

provide in the case of a statute labour road a clear passable road of not less than 20 feet in width. I see no ground for doubting the soundness of that decision, although it may be that road trustees have in many cases not strictly conformed to their statutory duty. But it is one thing to say that they may be liable as for negligence where an accident arises through their failure to provide a road of the statutory width, it is a totally different thing, and does not by any means follow, that they cannot recover for damage caused to a road of less than the statutory width by reason of extraordinary traffic. The statute does not impose any obligation upon them to have the road metalled so as to carry heavy traction engines for any patricular width. If it had I could have seen some plausibility in the argument maintained. As matters stand I am prepared to hold—agreeing on this point with the Sheriff—that it is irrelevant for the defenders to plead that the road was not the statutory width. It is admitted that logically the argument would be precisely the same although the road was 19½ feet at only a single point throughout its course and for the rest complied with the statutory conditions. The argument for the defenders seems to have been drawn from the domain of the law of contracts and to have no application to a case such as the present. I am content however, as the facts are in dispute, that this point, and the others to which Lord Dundas has more fully referred, should meantime be included in the inquiry and should not be made the subject of formal decision.

LORD DUNDAS intimated that the LORD JUSTICE-CLERK, who was absent at the advising, concurred in the opinion of the Court.

LORD GUTHRIE, who was present at the advising, delivered no opinion, not having heard the case.

The Court dismissed the appeal and affirmed the interlocutors appealed against.

Counsel for the Pursuers and Respondents—Horne, K.C.—Lippe. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for the Defender and Appellant Macmillan, K.C.—J. G. Jameson. Agents—Carmichael & Miller, W.S.

Tuesday, March 18.

FIRST DIVISION.

JACKS' TRUSTEES AND OTHERS v. JACKS AND OTHERS.

Succession—Election—Forfeiture—Equitable Compensation.

Question whether a widow who had elected to claim her legal rights and had surrendered testamentary provisions expressly declared to be in full

thereof, has forfeited these provisions absolutely, or only in so far as necessary to make equitable compensation to the beneficiaries under the will.

Macfarlane's Trustees v. Oliver, July 20, 1882, 9 R. 1138, 19 S.L.R. 850, and *Gray's Trustees v. Gray*, 1907 S.C. 54, 44 S.L.R. 39, commented on.

Succession—Will—Election—Appropriate and Reprobate.

A testator directed his trustees to pay to his wife the income of the residue of his estate, and on her death to pay various legacies, the provisions in favour of his wife being expressly stated to be in full of her legal claims. Power was, however, conferred upon her to surrender her liferent over all or any of the legacies so as to admit of these being paid at once. The widow elected to take her legal rights.

Held that she could not thereafter exercise the power of consenting to anticipation of payment.

Succession—Legacy—Vesting—Surrender of Liferent—Acceleration—Date of Payment.

A testator directed his trustees to pay to his wife the free annual income of the residue of his estate, and on her death to pay various legacies, some of which were absolute and not subject to any contingency, and others coupled with a clause of survivorship and conditional institution of issue. He further directed that the surplus residue should be at the absolute disposal of his trustees, to apply it as they might think fit in augmenting any of the legacies or helping kindred institutions to those favoured in the will. Power was conferred on the wife to surrender her liferent over all or any of the legacies so as to admit of immediate payment. The widow elected to take her legal rights, and thereafter executed a deed of ratification by which she irrevocably surrendered her liferent, and also consented, so far as she competently could, to the exercise of the power of anticipation.

Held that, as the non-contingent legatees had a vested and indefeasible interest in their legacies, they were entitled—if and when the trustees had funds in their hands sufficient to pay all the legacies vested and contingent—to immediate payment; but (*diss.* Lord Johnston) that, in the case of the contingent legacies, vesting, and therefore payment, was postponed till the widow's death, her repudiation of the liferent not having the effect of accelerating the period of vesting.

Succession—Legacy—Condition—Date of Payment.

A testator directed his trustees to pay to his wife the free annual income of the residue of his estate, and on her death to pay amongst others the following legacy—to the University of Glasgow to endow a chair, a legacy of £20,000, “declaring that should either

I or my wife endow any chair in the Glasgow or other university before the death of the survivor then this bequest shall fall." Power was conferred on the wife to surrender her life interest over all or any of the legacies so as to admit of immediate payment. The widow having elected to take her legal rights executed a deed of ratification by which she irrevocably surrendered the life interest, consented as far as she could to the legacies being immediately paid, and expressly bound herself not to endow any chair in Glasgow or any other university.

Held that the trustees were not entitled to make payment of the legacy prior to the date of the widow's death.

On 31st January 1913 Mrs M. F. Stiven or Jacks, The Gart, Callander, widow of William Jacks, LL.D., merchant, Glasgow, and others, Mr Jacks' testamentary trustees, *first parties*; Mrs Jacks, as an individual, *second party*; Mrs E. Jones or Jacks, widow of Thomas Jacks, the testator's brother, and others, conditional legatees, *third parties*; Glasgow University Court, *fourth parties*; William Wight, Clovenfords, Galashiels, a nephew of the testator, and others, non-contingent legatees, *fifth parties*; and Richard Jacks junior, Farnham, Surrey, and others, the issue of the conditional legatees above referred to, *sixth parties*; brought a Special Case for the determination of certain questions which had arisen in consequence of the second party's election to claim her legal rights.

By his trust-disposition and settlement the testator, who died on 9th August 1907 survived by his wife and without issue, assigned and disposed his whole estate to his trustees for, *inter alia*, the following purposes—"In the sixth place, for payment to my wife of the free annual interest or income of the residue of my estate, payable said income half-yearly, or in the option of my trustees as received, but with power nevertheless to her to consent to payment of all or one or more of the legacies hereinafter bequeathed, or part of all or one or more of them, so as to admit of payment thereof during her life, and subject to or free of duty, and In the last place, For payment of the several following bequests upon the death of my said wife, or should she surrender her life interest over any part thereof to admit of payment, then for payment of such part upon such surrender, viz.—(First) to Elizabeth Jones or Jacks, widow of my brother Thomas Jacks, if she has not married again, a legacy of £750; (Second) to the children of my brother the late Richard Jacks the following legacies, viz.—to his son Richard Jacks, £500; . . . (Third) to the children of my sister Isabella the following legacies, viz.—Richard Jacks Thomson, £3500; . . . (Fourth) to William Wight, son of my sister Jane, a legacy of £500: Declaring that in the event of any of my said nephews and nieces, children of my brother Richard and sister Isabella, dying before the date of vesting leaving issue

then surviving, such issue shall be entitled to the legacy which their parent would have taken on survivorship; (Fifth) to my niece Thomasina Jacks Armstrong or Wilson, wife of the said Henry Arnold Wilson, whom failing her issue, a legacy of £18,500; (Sixth) to the said Henry Arnold Wilson a legacy of £1000; (Seventh) to my sister-in-law Mrs Emily Stiven or Barrie, wife of the said Andrew David Barrie (*first*) a legacy of £1000, and (*second*) an amount equivalent to any estate heritable or moveable which may be bequeathed to me by my said wife should she predecease me; (*Eighth*) to the children of the said Emily Stiven or Barrie the following legacies, viz.—Andrew Barrie, £250; . . . (*Tenth*) to Mrs Margaret Anderson or Lee, residing in Edinburgh, in life interest till her son William Jacks Lee attains the age of 21 years' (which has happened), 'and then to him absolutely, a legacy of £300, which legacy shall be held by my trustees for said purpose, but providing that if the said William Jacks Lee should die before attaining said age survived by his mother she shall at his death become absolutely entitled to said legacy, but should he be the survivor and not reach said age, the capital at his death shall revert into residue, the income being in the interim applied for his benefit; (*Eleventh*) to Cecilia Jameson, my wife's maid, a legacy of £1500; . . . (*Thirteenth*) to Mrs Annie Bell or Murray, No. 25 Archibald Place, Edinburgh, if still a widow at my death, a legacy of £250; . . . (*Fifteenth*) to each of my domestic servants at the date of my death (except the said Cecilia Jameson), including outdoor servants, and to each of the clerks of my firm at the date of my death, for every complete year they have been employed by me or my firm—£20, but not more than £250, to anyone; . . . (*Sixteenth*) to the University Court of the University of Glasgow to endow a Chair of Modern Languages, to be called the "Chair of William Jacks," principally for commercial education as distinguished from classic, a legacy of £20,000, as also such portions of my library (foreign and other books) as my trustees may consider appropriate and likely to prove useful in connection with that endowment: Declaring that should either I or my wife endow any chair in the Glasgow or other university before the death of the survivor then this bequest shall fall; (*Seventeenth*) to the following institutions, viz.—the Royal Hospital for Sick Children, Glasgow, a legacy of £1500; . . . (*Twenty-first*) to the minister of the Established Church of Scotland, Callander, if I am a member of his church at the date of my death, or to the minister of such other church as I am a member of at the time of my death, a legacy of £250, and to J. Wilson Crawford, pastor of the Congregational Church, Dumbarton, a legacy of £250: . . . Declaring further that should the residue be insufficient to pay in full the legacies unpaid at the death of my wife, all such legacies shall be rateably reduced; as also that should there be a surplus of residue, such surplus

shall be at the absolute disposal of my trustees, original and assumed, who may apply it as they think fit in augmenting all or any of the bequests herein to persons, institutions, or associations, or in helping kindred institutions or associations in Glasgow or elsewhere just as I myself might have done if in life; which provisions in favour of my said wife shall be in full to her of all claims of *terce*, *jus relictae*, and others legally competent to her against my estate upon my decease."

The Case stated—“(3) The before-named Mrs Elizabeth Jones or Jacks, widow of the testator's brother Thomas Jacks, has not married again, and the said Mrs Annie Bell or Murray was a widow at the date of the testator's death, and still is. The testator . . . was at that date a member of the Church of Scotland, Callander, of which the before-named Rev. Thomas Marjoribank was then the minister. . . (5) By letter dated 16th December 1907, addressed to the first parties, the second party claimed her legal rights other than *terce*, and large payments have been made by them to her to account of these claims. (6) By deed of ratification, surrender, and consent, dated the 27th day of January 1913, the second party has ratified her election of her legal rights and irrevocably surrendered the whole *lif'erent* and other provisions conferred upon her by the said trust-disposition and settlement. Said deed further provides 'and I consent (so far as I competently can) in exercise of the power of anticipation conferred on me in the sixth place in said trust-disposition and settlement, and every other power enabling me, to payment being forthwith made (free of or subject to duty as the trust funds permit) by said trustees of the whole legacies bequeathed in the last place under the purposes of said trust-disposition and settlement as amended by said codicils: Further, and as regards said legacy to the University Court of the University of Glasgow, I hereby undertake, irrevocably and absolutely, not to endow any Chair in the Glasgow or other university now or at any time hereafter.' (7) The first parties have paid the trustor's debts and paid or distributed the legacies bequeathed under the fourth and fifth purposes of the trust-disposition and settlement, and are now in a position to pay the balance of the second party's claims. They have moreover sufficient trust funds now available to pay, with or without duty, the legacies bequeathed in the last place, which amount in all to the sum of £76,250, but questions have arisen as to whether they can competently pay all or any of said legacies now or during the lifetime of the second party, and, if so, what interest, if any, falls to be paid thereon. The third, fourth, and fifth parties are the various legatees named in the last purpose of the trust-disposition and settlement or their assignees. There is living issue of the marriage of certain of the third parties, and those issue are the sixth parties hereto."

The first parties *maintained* that by electing to take her legal rights the

second party was not in a position to exercise the power conferred on her by the sixth purpose of the trust-disposition and settlement to consent to payment during her lifetime of any of the legacies thereafter bequeathed, that in the absence of such power all said legacies were payable rateably and contemporaneously, and the second party's election to take her legal rights could not accelerate the date of payment of any of said legacies, in particular, as regards the legacies bequeathed in the 1st, 2nd, 3rd, 5th, and 16th places of the last purpose, these legacies, being subject to conditions which fell to be determined at the date of the second party's death, the deed of ratification, surrender, and consent by the second party being invalid and ineffective in so far as the second party purported to debar herself from endowing a university chair.

The second and third parties *maintained* that, the second party having surrendered her right to any part of the *lif'erent* of the estate, the legacies bequeathed to the third parties by the last purpose of the trust-disposition and settlement fell to be paid now, with interest from the date of the deed of ratification, surrender, and consent. Alternatively, the second and third parties *maintained* that by electing to take her *jus relictae* the second party had not forfeited her right to exercise the power conferred on her by the sixth purpose of the trust-disposition and settlement to consent to payment during her life of any of the legacies thereafter bequeathed, and, the second party having exercised her said right, the legacies bequeathed to the third parties by the last purpose of the trust-disposition and settlement fell to be paid immediately, with interest as aforesaid. They further *maintained* that, apart from the exercise of said power, the legacies to the third parties were in the circumstances payable now, with interest as aforesaid.

The fourth parties, in addition to the contentions of the second and third parties, further *maintained* that the second party had by the deed of ratification, surrender, and consent, validly and irrevocably debarred herself from endowing now or at any time hereafter any chair in the Glasgow or other university.

The fifth parties *maintained*, on similar grounds to those set forth by the second and third parties, that they were entitled to immediate payment of their legacies, with interest thereon from the date of the deed of ratification, surrender, and consent.

The sixth parties *maintained* that the legacies bequeathed by the last purpose of the said trust-disposition and settlement did not vest in the respective legatees until the death of the second party, and that the second party's election to take her legal rights under the settlement did not entitle her to execute the power conferred upon her under the sixth purpose of the trust. In any event, the second party's election did not accelerate the date of payment of said legacies, which was the date of her death. They further *maintained* that the deed of ratification, surrender, and consent,

whereby these second party purported to debar herself from endowing a university chair, was invalid and ineffectual, and was not irrevocable.

The questions of law were—"1. Do all or any of the legacies bequeathed in the last purpose of the trust-disposition and settlement as amended by said codicils fall to be paid now by the first parties, and, if so, which of them?—or 2. Is payment of all or any of said legacies postponed until the death of the second party, and, if so, which of them? 3. In the event of the first question being answered in the affirmative—(a) does interest on said legacies fall to be paid out of the estate from the date of the deed of ratification, surrender, and consent, and, if so, (b) at what rate?"

Argued for the second and third parties—The testator's object in postponing payment was the protection of the widow's life-tenant, and as that had now been surrendered payment of the legacies was accelerated and could be made at once—*Alexander's Trustees*, January 15, 1870, 8 Macph. 414, 7 S.L.R. 240; *Lucas' Trustees v. The Trustees and Patrons of "The Lucas Trust,"* February 18, 1881, 8 R. 502, 18 S.L.R. 363. The case of *Elder's Trustees v. Treasurer of the Free Church of Scotland*, March 10, 1881, 8 R. 593, 18 S.L.R. 392, was distinguishable, for in that case there was an express direction to hold the trust estate until the widow's death. The case of *Hughes v. Edwardes*, July 25, 1892, 19 R. (H.L.) 33, 29 S.L.R. 911, was also different, for there the existence of an alimentary life-tenant prevented immediate division. Where, as here, the testator clearly intended payment to be made in the event of the widow's surrender of her life-tenant, that intention would receive effect—*Muirhead v. Muirhead*, May 12, 1890, 17 R. (H.L.) 45, per Lord Watson at p. 50, 27 S.L.R. 917. The effect of the widow's election to claim her legal rights was not to forfeit her testamentary provisions finally but merely to give rise to a claim of equitable compensation to the estate—*Macfarlane's Trustees v. Oliver*, July 20, 1882, 9 R. 1138, 19 S.L.R. 850; *Gray's Trustees v. Gray*, 1907 S.C. 54, 44 S.L.R. 39—and where that was so there was nothing to prevent her exercising the power conferred upon her by the settlement of consenting to immediate payment. As to the rate of interest payable on the legacies, *Inglis' Trustees v. Breen*, February 6, 1891, 18 R. 487, was referred to.

Argued for the fourth parties—Where, as here, the widow had surrendered her life-tenant the declaration with regard to the endowment of any chair was no longer applicable for it only subsisted till payment—once payment had been made it became ineffective. Besides, the widow had expressly undertaken in the deed of ratification not to endow any chair. [On the competency of immediate payment counsel adopted the argument of the second and third parties.]

Argued for the fifth parties—The non-contingent legatees were clearly entitled

to immediate payment, for where, as here, the postponement of the period of distribution was to protect a life-tenant which had been surrendered there was nothing to prevent acceleration taking place—*Muirhead (cit.)*, per Lord Watson at p. 48.

Argued for the sixth parties—*Esto* that in the case of the non-contingent legatees payment might be made now, it was postponed in the case of the contingent legatees till the widow's death, for her surrender of the life-tenant could not by itself accelerate vesting. *Esto* that the question was one of intention, it was clear that the date of vesting was that of the widow's death. That was the period to which the conditional institution of the contingent legatees was referable, and the widow had no power at her own hand to virtually reform the settlement. To permit of immediate payment the beneficiaries must have a vested and indefeasible interest in their provisions—*Muirhead (cit.)*, per Lord Watson at p. 48. That was not so here, and payment therefore could not be made. The principle of equitable compensation was inapplicable where, as here, the trust could not, looking to the widow's age, be kept up long enough to fully compensate the estate.

[Counsel for the first parties cited *Haldane's Trustees v. Haldane*, December 12, 1895, 23 R. 276, 33 S.L.R. 206, as to whether the trustees were bound to pay any of the legacies before they had funds sufficient to pay all the legacies in full.]

At advising—

LORD KINNEAR—The question in this case arises from the action of the widow, who has declined to accept certain testamentary provisions made for her by her husband in full of all her claims for terce, *jus relictæ*, and others legally competent to her against his estate, and it regards the legal consequence of her rejection of the conditions of the will, and of her successful claim to have her legal rights.

The terms of the settlement are, so far as regards this question, to be found in the sixth purpose of the trust deed, by which the trustees are directed to hold in trust "for payment to my wife of the free annual interest or income of the residue of my estate, payable said income half-yearly or in the option of my trustees as received, but with powers nevertheless to her to consent to payment of all or one or more of the legacies hereinafter bequeathed or part of all or one or more of them so as to admit of payment thereof during her life and subject to or free of duty, and, in the last place, for payment of the several following bequests upon the death of my said wife, or should she surrender her life-tenant over any part thereof to admit of payment, then for payment of such part upon such surrender." And then there follow a number of special legacies in favour of different persons of which, without examining them in detail in the meantime, I shall only say that some of them are plainly absolute legacies to the legatees named without any substitution or destination over of any kind,

and others are legacies to a certain class of persons subject to a clause of survivorship and to conditions in favour of the issue of such persons.

Upon the widow Mrs Jacks claiming her *jus relictae* she executed a certain deed of ratification, surrender, and consent, by which she ratified her election of her legal rights and irrevocably surrendered the whole liferent and other provisions conferred upon her by the trust disposition and settlement, and further purported to consent, so far as she competently could, "in the exercise of the power of anticipation conferred on me in the sixth place in said trust disposition and settlement and every other power enabling me, to payment being made forthwith (free of or subject to duty as the trust funds permit) by said trustees of the whole legacies bequeathed in the last place under the purposes of said trust disposition and settlement."

The question is whether by reason of the lady's surrender of her liferent, with or without the special consent which she has given in making that surrender to the anticipation of payment, the legatees are entitled to immediate payment during her life notwithstanding that in terms of the will the legacies are to be paid only on her death.

It appears to me that that depends entirely upon the legal effect of the lady's claim to take her legal rights and reject the settlement. The bequests in her favour are given under the express condition that they are to be taken in full of her *jus relictae* and all other legal rights. She has rejected the condition and therefore she has rejected the bequest. She cannot claim under the deed to take a benefit given to her under an express condition so long as she refuses to comply with the condition upon which it was given. It would follow, that we are to consider the question of payment solely with reference to the other conditions of the will which regulate vesting and the period of payment on the footing that the liferent provided for this lady was as completely and absolutely out of the way as if she had died.

But then it is said that that is not exactly the position, because she has not only surrendered her liferent in the meantime but she has exercised a power given to her by the will to consent, if she should think fit, to the anticipation of payment of all or any of the legacies. I am of opinion—and I must say without doubt—that the exercise or the existence of that power makes no difference whatever to the question. She is still in the position of having rejected the condition upon which she took benefit under the will. She cannot approve and reprobate the will, and she cannot say "I will not take my liferent myself but I will authorise you to pay the accruing income which would have gone to me for the benefit of any particular persons or to make over to them the capital upon which such income would have accrued for my benefit if I had chosen to

take it." I think she is completely outside the will, and can no more exercise this power than claim payment of the liferent.

It is said that she is not finally excluded from the benefits of the will because the only effect of her rejection of the conditions is that the liferent given to her must go to compensate for the amount of money which she has taken away in name of her *jus relictae*, and that as soon as that compensation has been completely effected she may come back again and claim under the will. I do not think it necessary for the purposes of this case to express any definite opinion as to whether she could in any circumstances come back and claim benefit under the will upon that ground, and if it is not necessary I do not think it is desirable to do so, because the question has not yet arisen, and it will be time enough to decide it when it does arise. But since it has been raised, I venture to express my opinion that whatever the ultimate decision of it may be the claim put forward for the widow can find no support whatever in the case which was cited to support it, namely, *Macfarlane's Trustees v. Oliver* (9 R. 1138) because the vital point in *Macfarlane's Trustees v. Oliver*, which was held by the majority of the Court to distinguish the case from that of a forfeiture of a legacy in favour of persons like a wife or children who took their legal rights in place of the legacy was this, that there was no express condition in the will that the provision given to a child should be taken in full of legitim or under a condition of any declaration of forfeiture. It was on that, and as I think on that ground alone, that the majority of the Court held that in that particular case a child who had claimed legitim might nevertheless come back and take benefit from the bequests in his favour as soon as the whole legitim which he had taken away had been recouped in the course of the administration of the trust.

That is stated with the greatest clearness by Lord President Inglis in his opinion, where he says this—"If a provision is given by will in lieu of legitim or on condition of the legatee renouncing his claim of legitim, of course the condition must receive effect and the provision cannot be claimed either in whole or in part without a complete surrender of the legitim. But the provision is not affected in the present case by any express condition or any declaration of forfeiture. There is an implied condition arising from the legitim fund being embraced in the settlement and disposed of to the effect that no one can claim both the provision and the legitim, because that would be to take double payment at the expense of the other legatees." Then his Lordship goes on to say—"The important question is, What is the nature and extent of this implied condition? When a condition is implied in a will, though not expressed, it must be because without such implication the will cannot be carried into practical effect according to the mind of the testator.

This is the reason why the law implies the condition. But the implication must not be extended beyond the reason for it. The two must be commensurate." And then he goes on to say that that is the foundation of the doctrine of equitable compensation (a doctrine now established in the law of Scotland), which is not merely something short of forfeiture but something entirely different in principle.

That was the ground of judgment in *Macfarlane's Trustees v. Oliver*, and I think it is the ground plainly implied in the opinions of the majority of the consulted judges and expressed in Lord M'Laren's opinion, although it is nowhere expressed so explicitly and so clearly as by the Lord President. I have no doubt that the majority of the judges consulted proceeded upon that ground, that they were not dealing with any expressed condition that a legatee should not take legitim, but only with the implied condition which arose from the mere fact of the testator having included his whole estate in his will.

Now if that were conclusive I should not see so much difficulty in disposing of the question which I have said has been raised. But then a difference of opinion has certainly been expressed and made the ground of judgment in the case of *Gray v. Gray* (1907 S.C. 54). I do not think the present Court is in a position to overrule or reconsider the unanimous judgment of the Second Division; and therefore I should have thought, if it was necessary to decide the question now, it should be decided by a larger Court. But in the meantime I do not think it is necessary, because, assuming contrary to my own opinion that this lady has the right to come back although she has already announced that she has completely surrendered the whole benefits under the will, she has not come back yet; and until the condition upon which it is said she may claim some benefit under the will is purified she is plainly not in a position to exercise any right or any power given by the will. If at this moment she were professing to exercise the power of anticipation given to her, she would, in my opinion, be plainly approbating and reprobating the deed, which I think she cannot do. And I think it is perfectly obvious that she could not claim a right to regulate in any way the disposal of the income which she has refused to accept without contradicting her explicit rejection of the will.

It is admitted for her that she cannot have the income now accrued upon the funds in the hands of the trustees because she refuses to take her liferent, preferring to take her legal rights. Well, then, if she cannot take it herself, how is it to be said that she can dispose of it in favour of somebody else? The whole force and effect of this peculiar power given to her by the testator to authorise anticipation arises from the fact that the prejudice which will be caused by anticipation of any payment is a prejudice to the liferenter. It is because it is her money that is in ques-

tion that she is allowed to consent to payment which releases the whole or part of the capital to other people. If she is entitled, as the argument supposes, to stand by in the meantime until the income of the estate which would have gone to her if she had taken the liferent is accumulated so as to make up for the money she has taken away, she cannot at the same time say "But while that money is being accumulated so as to enable me to plead equitable compensation you are to hand over the capital so as to prevent any income accruing at all." She cannot reject the liferent and exercise a power over it which, in effect, is a power to dispose of it for the benefit of other people. Therefore it appears to me to be quite clear that, the liferent being out of the way, the only question is What is the effect of the testator's other directions as to payment of legacies?

Now I think that the general principles upon which that question has to be decided are very clearly settled. What remains of the deed when the liferent is taken out of the way is a direction to pay upon the death of the liferentrix, and it is quite clearly settled in law that, if there be nothing to postpone the direct and absolute payment of a legacy except a necessity for meeting a liferent or an annuity there is nothing in that necessity to prevent immediate vesting in the legatee.

The effect, therefore, of the bequests subject to this liferent in favour of individuals, without any additional institution or destination over, is to give an absolute right to these individual legatees. But then, on the other hand, it is settled equally clearly that, where the vesting of a legacy is dependent on the death of a liferenter, the mere surrender of a liferent so as to withdraw the liferenter's claim will not accelerate vesting and therefore cannot accelerate payment. The law is very clearly expressed by Lord President Inglis in the case of *Bryson's Trustees v. Clark* (1880, 8 R. 142, 18 S.L.R. 103), where he says at p. 145—"When nothing is expressed in favour of a beneficiary except a direction to trustees to pay to him on the occurrence of a certain event, and not sooner, and failing him to certain other persons as substitutes or conditional institutes to him, then, if he does not survive the period he takes no right under the settlement." I have substituted the word "pay" for "convey" in making that citation, because the particular case was concerned with heritable estate and not money; but that makes no difference in the expression of the principle so far as regards vesting.

Now the result, to my mind, is that where there is an absolute and indefeasible right vested in a legatee the disappearance of the liferenter will entitle him to claim payment even although payment is in words directed to be made at the liferenter's death, because there is no testamentary interest to interfere with his immediate payment; but, on the other hand, where vesting and not mere payment is dependent upon the death of the life-

renter nothing that the liferenter does in the way of abandoning his or her right can accelerate the period of vesting, because the testator has fixed it finally, and it is not for anybody else to make a new will for him.

I have referred to the case of *Bryson*, but then I think the law is just as clearly laid down in the House of Lords by Lord Watson, for he says in *Muirhead v. Muirhead* (1890, 17 R. (H.L.) 45, at p. 48)—“I see no reason to doubt that, in cases where the final distribution of a trust estate is directed to be made on the death of an annuitant, and it clearly appears that in postponing the time of the division the testator had no other object in view than to secure payment of the annuity, it may be within the power of the Court, on the discharge or renunciation of the annuitant's right, to ordain an immediate division. But in order to the due exercise of that power it is in my opinion essential that the beneficiaries to whom the trustees are directed to pay or convey shall have a vested and indefeasible interest in the provisions.”

So far, therefore, he described the one case which, I think, arises here—the claims of legatees who have an indefeasible vested interest. But then he goes on to say that in the particular case, if the testator's widow had not repudiated the provisions made for her in his settlement he thought it not doubtful that the vesting of the fee would have been suspended until her decease. And then he says—“There are three considerations, the concurrence of which, in my opinion, necessarily leads to that conclusion—(1) the bequests to children and their issue are not conceived in the form of a separate gift with a subsequent direction as to the time of payment, but are for the first time implied in the direction to pay on their mother's death.” I do not think that that of itself would be conclusive. It is one of the circumstances that has to be taken into account, and the other two are what are more important to consider—“(2) there is a gift over to their respective issue in the event of any of the testator's children predeceasing that date; and (3) there is a clause of survivorship, which in the event of any child and his or her issue failing before the widow's death gives their provisions to the surviving children. . . .” The conditional gift to issue in the event of children dying before payment, and a conditional institution of survivors in the event of some members of a favoured class failing before payment, are, according to this opinion of Lord Watson's, conclusive against the notion of immediate vesting during the lifetime of a liferenter or annuitant.

Now I think that in this will we find both classes of legacy as I have already said. I think it is plain enough that those legatees who have an absolute right given to them without a condition in favour of anybody else have in terms of law an indefeasible interest in their legacies; but then, on the other hand, that a gift in such terms as, for example, the gift to his

nephews and nieces under this declaration—“That in the event of any of my said nephews and nieces dying before the date of vesting leaving issue then surviving such issue shall be entitled to the legacy which their parent would have taken upon survivance”—appears to me to satisfy exactly the condition laid down by Lord Watson for a suspension of vesting notwithstanding the abandonment or surrender of the liferenter's claim.

It is said that you cannot impute to the testator the intention of making two different periods of vesting, but that he must be supposed to have conceived one uniform scheme of vesting according to which all legacies would vest at the same time and under the same condition. I cannot say that I see any reason in law or in ordinary notions of the purpose and effect of a testament to support that argument. There is no reason why a testator should wish all his legacies to vest at the same time; and accordingly it is perfectly familiar in many many cases that testators give legacies which are to be paid immediately notwithstanding the subsistence of liferents, and others which are not to be paid and not to vest until the liferents expire, and that for perfectly clear and natural reasons. A testator may give legacies to a class of persons, and that will naturally suggest questions of predecease and survivorship. He may give legacies to his own near relations and his interest in them will extend to their children, and therefore he may think it reasonable and natural to make provisions for the issue of his legatees as well as for the legatees themselves. But there are other cases in which his interest is confined to the particular legatee whom he desires to benefit. In this case, besides bequests to relations, there are bequests to the testator's servants. Well, he wishes to regulate the interests of his near relations; but he takes no concern in the person who may take an interest through the legacy to his servant—his only concern is in the servant himself. I can see no reason why the Court should interpose an artificial period of vesting if we find a clear direction in the will which implies the vesting of one legacy at the death of the testator himself and another at the death of an annuitant or liferenter who should survive.

I think that that disposes of the question of immediate payment; but in the answers which we give to the present case it will be necessary to define more particularly than I have done the particular legacies which fall within the one class and those which fall within the other.

But then there is another question, suggested by the third question which is put to us, arising out of a claim for interest from the date of the liferenter's deed of surrender and consent. I do not think it is seriously disputed—I rather understood it was not disputed at all—that if there were money enough and if there were legacies payable now—that is, vesting *a morte testatoris*, and payable as soon as it appeared that the liferent was not to

be maintained as the obstacle to immediate payment—then such legacies would be payable with interest from the date specified. But then that raises a question whether such payment can be made without prejudice to other interests, and the trustees have put in a minute which shows that there may be some risk of prejudice to the legatees whose legacies are not to be paid immediately if those who are entitled to immediate payment get both capital and interest now. But there is a different question which suggests itself, upon the consideration that no payment can be made before the date of payment specified in the will that will prejudice any interest for which the testator intended to provide, because such payment is not in direct obedience to the testator's directions. An obstacle to payment has been removed, but it still remains to see that his will is carried out as the funds will enable the trustees to carry it out in the interest of all the legatees.

Now if the liferent which the widow has rejected were to be accumulated from this moment of course it would go to any other legatees whose legacies would be held to cover it; it would go to payment of the special legacies, and in so far as there was anything beyond what was necessary for them it would go to residuary legatees. And if there were here a bequest of residue to definite persons who had an interest in the whole estate which was not expressly bequeathed by special legacies we should have to consider whether they were or were not entitled to object to immediate payment to the effect of preventing an accumulation which might ultimately have been for their benefit. But then there are no such legatees in this case. There is a gift of residue to the trustees by which the testator says that the surplus residue shall be at their absolute disposal, and "that they may apply it as they think fit in augmenting all or any of the bequests herein to persons, institutions, or associations, or in helping kindred institutions or associations in Glasgow," as he might himself have done if in life. There is no definite person who can claim under that, unless and until the trustees have given him or her an interest to make the claim. In the meantime, therefore, the residuary legatees are the trustees; and it is for them to consider whether there is anything in the claim of the legatees, who I think should be held entitled to immediate payment, that will prejudice that or any other interest which they are bound to protect.

I am therefore of opinion that any answer which we may give which will sustain a right to immediate payment must be made subject to the right or duty of the trustees to retain such funds as may be necessary to carry out the whole of the other provisions of the will.

There is another question, of a different kind, which is not put specifically but is covered by the second part of the general question, "whether payment of all legacies is postponed until the death of the second party, and, if so, which of them," and that

is the question as to a bequest in favour of the University Court of the University of Glasgow "to endow a chair of Modern Languages to be called the 'Chair of William Jacks,' but under this declaration, that should either I or my wife endow any chair in the Glasgow or other university before the death of the survivor then this bequest shall fall." Now the question is whether it is possible to get rid of the plain words of that bequest. The bequest is given conditionally upon no other chair being endowed during the lifetime of the survivor of the spouses. It is quite true that this lady has said, and it was right and proper for her to say it in the position in which she is, that she did not mean to endow any other chair. But that cannot be taken as a complete satisfaction of the testator's condition that this bequest is to fall in an event which may or may not happen during the liferent of his widow.

LORD JOHNSTON—The testator Mr Jacks by his settlement declared the sixth purpose of the trust thereby created to be "for payment to my said wife of the free annual interest or income of the residue of my estate, payable said income half-yearly or in the option of my trustees as received," and the last purpose to be "for payment of the several following bequests upon the death of my said wife, or should she surrender her liferent over any part thereof to admit of payment then for payment of such part upon such surrender."

This alternative date of payment depends upon a clause which was added to the gift of the residuary income immediately after the words which I have quoted, viz. "but with power nevertheless to her (his said wife) to consent to payment of all or one or more of the legacies hereinafter bequeathed or part of all or one or more of them so as to admit of payment thereof during her life and subject to or free of duty."

The legacies under the last purpose of the settlement, which were as many as twenty-one in number, for Mr Jacks left a large estate and no issue, were not by any means uniform in their conception.

They fall into classes of which the following are samples:

(1) "To Elizabeth Jones or Jacks, widow of my brother Thomas Jacks, if she has not married again, a legacy of £750."

(2) "To the children of my brother the late Richard Jacks the following legacies, viz. to his son Richard Jacks £500 . . . declaring that in the event of any of my said nephews and nieces, children of my brother Richard . . . dying before the date of vesting leaving issue then surviving such issue shall be entitled to the legacy which their parent would have taken on survivance."

(3) "To my niece Thomassina Jacks Armstrong or Wilson, wife of the said Henry Arnold Wilson (one of the trustees) whom failing her issue, a legacy of £18,500."

(4) "To the said Henry Arnold Wilson a legacy of £1000."

(5) "To Cecilia Jameson my wife's maid a legacy of £1500."

(6) "To each of my domestic servants at the date of my death (except the said Cecilia Jameson), including outdoor servants, and to each of the clerks of my firm at the date of my death for every complete year they have been employed by me or my firm, £20."

(7) "To the following institutions, viz.—The Royal Hospital for Sick Children, Glasgow, a legacy of £1500. . . ."

(8) "To the minister of the Established Church of Scotland, Callander, if I am a member of his church at the date of my death, . . . a legacy of £250, and to J. Wilson Crawford, pastor of the Congregational Church, Dumbarton, a legacy of £250."

There are two legacies of an exceptional character, Nos. 10 and 16 in the list contained in the settlement which it would only cumber the general question were I to refer to at present, but which I will deal with separately later.

The residue of his estate Mr Jacks left to the absolute disposal of his trustees, either for the augmentation of any of the legacies to persons or institutions named by him or for the help of kindred institutions.

Mrs Jacks the testator's widow survived him, and claimed her *jus relictae*, which was not excluded by marriage contract. And I think it right to say in justice to her that I interpret her action and what has followed on it as dictated by no antagonism to her husband's settlement, but by a wish to allow all his legatees to come into immediate enjoyment of their legacies consistently with justice to herself. Mr Jacks' residuary estate is sufficient to pay out his widow her *jus relictae*, to pay the whole legacies in full, and to leave a small resulting residue. Had Mrs Jacks surrendered her life interest in part in precise terms of the will she would in the circumstances have reduced her income by one half without any compensation in capital. By the course she took she surrendered her whole income (at any rate for the time) and took compensation in capital, but equally she allowed her husband's will to take full effect *quoad* the legacies, which amount to the large sum of £76,250, at once.

But it must here be noticed that the settlement of Mr Jacks contained this declaration, "which provisions in favour of my said wife shall be in full to her of all her claims of terce, *jus relictae*, and others legally competent to her against my estate upon my decease."

After Mrs Jacks' election to take her *jus relictae* she executed a deed of ratification, &c., by which, on a narrative of her husband's settlement, of her having claimed and taken her legal rights, of the trustees being in a position after settling with her to pay his whole legacies, and of her personal desire that such payments should be made forthwith, she ratified her election, surrendered irrevocably her life interest and whole other provisions (the latter, though unnecessary to mention in detail were of very considerable value), and concluded thus—"And I consent (so far as I competently can) in exercise of the power of

anticipation conferred upon me in the sixth place in said trust-disposition and settlement and every other power enabling me, to payment being forthwith made" of the whole legacies bequeathed, &c.

The main question in the case is whether all, or any, and which, of the legacies above referred to fall to be paid now or to be postponed till the death of Mrs Jacks the testator's widow.

I have carefully examined the whole of Mr Jacks' settlement in the above detail, because I do not think it is possible to come to a sound conclusion on the above question without considering its whole scope and bearing.

The first point to which I shall advert is Mrs Jacks' claim to *jus relictae*, and its effect.

I have always understood that where a provision or bequest by settlement is declared to be in full, in satisfaction, or in full satisfaction (for they all come to the same thing), of legitim or of *jus relictae*, a claim by a beneficiary to such legal rights involved absolute renunciation or forfeiture, from whichever side the claim is looked at, of the testamentary provision. It appears to me that the very terms of such a provision involve that the bequest is conditional, and I cannot myself understand a right being satisfied by a provision, and at the same time the right being exigible and the provision merely suspended or postponed.

The law is thus emphatically stated by the late Lord President (Ingليس) and Lord Mure in *Macfarlane's* case (9 R. at pp. 1166-7 and 1176). In that case Lord Mure says—"The law is, I apprehend, quite settled to the effect that the beneficiary electing to take his legal rights as against the will is held to have forfeited everything the will gave him beyond the amount of those rights," and the Lord President in different words regards the declaration of satisfaction as a condition to receive effect as matter "of course."

The point however was not alluded to by the other Judges, and it is maintained that the above observations were not necessary for the determination of the case, and do not enter into the grounds of judgment, and must therefore be taken as having no further weight than other *obiter dicta*. Your Lordship has spoken regarding the judgment in *Macfarlane's* case as one of the Court which was concerned in its decision. I find that I occupied to the case a humbler, but to the law and to the profession a responsible position, viz., that of the reporter, and as it happens I have an exceptionally distinct recollection of the case. In it for the first time the doctrine of equitable compensation which, although it had been long established in England, and although it may be said to have been adumbrated in Scotland, had never, so far as I am aware, *eo nomine* been accepted there, was adopted as part of the law of Scotland. The case was one which aroused much interest, and was the subject of much discussion in the Parliament House as well as before the Court, and was the

subject of an exhaustive argument in this Division, and afterwards of written papers laid before the whole Court, and I can say with perfect distinctness of recollection that the doctrine laid down by the two Judges whom I have quoted was the basis of their judgment and of those who concurred with them, but who did not think it necessary to repeat it. Much in a case of such importance passes in the discussion before the Court which cannot appear in the report, and I can have no doubt that it was made quite clear that the judgment of the Court upon the question at issue justified the general, which is found to preface the special, rubric.

But the matter does not enter the actual judgment, and we were referred to the case of *Gray* (1907 S.C. 51), where the doctrine referred to was repudiated by a direct decision to the contrary.

While I do not regard the reasoning whereby the expressed opinion of the Lord President and Lord Mure is avoided by the only Judge who makes reference to it as satisfactory, and while I think the question deserving and requiring reconsideration, I must accept the case as settling the law for the purpose of this case. In fact, from my point of view, though I should have come to the same conclusion in the present case on an opposite view of the law, if the law be as determined in *Gray's* case it only makes this case the more easily decided.

I accept, therefore, that Mrs Jacks' claiming and receiving her *jus relictae* did not involve total surrender or forfeiture of her testamentary provision, but left it open to her yet to claim and receive the latter, on equitable compensation having been made to all others affected by her taking the former. It may be that, humanly speaking, at Mrs Jacks' age equitable compensation cannot be looked for, but legally it must be regarded as possible and her claim to her provision of a liferent as capable of again emerging. In fact, *ex hypothesi*, the radical right to it remains with her; and this legal fact affects materially her deed of ratification and surrender. From being a document having no avail whatever it becomes one having an important bearing upon the present case.

What, then, is the date of vesting of Mr Jacks' legacies? This question must be first considered on the footing that the settlement took effect in terms and was in no way interfered with by the action of the widow. It was maintained, on the authority of *Bryson's* case (8 R. 142), that, as there was no gift apart from a direction to pay there could be no vesting until payment, and that as there can be no vesting till a contingency is purified there could be no payment in this case till the contingency is purified, where the legacies are coupled with a contingency or destination over. But then those who maintain this position find themselves in this dilemma, that, if the will takes its normal course, there can be no payment until the widow's death, that the legacies are roughly

of two classes—those personal and without contingency or destination over, and those coupled with a contingency or a destination over—and that they have to maintain a different scheme of vesting for those two classes in order to determine the result of the widow's surrender of her liferent with a view to anticipate payment. The conclusion to which they would have us come is that the personal legacies vest at the date of payment, whether that is the date of the widow's death or of her consent to anticipation of payment, but that the contingent legacies and legacies with a destination over cannot vest in any case until the widow's death, because these contingencies and destinations over are assumed to depend upon that date. For a different date of vesting of the different classes of legacies I hold that there is no ground in this case. It is against the whole indication of the testator's intention, as deduced from the terms of this purpose of his settlement. It is hardly conceivable that the testator intended that vesting of a legacy to his wife's maid or to his minister should vest on acceleration of payment irrespective of his widow's death, and one to his brother's widow remain contingent with the risk of lapsing, or one to his brother's son remain contingent and either go over to his issue or lapse on failure of issue should his brother's widow or his nephew predecease his own widow. Moreover, the contention takes no regard of the terms of the widow's power of anticipation. She may consent to the payment "of all or one or more" of the legacies. There is no distinction whatever between the different classes of legacies, whereas the contention above referred to would introduce a very marked distinction.

I can conceive it possible in this case to hold that vesting of the legacies took place *a morte testatoris*. I can also conceive it possible to hold that they vested at the date of payment, whether normal or anticipated. But I cannot understand its being maintained that some vested at such anticipated date of payment and that vesting of some was postponed till the widow's death notwithstanding that she consented to payment being anticipated. Between the two dates of vesting which I conceive to be possible, opinions, I concede, may differ. My own opinion is that in this case vesting is not dependent on the date of payment, whether normal or anticipated. I think it took place at the testator's death, and that no other conclusion can harmonise the whole of the sixth and seventh provisions of the settlement. Moreover, I find no difficulty in the case of *Bryson v. Clark (supra)*, or in the opinion of the late Lord President Inglis. In the first place, the settlement there was one of heritage, and the destination was one in accord with the subject; in the second place the Lord President expressed his opinion thus—"It is in vain to review the authorities in a question of this kind, but I think they amount to this, that *when nothing is expressed in favour of a beneficiary except*

a direction to trustees to convey to him on the occurrence of a certain event, and not sooner, and failing him to certain other persons as substitutes or conditional institutes to him, then, if he does not survive the period he takes no right under the settlement. I think that is settled law, and applicable to this case." I accept it as settled law. But is it applicable to *this* case: I think not. I think there is virtue in the words I have underlined, and that something is both implied and expressed in this case which makes the general doctrine inapplicable—implied in the general scope of this wide range of different legacies, and expressed *in gremio* of the power and condition of anticipation.

To revert more particularly to the different classes of legacies enumerated at the outset:—

The 1st, to a widow if she has not married again, vested, I think, *a morte*, subject to defeasance on remarriage before the date of payment, and was not held up, it might be for the whole of the widow's life, until Mrs Jacks' death, and in that case possibly to lapse. As to the 2nd and 3rd, where the testator speaks of the date of vesting he gives no aid to determine the date of vesting, nor does he indicate that he had any personal conception of what the date of vesting would be. He leaves it as simply the date of vesting, whatever that may be. Had he said the date of payment he would probably have fixed the date of vesting. But that would not suit the construction which I am venturing to dispute, for it would have then fluctuated according as payment was accelerated or not. I can then find no grounds in this particular case for postponing vesting in the nephews and nieces beyond the date of the testator's death, or for postponing payment of these legacies during the whole of the widow's life, in any and every event, for behoof of their possibly unborn issue. And such was not, I think, when the whole provision in question is looked at, the testator's intention.

Nor did he intend so to hold up the legacies of the class 4th, 5th, 6th, 7th, and 8th, but meant them, I think, to vest *a morte*, the postponement of payment being intended not to suspend vesting in any case, but necessary merely for protection of the widow's life-tenant.

I have so far dealt with the case as if things had taken their normal course under the settlement and Mrs Jacks had either died or surrendered in part her life-tenant, to admit of payment being made, which might have happened not immediately at her husband's death, but at any time between that date and her own death. In the normal case, as I think, neither Mrs Jacks' surrender of her life-tenant nor her death would have had any effect on the vesting of the legacies. Predecease of either of these events would not have cut off a legatee to whom there was a gift over any more than a personal legatee to whom there was none. It would merely have accelerated the date of payment. Such, as I have said, I believe to be the

result of a consideration of the general scope of this fasciculus of legacies.

But things have not taken their normal course. Mrs Jacks has claimed her *jus relicte* and has executed a surrender *valeat quantum* of her life-tenant. If the law is as determined by *Gray's* case (*supra*), Mrs Jacks was in a position to surrender in terms of the will, to admit of immediate payment, for legally her life-tenant was still radically hers, though now dormant to admit of equitable compensation being made, and was not either renounced or forfeited.

Again, if *Gray's* case (*supra*) does not fix the law applicable to this case, then it appears to me that the forfeiture of Mrs Jacks' life-tenant, by reason of her claim to *jus relicte*, which must then have ensued, inasmuch as it involves the same result as her voluntary surrender of her life-tenant, has by implication the same effect as her voluntary surrender. To hold otherwise would be, I think, to thwart the obvious intention of the testator. The case is entirely distinguishable in its circumstances and the nature of the interests involved from *Edward's* case (19 R. (H.L.) 33) and *Haldane's Trustees* (23 R. 276), to which we were referred.

But assuming that I am wrong in preferring the death of the testator as the general date of vesting, the alternative view of vesting which I have suggested, commends itself to me with almost equal force, and it is one which is equally effectual to dispose of the case in the circumstances as they have turned out. Assume that vesting did not take place at the death of the testator, it can I think hardly be disputed that it took place at the date of payment, else how could payment be made of a legacy not vested? And payment is to be made if the widow chooses to surrender her life-tenant, not of a limited class or classes of the legacies but of "all or one or more" of them. This would lead, it is said, to the result that vesting would be made to depend on the act of a third party. And the case of *Muirhead* (17 R. (H.L.) 45) was referred to as a conclusive authority in favour of the impossibility of Mrs Jacks' surrender resulting in the immediate vesting of the contingent legacies or those with a destination over. I read it as an authority for a diametrically opposite conclusion. This case is just the exception which proves the rule of *Muirhead's* case. As Lord Watson (at p. 50) puts it, "It is impossible to hold as matter of principle that the act of any person outside of and hostile to the trust can *per se* effect an alteration of the trustor's dispositions with regard to the vesting of interests in his estate. Such an act may be of material importance if the testator has either expressly or by implication signified his intention that upon its occurrence the period of vesting shall shift." I cannot ignore the guarded manner in which his Lordship's statement of the general principle is made. The widow's act is not here founded on *per se* but in relation to an indication of the testator's intention of

what should flow from that act—express if the authority of *Gray's* case is accepted, implied if the law be as stated by the Lord President and Lord Mure in *Macfarlane's* case. I can have no doubt, therefore, that, whatever view may be taken of vesting *a morte*, vesting did take place at latest at the date to which the act of the widow shifted the payment—and vesting not of certain of the legacies merely but of the whole. For I cannot draw any distinction in their effect according to the intention of the testator between the widow's voluntary surrender and her forfeiture of her annuity.

I noted in passing that there were two legacies in a special position, viz. the 10th and the 16th.

The 10th is in favour of Mrs Margaret Anderson or Lee and her son William Jacks Lee. Whenever payment can be made Mrs Lee's liferent of this legacy commences, but for some reason the fee intended for her son is to go to his mother if he does not attain twenty-one, and failing her it is to revert to residue. The fact that the testator here provides exceptionally for a reversion to residue is, I think, the most important confirmation of the view that he regarded all the other legacies where a lapse is contemplated as vesting at his death.

The 16th presents more difficulty. It is a bequest to the University of Glasgow for the endowment of a chair of modern languages, and it is subject to a declaration that should either "I or my wife endow any chair in the Glasgow or other university before the death of the survivor then this bequest shall fall." Like the reverter of William Jacks Lee's legacy, this provision is exceptional. But the declaration that it shall lapse in a certain event, distinguishing it from the remaining legacies, cannot affect them, except by way of confirming the conclusion already reached regarding them. The peculiarity of this legacy must be met by either retaining it at interest or taking security for its repetition in the event conditioned.

I am therefore for answering the first query in the affirmative as regards all the legacies with the exception of that to Glasgow University, and making a special arrangement regarding it, and the third query (a) in the affirmative and (b) at 3 per cent. per annum. It is, in my view, unnecessary to answer the second query.

LORD KINNEAR—I should like to add two observations which I omitted to make, but of which I have been reminded by Lord Johnston. The first is this, that where legacies have been given upon contingencies which have been already purified, they are, in my opinion, exactly in the same position as the legacies which have been given absolutely independent of any contingency at all. The case of the legacy to William Lee is an illustration. That was to be given to him if he attained the age of twenty-one, but if he did not attain the age of twenty-one it was to fall into residue. Now we are told that in point of

fact he has attained that age, and therefore his right becomes absolute. There is no difficulty, to my mind, in the application of that view arising from the interim gift of liferent to the mother, because the testator says distinctly that the income in the interim is to be applied for his benefit, and therefore it was really a legacy the income of which was to go to the legatee while in minority and the capital when he came of age. There are, I think, other legacies in which the contingencies have been purified.

Then the other observation I wish to make is this, that although I think that the power of the liferenter to authorise the anticipation of payment is completely out of the case as an operative power, in respect of her having rejected the will, still I should quite agree with Lord Johnston that power remains as part of the will, which we must read in order to ascertain the intention of the testator. I do not think that the rejection of a bequest strikes anything out of the will itself but only the benefit of the refractory legatee. But then, in that view, what the testator really provides is, that if his wife shall exercise a certain power then payment is to be accelerated, and the question of what is to happen if she does not exercise it must be decided according to the plain meaning and expression of the testator's will providing for that event. I agree that if there had been in fact an exercise of that power by the liferenter in terms of the will the legacies which were paid in consequence must have vested, because they were paid.

LORD MACKENZIE—The testator's widow elected to take her legal rights, with the result that she is not, at all events at present, entitled to draw the free annual interest or income of the residue of the trustor's estate bequeathed to her under the settlement. It is being applied on the principles of equitable compensation to make up the capital sum paid to her in full of her legal rights. It is not necessary for the purposes of this case to consider or decide what the right of the widow will be after compensation has been made. I take the case on the assumption that if and when the capital sum paid to the widow is replaced during her lifetime her right to the liferent would, under the terms of the settlement, revive. She has, however, executed a deed of ratification, surrender, and consent, by which she has surrendered irrevocably the whole liferent and other provisions conferred upon her by the settlement.

The question is whether payment of all or any of the legacies bequeathed in the last purpose of the settlement can now be made by the trustees. There is a power under the settlement given to the widow to consent to payment to all or one or more of the legatees in question during her life, and the direction in the last place is as follows—"For payment of the several following bequests upon the death of my said wife, or should she surrender her

liferent over any part thereof to admit of payment, then for payment of such part upon such surrender." The widow, under the deed of ratification, surrender, and consent, consents so far as she competently can to payment being forth with made of the whole of the legacies, but I think it plain that the trustees cannot proceed upon this as a warrant to them to make payment to the legatees. The widow cannot approbate and reprobate the settlement. Having claimed against the settlement she cannot exercise a power conferred by it. The operative direction therefore is to the trustees to pay the bequests in question upon the death of the widow. On the authority of *Muirhead v. Muirhead*, 17 R. (H.L.) 45, the widow's repudiation of her liferent has no effect on the vesting of the legacies, although it has an effect as regards the payment of those legacies which have already vested. As Lord Watson says—"It is impossible to hold as matter of principle that the act of any person outside of and hostile to the trust can *per se* effect an alteration of the trustor's dispositions with regard to the vesting of interests in his estate." The testator here had no other object in view in postponing the time of payment than to secure the liferent to the widow. That liferent being now at an end, partly through the compulsory application of the doctrine of equitable compensation, and ultimately, if the occasion arises, through the surrender of her liferent right by the widow, there is no reason why the trustees should not make an immediate division (always provided the state of the funds permits it). This division, however, must be limited to those who have a vested and indefeasible interest in their legacies. In the case of those whose legacies are contingent, where there is a clause of survivorship or destination-over, the rule laid down in many cases, of which *Byson's Trustees v. Clark*, 8 R. 142, is probably the most often quoted example—the beneficiary who does not survive the period for payment prescribed by the testator takes no right under the settlement. All the elements indicative of suspended vesting mentioned by Lord Watson in *Muirhead* are present here.

The third parties are the contingent legatees. In my opinion they are not entitled to immediate payment. In the case of one of the third parties, Mrs Elizabeth Jones or Jacks, the contingency is created not by a destination-over but by a condition in regard to re-marriage. This in my opinion continues during the lifetime of the testator's widow. The fifth parties are the legatees in whose case there is no gift over or contingency. These, in my opinion, are entitled to immediate payment if and when the trustees have in hand sufficient funds to make full payment, with interest, of the whole legacies whether vested or contingent. Until then the trustees are neither bound nor entitled to make payment to any of the legatees. Interest on the legacies will be at the rate the money has earned, and runs on the legacies which are

vested from the date of the deed of ratification. On the legacies which have not vested it will not begin to run until the period of payment has arrived.

This leaves only the question in regard to the bequest of £20,000 to the University of Glasgow to endow a Chair of Modern Languages. The settlement contains the declaration that should either the testator or his wife endow any chair in Glasgow or other university before the death of the survivor then that bequest shall fall. This condition is independent altogether of the question whether the widow has taken her legal or conventional provisions. It cannot be seen until her death whether she has endowed any chair in Glasgow or any other university. Therefore it cannot be seen during her lifetime whether the testator's bequest is to fall or not. It is no doubt true that by the deed of ratification, surrender, and consent, Mrs Jacks irrevocably and absolutely undertakes not to endow any chair in Glasgow or any other university now or at any time hereafter. If, however, the trustees pay the £20,000 to Glasgow University upon this undertaking it is impossible they could ever get the money back. They have paid to Mrs Jacks the full amount of her legal provisions. If therefore, after payment to Glasgow University by the trustees, Mrs Jacks chose to endow a chair in that or any other university I am unable to see by what means the trustees could carry into effect the express declaration of the testator. I do not mean for a moment to suggest that Mrs Jacks would do anything in violation of the undertaking she has given. The Court is, however, bound to treat the matter on a strictly legal basis, and so regarding it I am unable to hold that the Court would be warranted in sanctioning immediate payment of this bequest.

The LORD PRESIDENT did not hear the case.

The Court pronounced this interlocutor—

"Find in answer to the first and second questions of law in the case that (1) the trustees are not entitled to pay any of the legacies before they have funds in their hands sufficient to make payment with interest and duty of the whole legacies; if and when they have funds sufficient, the fifth parties will be entitled to receive immediate payment of their legacies; (2) payment of the legacies and bequests to the third and fourth parties is postponed until the death of the second party; Reserving any question that may arise if the liferent of the second party should at any future time be held to revive, Answer branch (a) of the third question in the affirmative, and find in answer to branch (b) of said third question that interest falls to be paid at the rate the money earns in the hands of the trustees. . . ."

Counsel for the First Parties—Hon. W. Watson. Agents—Webster, Will, & Company, W.S.

Counsel for the Second and Third Parties—C. H. Brown. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Fourth Parties—W. A. Ramsay. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Fifth Parties—D. P. Fleming. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Sixth Parties—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

Wednesday, March 19.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'CLYMONT v. GLASGOW CORPORATION.

Expenses—Taxation—Preparation for Proof—Tender—Acceptance of Tender—General Regulation (No. 3) Appended to A.S. 15th July 1876.

An action raised in the Sheriff Court was, after proof had been allowed, appealed to the Court of Session for jury trial. An order for issues was thereafter pronounced, but before further procedure a tender was made by the defenders and accepted, the sum tendered being decerned for with expenses.

Held (after consultation with the Judges of the Second Division) that the defenders were liable for the expenses of precognitions and medical reports obtained by the pursuer while the case was still in the Sheriff Court, and charged on the Sheriff Court scale.

Church v. Caledonian Railway Company, December 22, 1883, 11 R. 398, 21 S.L.R. 268, *overruled*.

No. 3 of the General Regulations appended to the Act of Sederunt 15th July 1876 provides—"The expenses to be charged against an opposite party shall be limited to proper 'expenses of process,' without any allowance (beyond that indicated in the table) for preliminary investigations, subject to this proviso, that precognitions (so far as relevant and necessary for proof of the matters in the record between the parties), although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor shall be pronounced either approving of issues or allowing a proof."

Mrs E. Aitken or M'Clymont, wife of John M'Clymont, 733 Garscube Road, Glasgow, *pursuer*, with the consent of her husband as her curator and administrator-in-law, brought an action against the Corporation of Glasgow, *defenders*, in which she claimed £250 as damages for personal injury which she alleged she had sustained through the fault of one of the defenders' servants while in the course of his employment as a tramway conductor, the pursuer's allega-

tion being that he (the conductor), while attempting to remove the pursuer's grandson from a tramway car, pushed him against the pursuer, who was in the act of boarding the car, with the result that she was thrown to the ground and injured.

On 31st October 1912 the Sheriff-Substitute (FYFE) allowed a proof. Thereafter, on 1st November, the cause was remitted, on the pursuer's request, to the First Division, and on 13th November their Lordships ordered issues. On 19th November the defenders lodged a minute of tender in which they offered £50 with expenses as taxed on settlement of the action. On the following day the pursuer lodged a minute accepting the tender, and on the same date the Court pronounced an interlocutor decerning against the defenders for payment to the pursuer of the said sum with expenses, as the same should be taxed by the Auditor.

The Auditor having lodged his report the defenders, on 27th January 1913, lodged a note of objections thereto, in respect that he (the Auditor) had allowed various items therein specified, amounting in all to £12, in respect of precognitions and medical reports taken while the case was still in the Sheriff Court and charged on the Sheriff Court scale.

The note was heard in the Single Bills of 6th February before a Court consisting of the LORD PRESIDENT, LORD JOHNSTON, and LORD MACKENZIE.

Argued for defenders—Where, as here, issues had not been adjusted prior to the acceptance of the tender these expenses should be disallowed—*Church v. Caledonian Railway Company*, December 22, 1883, 11 R. 398, 21 S.L.R. 268.

Argued for pursuer—Where, as here, an order for proof had been pronounced in the Sheriff Court and an order for issues in the Court of Session the pursuer was entitled to the expenses incurred by her in preparing for the proof—*Boyle and Others v. Olsen and Others*, November 15, 1912, 50 S.L.R. 67. [LORD PRESIDENT—We shall consult with the Judges of the Second Division before disposing of this.]

At advising, the opinion of the Court was delivered by the

LORD PRESIDENT—In this case an action of damages was raised in the Sheriff Court, and a proof was allowed in respect that a plea to the relevancy was not insisted in by the defenders. The pursuer then appealed for jury trial, and there being no question of relevancy issues were ordered. On the day that issues were to be adjusted a tender was put in, and, the pursuer having accepted it, the sum tendered was decerned for with expenses.

When the pursuer's account of expenses was presented it included charges for precognitions which were necessary for the case if it was to go on, and they were charged at the Sheriff Court scale. The Auditor having allowed the charges for these precognitions, they were objected to, the objection being based on the deci-