

A.S. 24th February 1846, "to fix the time and place of trial." The Court fixed the trial to take place on 27th July in the First Division.

In January 1885 Mrs Fanny Evans, wife of William Evans, pattern-maker, Liverpool, and her husband as her administrator-in-law and as an individual, raised an action against Mrs Amelia Stool, the widow of the deceased Alexander Stool, seaman, Dundee, and others, his representatives.

On 28th May 1885 the Lord Ordinary (LEE) appointed the pursuers to lodge issues.

On 15th July 1885 the First Division adhered to this interlocutor.

On 15th June 1886 issues were adjusted.

On 18th June 1886 the pursuers gave notice for jury trial at the Summer Sittings.

On 5th July 1886 the pursuers countermanded this notice and gave notice for jury trial at the Christmas Sittings. The 5th of July was the last day on which notices could be given for trial at the Summer Sittings.

The defenders then presented a note to the Lord President, in which they sought that the countermand should be discharged, and that the trial should proceed at the Summer Sittings.

By A. S. 24 February 1846 it is provided that "in case either party countermands the notice of trial given by him, it shall be competent for the Court, if then sitting, or to the Judge at the Sittings, or on the Circuit for which such notice of trial had been given, to fix the time and place of trial, on cause shown by the opposite party." The defenders argued that they would suffer hardship if the case were delayed until the Christmas Sittings. The Act of Sederunt gave the Court power to fix the time and place of trial, which might be at the Summer Sittings, in spite of the countermand—*Campbell v. Caledonian Railway Company*, Dec. 6, 1881, 9 R. 251.

The Court, in respect that the pursuers had stated no good reason for their countermand and the postponement of the trial till winter, fixed it to take place on 27th July at the Summer Sittings of the First Division for jury trials.

Counsel for Pursuer—A. S. D. Thomson. Agent
—William Officer, S.S.C.

Counsel for Defenders—G. W. Burnet. Agent
—George Andrew, S.S.C.

Thursday, July 8.

SECOND DIVISION.

[Lord Fraser, Ordinary.]

TAIT'S TRUSTEES v. TAIT AND OTHERS.

Husband and Wife—Jus relictæ—Effect on Settlement of Wife's Election of Legal Rights—Legacy—Special and General Legatees—Residue.

A trustor conveyed his estate to trustees, directing them to convey his interest in certain leases of farms, and the farm stocking on the farms, to two of his nephews respectively, to pay certain pecuniary legacies, and to give his widow the liferent of the residue, and after his death to divide it

among certain residuary legatees. The widow took her *jus relictæ*. Held that the residue must first be exhausted in payment of *jus relictæ* before the special legacies to the nephews could be infringed upon (*alt.* judgment of Lord Fraser, who held that the *jus relictæ* should in the circumstances of the case be paid from the whole moveable estate *en masse*, each legatee contributing in proportion to the amount of his legacy).

William Tait died on 9th December 1884. He was survived by his wife but had no children. He was tenant of the farms of Venchen, near Kelso, Wideopen, Open Haughs and Town Yetholm Mains in Yetholm, Roxburgh, and of Linden, near Gala-shiels. He was also joint-tenant along with his nephew Andrew Lees of Buckholm, Williamlaw, and Ladhope Muir in the parish of Melrose. He left a trust-disposition and settlement by which he conveyed to trustees, of whom Andrew Lees and another nephew, George Tait, accepted and acted as his trustees, his whole estate and the leases of the farms, and in the *second* and *third* purposes directed them to convey to his wife the whole household furniture in the farm-house at Venchen along with £200 for mournings and interim aliment. He further directed them, *fourthly*, to pay £250 to Jane Tait, his housekeeper at one of his farms, and £50 to George Maillen, his shepherd at Venchen; *fifthly*, to convey to his nephew Andrew Lees (1) his whole interest in the lease of the farms of Buckholm, Williamlaw, and Ladhope Muir, (2) his right to the lease of Lindean, (3) the farm stocking, cattle, and household furniture, &c., on these farms, declaring that Lees should by acceptance thereof be bound to free and relieve the trustees of rents, wages, &c., in respect of these farms; *sixthly*, to convey to his nephew George Tait (1) the trustor's right to the lease of the farms of Venchen and Wideopen, (2) the farm stocking, &c., on the farm, under the same declaration as applied to his other nephew. Each of these two nephews was also to pay the trustees £350 at the end of five years from the trustor's death, and £350 at the end of ten years from the same period. He directed the trustees, *seventhly*, to pay to his wife a liferent of the residue of his trust-estate, the sums of money to be paid by Lees and Tait to be included in residue; *eighthly*, on her death to realise his estate and divide the free proceeds amongst his sister Mrs Agnes Tait or Davidson and his nephews and nieces in equal shares, these shares of residue not to vest till the time of payment arrived. By a codicil to the settlement, on the narrative of the provisions to the nephews of the trustor's right to the leases of his farms, and whereas it was his wish that the assignments to them should be made as soon as possible after his death, and should take effect as at that date, he declared that each should be entitled to any profits the trustees might make out of the leases which were to go to him while they might hold them, and on the other hand should be bound to pay losses incurred by the trustees with reference thereto. This provision in the wife's favour was to be declared in full of her terce and *jus relictæ*. The trustees entered on their office and found that the free moveable estate after payment of debts amounted to £17,348, 3s. 6d. Mrs Tait, the widow, intimated that she repudiated her conventional provisions under the

trust-deed, and she claimed one-half of the moveable estate as her *jus relictae* in respect there were no children of the marriage. The effect of this claim was to raise certain questions for the judicial settlement of which the action of multipointing was brought by the trustees. The defenders called in the action were the widow and the other legatees and the whole of the parties interested in the residue of the estate.

The question of legal importance now to be reported was thus stated by the real raisers (Cond. 7) —“The amount payable to Mrs Tait *jure relictae* will require to be judicially ascertained, and it will also require to be judicially determined whether for the payment of the amount that may be found to be due and payable to the widow the general residue must first be exhausted, including the amount required for payment of the money legacies of £250 and £50, or whether the widow's claim for one-half of the value of the farm stocks that belonged to the deceased lies against these stocks, and the legatees to whom the same have been left, or whether in questions *inter se* these legatees are liable to relieve the general residue, and the general and residuary legatees of the widow's claim so far as relating to these stocks, or to the one-half of the value thereof.”

Claims were lodged amongst others by the widow for her *jus relictae*, and for aliment from the testator's death, by Andrew Lees and George Tait claiming assignments to the leases and the farm stock bequeathed to them, and by the residuary legatees. Lees and Tait maintained that for the payment of the widow's *jus relictae* the general residue must first be exhausted, while the residuary legatees maintained that the *jus relictae* must be paid from the whole of the personal estate *en masse*, and that each legatee should contribute in proportion to the amount of his or her legacy.

The Lord Ordinary (FRASER) sustained the widow's claim for *jus relictae*, and further “Finds that the payment of the *jus relictae* must be made by all the legatees to the amount of one-half of the legacies received by them, and that the burden of such payment is not to be laid upon the residue estate in the first place.”

“*Note.*—[After stating other questions not the subject of final decision in this branch of the cause] —“Another question stated upon the record is this— [His Lordship quoted Cond. 7, quoted supra] —The rule is settled that where a widow or children claim legal rights of *jus relictae* and legitim which are inconsistent with the testamentary arrangement made by the husband and father by a general settlement, they cannot claim provisions in their favour under the settlement, and these go to the party from whom the property necessary to meet the *jus relictae* or legitim is taken. The trustee, moreover, in this case, has not left this matter in doubt, because he has expressly declared that the provisions in the widow's favour are to be held and accepted of by her as in full of terce and *jus relictae*.”

“The questions now are—1st, From what part of the personal estate shall the *jus relictae* be taken? 2dly, To whom shall the forfeited interests of the widow be given?”

“The two legatees, Tait and Lees, contend that the *jus relictae* must be paid from the residuary estate, and that it is only in the event of that estate being insufficient in amount that any claim

can be made against them. There can be no residue, it is said, until all the debts are paid. *Jus relictae*, it is further said, is a debt, and must be satisfied before there can be any residue. Special legacies are not to be encroached upon till residue and general legacies are exhausted. Such is the argument, and the whole argument, submitted by Tait and Lees.

“This raises a somewhat novel point, and it is necessary to consider whether or not the rule applicable to ordinary debts is applicable to the case of a claim for *jus relictae*.”

“No doubt *jus relictae* is in one sense a claim for a debt against the executor or trustee, as is shown by this, that the widow is not entitled to demand payment from any debtor to her husband's estate of a third or a half of the debt owing by him. Her claim is against the executor. See *Dunduff v. Craigie*, M. 3843 (1612), where it was found that ‘The relict has no action against the defunct's debtors for her third; she must pursue the executors, or if there are no executors she must confirm herself executrix-creditor.’ ‘The Lords considering that the relict could fall nothing by her defunct husband but the third of his free gear, which could not be known but by confirmation of her husband's testament, that she behoved to urge the confirmation thereof; and albeit, she might have retention of her unquihle husband's goods, being in her hands for her third thereof, yet she could not have action for her third of the goods against any other till the testament was confirmed.’ This was subsequently adhered to in *M. Aulay v. Bell*, M. 3848 (1712); but the argument of the executor in this case was carried no further than this,—‘The wife's interest in the moveable estate of her husband, upon dissolution of the marriage, is to be regulated according to the nature of the subject—that is, she hath a right of property to the legal share of moveables that were in the joint possession of the husband and her, *stante matrimonio*; but the husband and his executors are fiars of sums of money, in which she hath no *jus in re*, but only a personal action against the executors to make the half furthcoming to him.’

“There is a controversy as to whether the *jus relictae* is a right of succession or a right of division. *Stair* (iii. 8, 43) and *Erskine* (iii. 9, 20) are of opinion that it is a right of division of the property over which the husband had, during the marriage, absolute right of disposal. Erskine, in dealing with the case of renunciation of *jus relictae* during the husband's life, lays it down that such a renunciation does not operate as a conveyance of one-third ‘to her husband, so as to increase the dead's part from one-third to two-thirds,’ and he then adds, ‘The reason is, the wife's right is not of the nature of a debt, which may be transferred by the wife to the husband; it is a right of division which takes no place till the dissolution of the marriage.’

“In the case of *Fisher v. Dixon* (16th June 1840, 2 D. 1156), which had regard to a claim for legitim, Lord Mackenzie put the matter thus:— ‘When a father executes a general disposition of this kind, it is quite clear that he thereby conveys to the donee the whole moveable estate, not excepting any part of it on account of legitim. The donee has a title, therefore, to the whole, in itself good and valid. But the children, by the father's death, have vested in them a prefer-

able right to a half or a third of that moveable estate, falling to them in equal shares. This is vested *sola supervivencia* in each child for his own share. All of them, therefore, or each of them for his own share, may either reduce the general disposition *pro tanto*, and directly vindicate their shares of that legitim as under a real right of succession to the father, or they may leave the disposition unreduced, and letting the general donee take the whole estate in the first instance, claim from him the amount of their shares of legitim. The latter is, I conceive, the more easy and natural way. The general donee is entitled to take confirmation in his own favour generally, in so far as not opposed, and thereby obtain possession of the moveable estate, and to keep it subject to the claims of the children against him on account of their shares of legitim.'

"The truster in the ordinary case knows that he must leave some debt to be paid off, and he knows the rule of law that that debt must be cleared away before there can be any residue, and that general legacies must suffer abatement before special can be encroached upon; and the law therefore presumes that he intends that the matter shall be so adjusted. But there can be no ground for holding such an intention to exist, with regard to a claim for *jus relictae* made in defiance of his settlement,—a claim which he could not have anticipated, and which he could not be supposed reasonably to have considered as standing in the position of an ordinary debt. Tait and Lees stood in no nearer relationship to him than did the persons to whom he conveyed the residue of his estate. They were nephews, it is true, but the residuary legatees were his own sister, and the children of a brother and of other sisters. If, therefore, it cannot be reasonably supposed that he intended the residue to be entirely carried off by his widow, is there any other ground in law for holding that the claim must come against the residue in the first place? The rule that the widow cannot directly claim from the debtors to her husband's estate a half or a third of the sums due by them, but must make claim against the executor confirmed, is mere matter of administration, and for convenience sake. The *jus relictae* vests *ipso jure* upon the husband's death, and the widow's right is to a half of the whole moveable estate, whatever it may consist of. If it can be turned into money by sale, and her right reduced to a pecuniary value, this, as being the most convenient course, will be adopted; and it is the ordinary course. But if the corporeal moveables left by the husband cannot be sold by auction or otherwise, she is entitled to demand a third or a half of these moveables specifically.

"Such being the nature of her right, the Lord Ordinary cannot adopt the contention supported by Tait and Lees. There is no direct authority in the shape of precedents upon the subject. It is certainly not determined by any of the cases,—all of recent years,—where the Court had to adjust the rights of parties in consequence of claims for *jus relictae* and legitim being made, adverse to the husband's and father's will. The points presented for decision in these cases had reference to the persons to whom the provisions, forfeited by the reclaiming widow and children, should be given. Heirs and next-of-kin claimed these forfeited provisions as intestate succession

undisposed of; a fiar claimed the immediate enjoyment of the liferent in consequence of the forfeiture of the liferent; a daughter, who had right along with another daughter to the rents of an estate, claimed the half which was forfeited by that other daughter in consequence of her insisting upon legitim; and residuary legatees also put in their claim for the forfeited provisions. In all these cases the Court had to find out who was the party who was hurt by the upsetting of the settlement; but no question was raised as between one set of beneficiaries and another, as to which portion of the estate should bear the burden of the adverse claim for legitim or *jus relictae*.

"The cases seem to be in the order of date as follows:—

"In *Ker v. Wauchope* (3rd May 1819, 1 Bligh, 25) the heir-at-law was successful in reducing the death-bed deed which had conveyed landed property for general purposes, but which had given a liferent to the heir. The forfeited liferent was given to the residuary legatee, who was the sufferer by the landed estate being carried off.

"In *M'Innes or M'Allister v. M'Allister* (29th June 1827, 5 S. 862) the heir-at-law took up the estate which the testator had appointed differently, and this he was enabled to do because there were not disposing words in the will. A liferent interest of £5000 had been bequeathed to the heir, and which the Court held to be forfeited, in consequence of his taking up the landed estate against the appointment in the will. This forfeited liferent was given to the persons to whom the landed estate so carried off had been bequeathed.

"In *Peat and Others v. Peat and Others* (14th February 1839, 1 D. 508) a widow repudiated the provision by her husband's will and claimed *jus relictae* and terce. The provision in her favour was the interest on an heritable bond for £2000, the principal sum being appointed to be paid on her death to the testator's children. In consequence of her claim for *jus relictae* and terce, she was held to have forfeited two-thirds of the interest payable on the bond, the other one-third going to her as terce. The forfeited two-thirds were given to the residuary legatees. The *jus relictae* was paid from residue; but the only question argued and decided was whether the forfeited two-thirds should go to the residuary legatee or to the persons who were to obtain the principal sum on the widow's death.

"In *Nisbet's Trustees v. Nisbet* (6th December 1851, 14 D. 145) the whole estate was ordered to be divided among brothers and sisters and their families, but there was an express clause of forfeiture in the event of any of the children challenging the settlement. One of them did so on the head of death-bed, and his share was given to the other brothers and sisters, whose proportion of the estate was lessened by the reduction of the father's deed. A claim was made by the next-of-kin, on the footing that *quoad* the forfeited share there was intestacy, which claim was rejected, and this was the only point decided.

"In *Breadalbane Trustees v. Pringle* (15th January 1841, 3 D. 357) a child claimed legitim, and thereby forfeited a liferent given by the father's will to her. This forfeited liferent was ordered to be given to the general donees of the father, who were the parties bound to pay the legitim.

“In *Davidson's Trustees v. Davidson* (15th July 1871, 9 Macq. 995) there was a direction to the trustees to give specific subjects in liferent to children and the fee to grandchildren, and the remainder of the estate was conveyed to trustees, with a direction to divide it among the grandchildren. Three of the children having repudiated the provisions in their favour, and successfully claimed legitim, their liferents of the specific subjects were given to the residuary legatees who were injured by the claim for legitim. The contention here was on behalf of the heir-at-law, that the liferents came to him on the footing of intestacy, and on behalf of the fiars of the specific subjects, on the footing that the liferents not being claimable, the right of fee became at once available.

“In *Harvey's Trustees v. Harvey's Trustees* (30th January 1862, 1 Macph. 345) the forfeited interest was not given to the residuary legatees, but to parties whose beneficial interest was diminished by the election made. Lord Curriehill in this case observed—‘In the cases of *Ker, Peat, and Breadalbane*, it was held that such an application of what is forfeited is in such cases warranted on the principle of *surrogatum*, or what appears to be called in England equity of compensation. In the case of *Nisbet* some doubts are thrown upon that principle. But whether or not it be sound, the principle of implied will is clearly so;’ that is, the implied will of the testator that the parties whose provisions were diminished by the election should get the benefit of the property that was forfeited.

“The Lord Ordinary was referred to an English case which has some bearing upon the present one, as showing that a testator may by the terms of his will so define the residue as that the residuary legatee, in place of being a general legatee, shall be a specific legatee, and such seems to be the case here. But further, there may be such a claim made against the estate, or such a loss sustained by it, as to render the application of the rule as between special and general legatees altogether unjust and inequitable. For example, a testator having given directions to invest his estate and pay the interest to his wife for life, and after her death to pay seven different legacies, and then the residue to a legatee, the fund set apart, £2300, was in great part embezzled by the administrator, so that only £716 remained. It was held that ‘the pecuniary legatees must abate *pari passu* with the residuary legatee, each being entitled to the proportion they would have had if the whole amount had been forthcoming’ (*Baker v. Farmer*, 1st June 1867, L.R., 4 Eq. 382). Vice-Chancellor Malins thus expressed himself in regard to these facts—‘In this state of things a common calamity happens to them both by the dishonesty of the persons in whose charge the fund was. The result is, that instead of £2300 stock, there is only £716 now forthcoming. What does fairness and justice require under such circumstances? I consider that justice requires that, as they have a common interest in the fund, and as the calamity is common, so the loss should be common also; in other words, that they should bear the loss in proportion to their interest, because this priority of the legatees has no application here, there being no deficiency of assets to pay the legacy in full. I

must consider both of these parties as being in the possession of the legacy through the possession of the trustees, who await the period of distribution, namely, the life estate falling in, and upon that period of distribution arriving, if it had not been for the default of the trustee, the whole fund would have been forthcoming, and there would have been enough to pay all, and the residue would have gone to the residuary legatee.’

“The conclusion at which the Lord Ordinary has arrived is that it would not be consistent with equity to do otherwise than declare that the *jus relicta* shall be paid from the whole of the personal estate *en masse*, and that each legatee shall contribute in proportion to the amount of his or her legacy.”

Lees and Tait reclaimed, and argued—*Jus relicta* was the widow's right to claim against the free executry estate of her husband to the extent of a-half or a-third according as there were children of the marriage, and the claim was one of debt against the estate and not a right of division. It was so regarded in *M'Aulay v. Bell*, Dec. 12, 1712, M. 3848, and *Dunduff v. Craigie*, March 13, 1612, M. 3843; Erskine's doctrine as to its being a right of division had been criticised in *Fisher v. Dixon*, June 16, 1840, 2 D. 1121. The ordinary rule must apply here. The deficiency created by the widow's claims must be made up so far as the residue was concerned, first, out of the residue, then out of the general legacies, and lastly, if both were inadequate, out of the subjects of special bequests—*Inglis v. Inglis*, Jan. 18, 1869, 7 Macph. 437, *vide* opinion of Lord President. The decision in *Baker v. Farmer*, cited by the Lord Ordinary, had been reversed, May 8, 1868, L.R., 3 Ch. App. 537. The rationale of the other cases cited by him was that persons injured by the *jus relicta* were to be compensated.

The residuary legatees replied—This was an exceptional case, and the ordinary rule could not be applied, for two reasons. (1) It was quite clear that the truster had never contemplated the widow's repudiation of her conventional provisions. He could never have intended his widow entirely to carry off the residue of his estate. (2) The truster had practically made a tripartite division of his estate. The residuary clause was not a bequest of residue but a bequest of a specific and defined part of his estate not conveyed to others—*Attorney-General v. Johnstone*, July 5, 1769, Ambler's Rep. 579; *Baker v. Farmer*, *supra*; *Williams on Executors*, 1467.

At advising—

LORD JUSTICE-CLERK—The main question which was argued in this case is one upon which the Lord Ordinary has bestowed a great deal of learning and labour, and has treated with great ability; and to that question I intend substantially to confine the remarks which I have to make upon the case. It relates to the succession of a farmer of the name of Tait, who was tenant of certain farms, and died on the 9th December 1884. By his settlement he made a variety of provisions for his wife and for his two nephews Andrew Lees and George Tait, and he has left the residue of his property, after fulfilling these purposes, in certain proportions among several persons named. The widow, however, has repudiated

the settlement and betaken herself to her legal rights.

It is not necessary, in indicating the view which I am disposed to take on the question which the Lord Ordinary has treated, to go into any detail in regard to the provisions of the settlement or the state of the estate. The question resolves itself into one which may be very shortly enunciated, and it is simply this—whether when a testator deals in his settlement with the whole of his estate, including that part of the moveable property which would fall under the *jus relicta* of his widow should she claim it, and leaves, after certain bequests, the residue in certain proportions to others, the *jus relicta* when claimed falls to be paid equally from all the beneficiaries who are entitled to benefit under the instrument, or whether the residue must in the first place contribute the means of satisfying the claim of the widow? I think that shortly is the question which the Lord Ordinary has raised, and on which he has come to the result that all legacies, including the residue, must contribute equally, and that there is no reason why the residue alone should bear the burden in the first instance. This of course implies that the provisions contained in the other portions of the deed are to be diminished to the extent necessary to equalise the proportion to be deducted from these shares with the shares of the residuary legatees. On this question it appears to me that many of the authorities quoted by the Lord Ordinary have no material bearing. Whatever may be the nature of the *jus relicta*, whether a claim for division or a claim for debt, this at all events is certain, that the testator has no right and no power to test upon it. And that I imagine to be the true key of the whole position, and so far as the nature of the right is concerned I think the distribution must proceed as if the testator had dealt in his settlement with nothing but what he was entitled to test upon, and that he had not tested or endeavoured to test on that portion of the moveable succession which fell under the *jus relicta*. It is not an accurate, or at least a complete, analogy to liken this question to one where a forfeiture has been incurred under the terms of the settlement itself. It is quite true that the widow cannot claim benefit by the settlement, and at the same time claim the *jus relicta*, but the diminution thereby caused to the beneficiaries under the deed does not arise from any forfeiture created by the testator, but arises simply from the testator endeavouring to do that which the law will not permit, and to use his power of testing on a fund which was, in fact, beyond his power. If this position is sound, then the result of the withdrawal by the widow, from the funds left under the settlement, of that portion on which the testator could not test, simply leaves the settlement itself to be worked out according to its terms, and can, I imagine, impose on the beneficiaries no other proportional burden than they were bound previously to bear. It could not have been pretended, if that had been the position in which the case stood, that the residuary beneficiaries, the residuary legatees, had any higher or different right in competition with the special legatees than they would have had if the whole fund had been subject to the testator's power; and therefore I come to the conclusion that as the residue is only what remains over after the other burdens

on the succession are satisfied and provided for, so it must be now as it would have been if the testator had not dealt with the fund falling under the *jus relicta*. In this case, before the residue could be ascertained, the other legacies left in the will must be satisfied in the first instance out of the funds with which the testator was entitled to deal. The result will no doubt diminish the amount of the residue to a large extent, but I have been unable to see any ground upon which any other conclusion should be arrived at. The Lord Ordinary also deals with the question of equitable compensation—the principle, in other words, that those who suffer by the repudiation of the widow should be compensated out of such portion of the funds as she by her repudiation forfeits. None of the authorities referred to by the Lord Ordinary solve or even raise this question or support the view that the persons entitled to the residue are to be held to be placed on the same footing with special legatees. The judgment of Vice-Chancellor Malins in *Baker v. Farmer* was, I understand, reversed on appeal. There is no question as to the soundness of this principle, and the Lord Ordinary has come to certain results in regard to it. But if your Lordships agree with me in regard to the point of which I have spoken, it may be convenient that the case should go back to his Lordship, as some readjustment may be necessary.

LOLD CRAIGHILL.—I concur. The chief question for the decision of the Court arises in consequence of the repudiation by the widow of the truster of her testamentary provisions. There were left to her by her husband the liferent of the furniture and the house at Venchen, £200 for mournings and interim aliment, and lastly, the liferent of the residue of the trust-estate. In place of this she claims her *jus relicta*, which is half of the free estate. The effect of this claim upon the provisions granted to others is such as renders the fund at the disposal of the trustees insufficient for their payment. That the widow is entitled to her *jus relicta*, or in other words to a half of the free estate, is not disputed. The controversy arises amongst—first, Mr Lees and Mr Tait, as special legatees; second, Jane Tait and George Maillen, the former a legatee of £250, and the latter a legatee for £50; and thirdly, nephews and nieces of the truster, who are residuary legatees. The question in controversy is, as presented by the Lord Ordinary in his opinion, whether for payment of the amount that may be found due and payable to the widow, the general residue must first be exhausted, including the amount required for payment of the money legacies of £250 and £50? The Lord Ordinary has decided this question in the negative by finding that the payment of the *jus relicta* must be made up by the legatees to the amount of one-half of the legacies received by them, and that the burden of such payment is not to be laid on the residuary estate in the first place. This finding he admits is not in consistency with the general rule of law, which is, that deficiencies for the payment of prior claims are to be drawn—first, from residue; second, from general legacies; and third, from special legacies; but he thinks that the present is an exceptional case, because the widow's assertion of her right to *jus relicta* was not within the

trustee's anticipation, and also because the bequest to those called residuary legatees is not upon a proper interpretation a bequest of residue but a bequest of a defined portion of the estate. I am not able to adopt these views of the Lord Ordinary. My opinion is that the ordinary rule is as applicable to this case as it would be to a case in which the deficiency is created by the payment of ordinary debts. The rights of the widow and her possible repudiation of her conventional provisions were things presumably within the contemplation of the trustee, but whether they were or were not seems to be immaterial to the result. If this widow accepted of her testamentary provision his will would have effect. If she did not, but claimed her *jus relictae*, the operation of the will would be limited to the dead's part. All else would be unaffected. The legatees would receive their bequests according to their several rights. The special legatees would receive their special legacies if the subjects of the bequests were in existence and were free of the burden of contribution for the payment of the widow's claim. In like manner, the general legatees would receive their legacies if there was a fund out of which these could be paid, and last of all, the residuary legatees would receive what remained of the estate after prior rights had been satisfied. In other words, the deficiency created by the claim of the widow for *jus relictae* must be made up, so far as the residue is concerned, out of the residue; next, if the residue be insufficient, then out of the fund which otherwise would be available for the general legacies, and lastly, if both these are inadequate, then to the extent required out of the subjects of the special bequests. This is the ordinary rule of ranking, and I think must be followed on the present occasion. The Lord Ordinary has another reason for dealing with the present case as exceptional. He thinks that the residuary clause is in this case not a bequest of residue but a bequest of defined portions of the estate, inasmuch as it is a bequest simply of what is not conveyed to others. But it appears to me to be an erroneous interpretation. The clause seems to me to be an ordinary residuary clause. Money not in view of the trustee at the time when the settlement was made, and not required for other trust purposes, would fall into residue, and in like manner out of this residue must come moneys which are necessary to meet prior demands according to the settled rules of trust-administration. This finding of the Lord Ordinary must therefore, I think, be recalled, and another, by which the deficiency shall be provided for in the ordinary way out of, first, residue; secondly, general legacies; and lastly, special legacies, be substituted for it.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

The Court pronounced this interlocutor:—

“Find that the widow of the testator is entitled, in virtue of her *jus relictae*, to one-half of his moveable estate remaining after payment of his debts, and that the bequests made by him are prestatable and payable out of the other half so far as available, in the following order of preference, viz.:—Firstly, the special legacies; secondly, the general

legacies; and lastly, the residue: Recall the said interlocutor in so far as inconsistent with these findings, and *quoad ultra* adhere thereto.”

Counsel for Trustees (Real Raisers)—Comrie Thomson. Agents—Romanes & Simson, W.S.

Counsel for Mrs Tait—Darling. Agent—Thomas Dalgleish, S.S.C.

Counsel for Lees and Tait—Mackay—Goudy. Agents—Fraser, Stodart, & Ballingall, W.S.—W. & J. Burness, W.S.

Counsel for Residuary Legatees—Gillespie. Agents—Tawse & Bonar, W.S.—Mitchell & Baxter, W.S.

Thursday, July 8.

SECOND DIVISION.

CRAWFORD'S TRUSTEES v. CRAWFORD AND OTHERS.

Succession—Faculty and Powers—Apportionment by Father of Marriage-Contract Funds—Interest on Child's Share—Resulting Intestacy—Conditio si sine liberis decesserit.

By his antenuptial contract a husband bound himself to pay an annuity of £150 to his wife if she survived, and to pay to the children of the marriage, if more than one (which happened), £1500, he having power to apportion this sum among them, and failing apportionment the division to be equal, the period of payment being the first term after his death, or their majority or marriage, but declaring that their provisions should be subject to their mother's jointure if he should not leave sufficient fortune to answer both. In respect of their provisions the legal rights of widow and children were excluded. By a trust-disposition and settlement he subsequently directed that his whole free estate should after payment of debts be held for his widow in life, and on her death should be divided into seven shares, of which three of the five children of the marriage should have one each, and the other two children two each, declaring that the trustees might alter this apportionment if they chose, and that none of the shares should vest till they became payable. The estate he left was just sufficient to pay the marriage contract annuity of £150 to the widow, and there was no division till her death. She was predeceased by four of the five children, of whom two left issue. The estate being thus free for division by her death, held (a) with regard to the £1500 provided to the children by the contract (1) that the settlement was not intended to operate and did not operate an apportionment thereof, because it declared that the shares given by it should not vest till they became payable on the widow's death, while the right to the funds provided by the contract was an interest vested in the children, and payable at his own death, and because the apportionment under the settlement was made subject to the discretion of the trustees; (2) that the shares in