done; and so Mrs Faulder's share must be dealt with as if it had been invested in heritable property, or in heritable security, and the titles had been taken to her in liferent, and to her issue in fee. That being so, it is clear that Mrs Faulder had no right in this portion of her father's estate but a bare liferent. No doubt if his directions had been carried out to the letter she might have been in the position of fiduciary fiar for her children *nasicturi*, but she could never have had a real or beneficial fee in herself.

What, then, became of the fee of this share, Mrs Faulder having died without issue? It is claimed by two sets of persons—First, the next-of-kin of the testator, on the ground that it is undisposed of by the settlement, and so falls into intestacy; and second, by the trustees under the settlement, on the ground that it falls into the general conveyance of the estate in favour of the testator's children, and must be dealt with on the footing of being a proper residuary bequest. I am of opinion that this share has become intestate succession, and that the testator's next-of-kin are entitled to be preferred. I think there is no residuary bequest at all. The testator simply, after providing for his widow, directed his whole estate to be divided into as many equal shares as there should be children—that is, in effect ten, for he left four sons and six daughters. That exhausted the estate so far as division was concerned, and when the shares were paid over to the sons and invested for the daughters, as ought to have been done in terms of the codicil, the trustees were *functi officio* and had no more to do. No one could take any residue under the deed. I think that is so well settled by authority that it is useless to enlarge upon it. The case of *Jameson Torrie*, May 31, 1832, 10 S. 597, is perhaps the leading, though not the earliest one, and that was followed by others, and was commented on in many cases where the decision went in an opposite direction; but I think no one doubts that where an entire estate is directed to any certain number of beneficiaries and nothing is said about residue, there can be no proper residue, and if a share lapses it passes to the next-of-kin *ab intestato*.

I am therefore of opinion that the claim of the testator's next-of-kin should be preferred.

Lord Deas—I think it is sufficient for me to say that the only difficulty I have had in agreeing with the conclusion at which your Lordship has arrived is one which, on paying careful attention to the terms of the deed, I have found to be obviated.

I agree with your Lordship that under this settlement we must hold that what should have been done by the trustees has been done, and proceeding on that assumption, the trustees must be held to have denuded some time ago. On that assumption, if the succession of the estate going to the daughters had been personal or moveable, I am of opinion that under this deed, the trustees having once denuded in favour of the daughters, nothing could come back to intestacy. The share of a particular daughter would go to her own heirs or descendants. The more so that that would seem, looking to the deed, to have been clearly the testator's intention. It is stated in the codicil "Which provisions conceived in favour of my children shall be accepted of by them respectively, and the same are hereby declared to be in full of all legitim, portion-natural, bairns' part of gear, executry, or other claim whatsoever, legal or conventional, competent to them, or which they or any of them or their issue can ask or demand by and through my death or the death of their mother." A succession of personalty being conveyed and accepted, there is no possibility of anything coming back to the testator's estate. But then there is a power in this deed to lay out the daughters' shares in the purchase of heritable subjects or heritable securities for the daughters in liferent and for their children in fee. It is a mere power in the deed itself, but there is a clause in the codicil which seems to make it an imperative direction, for it says that the trustees "shall pay to each of them, out of her share, upon her marriage or majority, the sum of £200 sterling, and the remainder of the share of each of them shall be laid out, and the titles taken thereto to her and her issue, under the conditions particularly expressed in the said deed with reference to the shares of my daughters hereby referred to." The laying out is here directed in imperative terms, and when we go back to the passage in the deed it seems too clear for argument that the mode of investment which is here imperatively enjoined is the same as that which was formerly a power only. Suppose that the shares of the estate had been made over in the form of heritage with conditions of that kind, I should have no doubt that the destination of that heritable estate would have carried it in the way there contemplated, and if that be so, I agree in thinking that the share in question has lapsed, and that being so, my only doubt is thereby removed.

I have merely further to observe, with regard to the reference in the argument to the case of *Cumstie* (30th June 1876, 3 R. 921), which seemed to be thought in place, that I consider it has

nothing to do with the matter. In the ordinary case, where a liferent is given to a daughter (or a son), it is clear there is nothing but a liferent given; but the nicety in *Cumstie's* case was the destination to sons *nominatim* in liferent for their liferent use allenarly, and their heirs whomsoever equally betwixt them in fee heritably and irredeemably. It was from these words relating to the heirs that the whole difference of opinion arose. It was held by the majority of your Lordships that the result would be that no fee was given to anyone—that it could not go to the heirs, and so there was no fee at all. I thought that might be so, and yet that there was a conclusive indication that the share was meant to be given out and out, and never to come back—in fact that "heirs whomsoever" was equivalent to "himself." And I should decide again in the same way now, but that has nothing to do with the present question.

With that explanation, I do not differ from your Lordship's conclusion, though I should not have been sorry to do so, as our judgment seems to proceed rather against the wish of the testator.

Lord Mure—On the terms of the two deeds taken together it is quite clear from the authorities that Mrs Faulder's right to her share was a mere liferent. The direction in the codicil is distinct, and sufficient to obviate the difficulty which has been suggested, as to whether the words "as also" in the trust-deed are to be read back to the words "appoint and direct," or express merely a power to the trustees. That being so, I think it is settled that Mrs Faulder took nothing but a liferent, and could take no fee unless it were merely a fiduciary one for her children who might be born.

With reference to Lord Deas' remarks, I do not think it necessary to give a decided opinion as to whether a different rule would have applied had the power or direction been so worded as to allow the trustees to deal with the bequest as if it had been directed that it should be invested upon ordinary moveable security to Mrs Faulder in liferent and her children in fee. It is clear on the facts as they are that Mrs Faulder had merely a liferent, and I think that even in the other case she would have had no more. In the case of *Gordon* v. *M'Intosh*, in the House of Lords (April 17, 1845, 3 Ross' Leading Cases, 617), the opinions of Lord Campbell and Lord Brougham indicate that by the law of Scotland the same rule would apply had the money been invested in moveable property, for there the bond contained no express direction to invest in heritable security, and Lord Campbell says distinctly (p. 624)—"I am not at liberty to inquire into the reasonableness of it, or how far strict feudal principles, by which the disposition of real property has been regulated, ought to have been applied to the settlement of a sum of money as a provision for a family on marriage. The decisions of the Scotch Courts make no distinction between land and money in this respect, and with regard to money, treat such a disposition to the parent for life, remainder to the children *nascituri*, without the word 'allenarly,' as in effect a simple destination which may be defeated by the parent, who is considered the fiar. If the word 'allenarly' is added, this is tantamount to fencing clauses in a deed of entail, and prevents alienation, though still the parent would be the fiar." "Allenarly" did not occur in that deed, and both Courts accordingly held that the fee was in the mother because "allenarly" was not there. In regard to that point, I should reserve my own opinion, but I am not prepared to hold that under the direction here given the same rule would not equally apply.

As to the second point, I concur in thinking that Mrs Faulder's share having lapsed owing to her having no issue, became intestacy, and so goes to the testator's next-of-kin.

Lord Shand—I concur in the judgment proposed by your Lordship. It appears to me that the previously decided cases settle both points now raised for judgment. As this lady's share of her father's estate was given her for liferent use allenarly, she had no fee, and in the absence of any proper residuary clause in the settlement I think her share goes back to intestacy.

The decision of the case seems to me to suggest two observations worthy of the attention of the profession. The first of these is, that as the effect of giving a liferent use allenarly to a child is to exclude all right of fee, if it should be desired, as might often be the case, failing issue of the liferenter, to give the liferenter or her heirs a power of disposal of the fund *mortis causa*, or to give a fee to the heirs of the liferenter, this should be done expressly by a clause declaring that the liferenter shall have a power of disposal of the fee *mortis causa*, and failing the exercise of such power that the fee shall vest in the liferenter's heirs.

The second point, the importance of which is illustrated by previous cases, is, that in order to save partial intestacy, such as here occurs, obviously against the wish of the testator, the deed should contain a clause expressly dealing with residue, which will take effect as to lapsed provisions of the testator's estate, and carry these provisions to the persons whom the testator desires to favour.

The Court recalled the Lord Ordinary's interlocutor, and sustained the claim for Alexander Fulton and others, the testator's next-of-kin.

Counsel for Mr Fulton's Trustees—Maconochie. Agent—J. Gillon Fergusson, W.S.

Counsel for Mrs Faulder's Next-of-kin—Ure. Agents—Maconochie & Hare, W.S.

Counsel for Mr Fulton's Next-of-kin—Murray. Agents—Maconochie & Hare, W.S.

Saturday, February 7.

SECOND DIVISION.

SPECIAL CASE—FORDYCE AND OTHERS (FORDYCE'S TRUSTEES) *v.* WYNDHAM KENNION AND OTHERS.

Power of Appointment—Where given under a Scotch Deed, and Executed by a Deed valid under Scotch Law but not by the Lex domicilii.

A Scotsman by a Scotch deed gave a power of appointment to certain of the beneficiaries. One of the donees of the power became a domiciled Englishwoman, and exe-