ing this reduction. There is very little interest in this child to bring this action now. She is eleven years of age, and had she waited other ten years would have been put in possession of the property under the deed she seeks to reduce. As to the plea of homologation, it might have been a very strong one if insisted in. The trustee, after acting for so many years, could not have abandoned the deed without putting in defences, and I am of opinion that he stated none that he was not bound to state. I think that he was entitled to a judgment of the Court, and that he did nothing which was not necessary in obtaining it. Neither do I find any unnecessary litigation in the question of accounting. In fact I never saw an interlocutor sheet that showed less; and, on the whole, I am of opinion that nothing was done which could have been omitted with safety, and consequently that the Lord Ordinary should have allowed the defender his full expenses.

LORD ARDMILLAN—I am very unwilling to interfere with the Lord Ordinary's discretion in this matter. The trustee was probably entitled to say, I cannot give up the trust extra-judicially; bring an action of reduction and I will make the slightest defence I can. But I do not think that this is exactly the course that he took. He came into Court with a statement in his mouth which he afterwards departed from. He has now taken the proper course; but it is only by departing from his previous one. In the matter of accounting he proceeded quite properly, and therefore I think he was entitled to some expenses, and the Lord Ordinary has found accordingly. I see no reason for disturbing his judgment.

LORD KINLOCH concurred with the majority of the Court.

LORD PRESIDENT—I am disposed to agree with the majority of your Lordships that the Lord Ordinary's finding of expenses was much too severe. I confess I do not at present see any good ground for modifying expenses at all, but think that the trustee was entitled to his full expenses. With regard to the first plea as it now stands—that, namely, of homologation—it is clear that it was one he was entitled to, and I am of opinion that he might have successfully supported it. For observe, the plea is not against the action—not that the action is barred by homologation—but to defend the actings of the trustee, which are substantially called in question. That is a defence he is surely entitled to. There is no defence maintaining the absolute validity of the deed, and there was no discussion on that point. On the other hand, the trustee did not admit the invalidity of the deed, and I am of opinion that he was not entitled to do so, or to denude without an order of the Court. I think he was bound to come into Court as he did and obtain a formal judgment from the Lord Ordinary. That judgment was given, and the parties then went into an accounting, where the defender was found entirely in the right—so much so that the pursuer accepted his statement of accounts without discussion. Under these circumstances I am of opinion with your Lordships that the defender did not cause any unwarrantable litigation or take any steps in this process which he was not entitled, nay, bound, to take, and therefore that he is entitled to his expenses in full, and not as modified by the Lord Ordinary.

Agents for Pursuer—J. & A. Peddie, W.S.
Agent for Defender—Alex. Morison, S.S.C.

Friday, May 26.

JAMES LEITCH LANG *v.* GLASGOW COURT-HOUSE COMMISSIONERS.

Statute—Lands Clauses Consolidation (Scotland) Act—Compulsory Sale—Notice—Special Jury—Waiver. Held (by a majority of the Judges, Lord Deas reserving his opinion), that where the promoters of an undertaking are empowered to take lands by compulsory sale, sec. 40 of the Lands Clauses Consolidation (Scotland) Act 1845 (which requires ten days' notice in writing of the time and place of inquiry to be given by the promoters to the party claiming compensation), is imperative, and not merely directory, and applies to the case where a special jury is summoned as well as to the case of a common jury; but *held* unanimously that a claimant, who was present and took part in the proceedings before the Sheriff at which the trial was fixed, who examined havers under an interlocutor fixing the time and place of trial, and who successfnlly resisted a subsequent motion by the promoters to have the trial postponed, had waived his right to notice.

The complainer Mr Lang is lessee of certain premises in Glasgow. On the 28th December 1870 he was served with a notice from the Glasgow Court-House Commissioners, intimating that under a local Act they required to enter upon the said premises, and requesting a statement of his interest and claims. Mr Lang claimed as compensation £1825, with £25 per cent. as additional, as for compulsory sale; and intimated his desire to have the amount determined by a jury. The secretary to the Commissioners on the 5th January 1871, on their behalf, tendered £150 to Mr Lang as compensation; and intimated that in case of his declining to accept of the same the Commissioners would present a petition to the Sheriff to summon a jury to settle the amount. Mr Lang declined the tender, and a petition was accordingly presented on 17th January 1871 by the Commissioners, praying the Sheriff to summon a special jury for the purpose of fixing the compensation. In terms of section 53 of the Lands Clauses Consolidation (Scotland) Act the Sheriff summoned both parties to appear before him on 25th January. On that day, in the presence of both parties, he nominated a special jury, and appointed the 31st January for reducing the number of the jury to twenty. On the 31st January both parties again appeared before him. The proceedings are embodied in the following interlocutor, pronounced by the Sheriff of that date:—

"*Glasgow, 31st January* 1871.—The Sheriff having heard parties' procurators, and they having alternately suggested eight names each to be struck off the list of special jurors, so as to reduce the same to twenty—strikes out and reduces accordingly, the names so struck off being as follow—viz. (here follows list): Farther appoints Wednesday, the fifteenth day of March next, at ten o'clock forenoon, for proceeding with the trial for ascertaining and

awarding the compensation due by the petitioners, within the Justiciary Court-Hall, foot of Salt Market Street, Glasgow, with continuation of days; and grants warrant to and authorises the Clerk of Court to issue a precept at the instance of the petitioners for citing the Jurors as reduced to attend at said diet: Farther, grants diligence at the instance of both parties for citing witnesses and havers to compear, time and place foresaid; as also, on the mutual craving of parties, grants diligence at the instance of both parties for recovery of writings, and commission to Robert Frame, writer in Glasgow, to take the depositions of the havers and receive their exhibits; said commission to be reported, along with the exhibits, on or before the said 15th day of March next."

Mr Lang, under this interlocutor, called upon the Commissioner named to examine havers with a view to trial, and havers were accordingly examined before him. On the 11th March the promoters moved the Sheriff to postpone the trial which had been thus fixed for 15th March. Mr Lang, through his procurator, refused to consent to the trial being delayed, and the Sheriff pronounced an interlocutor refusing the motion. On the same day Mr Lang lodged a minute in the following terms:—"The respondent James Leitch Lang states that the petitioners have failed to comply with the fortieth section of the 'Lands Clauses Consolidation (Scotland) Act 1845,' in so far as they have failed to give to him or his known agent not less than ten days' notice in writing of the time and place of the inquiry, and that the petition and the whole proceedings under the same have therefore become inept and fallen; and the petitioners are liable to pay to the said respondent the amount of compensation claimed by him, for which, with the costs, the said James Leitch Lang will immediately raise an action in a competent court. And the said James Leitch Lang protests that he shall not, by continuing to appear in the present proceedings, and citing and examining and cross-examining witnesses, and addressing the Court and jury at the trial, be held as in any way abandoning or departing from his objection to the said proceedings, or his right under the statute to sue for and recover the full sum claimed by him, with costs, in any competent court."

On the 13th March Mr Lang presented to the Lord Ordinary on the Bills a note of suspension and interdict against the trial proceeding on the 15th, on the ground that the promoters had failed to give to him ten days' notice of the time and place of inquiry, as required by section 40 of the Lands Clauses Consolidation (Scotland) Act.

Interim interdict having been granted, and the case debated, the Lord Ordinary (MURE) pronounced the following interlocutor:—

"1*st April* 1871.—The Lord Ordinary having heard parties' procurators, and considered the note of suspension, answers, and productions, recals the interim interdict, and refuses the note of suspension; Finds the respondents entitled to expenses, of which appoints an account to be given in; and remits the same, when lodged, to the auditor to tax and report.

"*Note.*—The Lord Ordinary is not satisfied that the 40th section of the Lands Clauses Act, founded on by the complainer, has any direct application to trials before a special jury. It occurs in that part of the statute which relates almost exclusively to proceedings preparatory to trial by common jury, which are *ex parte* at the instance of the promoters of the undertaking, and in which it was therefore necessary to make provision that notice should be given to the opposite party of the day fixed for trial, in order that he might have due time to prepare for the trial.

"Trials by special jury, on the other hand, are from the first *quasi* judicial, if not judicial, in their character, in which the Sheriff is appointed to summon both parties before him for the purpose of nominating and reducing the number of the special jury for the trial to which the proceedings relate. Now, this seems necessarily to imply the fixing of the day of trial, as was done in the present case, in presence of both parties, and with reference to which there was consequently no more reason why the promoters should be required to give notice of trial to a claimant than that the claimant who stands pursuer of the issue should give notice to the promoters. There is accordingly no provision as to notice specially applicable to trials by special jury. And the presumption in these circumstances seems to be that the Legislature thought that the fixing of the day of trial in such proceedings would of itself be sufficient notice; and that it might be safely left to the judicial discretion of the Sheriff to see that the trial was fixed at a time convenient for both parties, just as other matters relative to the nominating of the special jury are left to be dealt with by him in the manner in which such matters are regulated by the laws for the time being.

"But even if the 40th section of the statute were to be held applicable to the case of trial by a special jury, the provision is not, in the opinion of the Lord Ordinary, of so imperative a character that the omission of it must necessarily have the effect of creating a nullity, and thereby irritating the whole previous proceedings, as seems to be contended for by the complainer; it is directory merely, and one which a claimant may, it is thought, be held to have waived or dispensed with; whereas here, he was not only quite well aware of the fact that the trial was fixed by the Sheriff to take place on a particular day, but was actually a party to the proceedings before the Sheriff at which the trial was so fixed, and the interlocutor of the 31st of January 1871, by which the day of trial was fixed, in order to recover evidence to be used at the trial; and so late as the 11th of March 1871, resisted a motion made by the respondents to have the trial postponed. In these circumstances, which are fully borne out by the proceedings, a copy of which has been produced, it humbly appears to the Lord Ordinary that the complainer is barred from maintaining that he had not received notice of the time of trial; and that the suspension must on that ground also be refused."

Mr Lang reclaimed.

WATSON and BALFOUR for him.

SHAND and MACDONALD for respondents.

At advising—

LORD PRESIDENT—This note of suspension and interdict has been presented in the course of proceedings taken by the Glasgow Court House Commissioners for the compulsory purchase of certain subjects of which the complainer is lessee. The object of the suspension is to prevent the respondents from proceeding with the trial for the purpose of ascertaining the amount of compensation due to the complainer. The ground of suspension is, that the complainer has not received ten days' notice of the time and place of the inquiry, required by section 40 of the Lands Clauses Con-

solidation (Scotland) Act. The Lord Ordinary has found this a bad ground for interfering with the proceedings, and recalled an interim interdict previously granted. The grounds on which his Lordship's judgment has been maintained are three in numder:—(1) That section 40 does not apply to this case, inasmuch as a special jury was summoned; (2) That the provisions of the section are directory, and not imperative, and therefore that failure to comply with them will not prevent the respondents from going on with the trial; (3) That even supposing section 40 to be applicable and imperative, notice had in the circumstances of this case been dispensed with by the complainer. I do not think the first argument well founded. I hold that the statute requires ten days' notice in every case. The clauses of the statute which apply to these proceedings are those beginning with the 36th and ending with the 52d, but those which we require most to consider are the 39th, 40th, and 41st. The 39th provides that when the petition is presented to the Sheriff he shall summon a jury—in the ordinary case twenty-five common jurymen. The claimant has notice before that the petition is to be presented, but he would have no notice of the time and place of the inquiry unless for the provisions of section 40. The object of that section is clear, and its provisions are explicit. The question comes to be, Whether these provision are superseded and others substituted in the case of a special jury? The respondents maintain that section 40 has no application when a special jury is summoned. Section 53 provides for the manner in which the special jury is to be struck. If in the case of a special jury everything done by the Sheriff is to be done in the presence of both parties, there would be a great deal in the argument of the respondents. The purpose of the meeting of the parties in section 53 is very distinctly announced "for the purpose of nominating a special jury." The Sheriff is to nominate the special jury in the ordinary way required in other cases, and to appoint a day for the parties to appear before him to reduce the jury to twenty, and on the day appointed the Sheriff is to reduce the special jury in the manner used in the Court of Session. There the section comes to an end—there are no further provisions for the procedure with a special jury. There also, in my opinion, comes to an end the presence of parties before the Sheriff. What the Sheriff has to do is to summon the special jury as under section 39. But that proceeding under section 39 is a proceeding entirely in absence of the parties—at least of the claimant. After the claimant, in combination with the opposite party, has reduced the jury, he is entitled to leave the Court. The fixing of the time and place of inquiry is a matter done in his absence, and just as much requires notice as in the case of a common jury. *Secondly*, it is said that section 40 is directory and not imperative. I am not able to understand this argument. The difference between *directory* and *imperative* is clear, but where a statute requires certain notice before a thing is done, it is a curious thing to say that the thing can be done without the notice.

There remains the question, whether the complainer has not in effect dispensed with notice. For there is no doubt that even a statutory notice can be dispensed with by the party for whose benefit it is required. The petition was presented on the 17th January. On the 25th the parties met before the Sheriff, when a special jury was nominated in terms of section 53. By the same section the Sheriff appointed parties to appear before him on the 31st January, for reducing the jury. The parties met accordingly on the 31st, and reduced the jury. If no further proceedings had been taken there would have been nothing to prevent the application of section 40. The claimant would have been entitled to his ten days' notice. But a good deal more was done. It was reasonable and natural that the parties, present as they were before the Sheriff, should then adjust the time and place of the inquiry, as matter of arrangement. Accordingly it is conclusively established that it was made matter of arrangement that the trial should take place on a certain day. The interlocutor of the Sheriff, after striking the jury, proceeds to appoint the time and place of the trial—"10 o'clock, Wednesday the 15th March, within the Justiciary Court Hall, foot of Salt Market Street, Glasgow." But the parties want something more still, viz., diligence against havers, preparatory to the trial. That diligence is granted on the mutual cravings of parties; a commissioner is named, who is to report on or before the said 15th March. Mr Lang proceeded to act on this interlocutor. He went to the commissioner named, and examined havers before him. The question comes to be, whether, after all this, he can be allowed within ten days of the time fixed on to plead want of notice? I consider that there is quite sufficient to instruct that on the 31st March he dispensed with notice. And on this last ground I concur with the Lord Ordinary's interlocutor.

Lord Deas—I am disposed to agree with your Lordship that section 40 applies to a special as well as to a common jury. But it is not necessary to decide the point. It is enough for me that the interlocutor of the Sheriff of 31st January fixes a day of trial with the complainer's consent. I do not care whether the statute is imperative or directory. The party entitled to notice can surely dispense with it. To my mind the import of the Sheriff's interlocutor is, that the 15th March was appointed as the day of trial with the consent of both parties who were before him.

Lord Ardmillan—I had considerable difficulty in whether section 40 is applicable to the case of a special jury. I have come to the conclusion that it is. But I do not think I have ever seen a clearer case of dispensing with a notice required by statute.

Lord Kinloch—I am of opinion that the Lord Ordinary has arrived at a sound conclusion in this case; though I cannot concur in all the observations in his note. I do not think it can be held that the statute contains two different codes of procedure with regard to common juries and special juries respectively. It contains one code of procedure, with merely the differences created by the distinction of the two cases. I do not doubt that section 40th applies, or may apply, to the case of a special jury; as, for instance, where, under section 53, nothing has been done at the meeting of the parties except to reduce the jury, and the day of trial is appointed by the Sheriff, outwith the presence of the parties, by an after interlocutor. There can be no doubt that in such a case notice must be given by the promoters to the claimant of the time and place of trial in terms

of section 40. But I think the clause alone applicable, either as to the common or special jury, where the day of trial is fixed by the Sheriff without the presence and consent of the claimant. In such a case there is a clear reason for notice being given by the promoters. In the present case, where the day of trial was fixed by an interlocutor pronounced in the presence of both parties, and, as I must presume, not only with the knowledge but consent of the claimant, further notice was not necessary, and I think was not required by the statute. At all events, I am very clear that if such notice was still requisite in point of form, the claimant waived his right to it, and is now barred, by personal exception, from pleading the want of it. It is indubitable that the statutory notice may be dispensed with. A letter dispensing with it would be clearly effectual. I think the conduct of the claimant equally dispensed with it in the present case. What can be more distinct evidence of waiver of notice than to take by personal concurrence an interlocutor appointing a day of trial, and on personal craving a diligence against havers, to be reported by that day, followed up by an examination of havers, and a successful opposition to the day of trial being postponed? It is, after this, altogether extravagant to object that notice of the day of trial was not given; and I think the judgment of the Lord Ordinary refusing the note clearly right.

The Court adhered, with additional expenses.

Agents for Complainer—Maclachlan & Rodger, W.S.

Agents for Respondents—Webster & Will, W.S.

Friday, May 26.

WM. WOOD (MENZIES' JUDICIAL FACTOR) *v.* MENZIES AND OTHERS.

Donation inter virum et uxorem—*Apportionment — Trust—Truster' Intentions — Liferent.* (1) Where a husband had opened an account with a bank in his wife's name, upon which she had operated for some years, and into which during that time dividends of the husband's were paid, and which was not closed at his death, but contained a considerable sum standing at the wife's credit; where moreover a sum of £600 had been withdrawn from this account, and placed on deposit-receipt in name of the wife alone, and had not been disturbed during the remainder of the husband's life—*Held* that, though it was proved that a few days before opening the account in his wife's name the husband had received payment of a legacy belonging to his wife, but falling under his *jus mariti*, which in amount almost exactly tallied with the sum first placed to the wife's credit on opening the account, still there was no sufficient evidence that the husband had intended to make any donation to his wife.

(2) Where a truster directed his trustees to convert into money his whole estate, and invest it in certain specified ways, and pay "the whole free annual proceeds to his wife during all the days and years of her life"—*Held* that the mere fact that a portion of the testator's funds were invested in consolidated 3 per cent. annuities, and were left so invested by the trustees, did not affect the question of vesting of the liferent in the widow; that that was a matter to be determined by the testator's intention, and not by any legal rule of apportionment, and that his intention being to give her the universal liferent of his estate as of a sum of money, the first dividend on the above-mentioned consols payable two days after the truster's death fell to be apportioned between the capital of the estate and the liferentrix; as did also that for the half-year current at the liferentrix's death, notwithstanding that under the then existing law consolidated annuities were not appportionable.

(3) Circumstances in which a testator was *held* to have validly disposed of the balance or savings made by his trustees and widow out of the annual income of the estate payable to the said widow, but so far only as these savings were still in the hands of the trustees, and had not been drawn by or paid over to the widow.

The late William Menzies, of 114 George Street, Edinburgh, left a trust-disposition and settlement, with codicil attached, whereby he left to trustees his whole means and estate. His directions to his trustees were, *inter alia*—"*First*, My said trustees or trustee shall, at such time or times after my death as they or he may think most advantageous, sell and convert into money my whole heritable and moveable estates, wherever situated, excepting my said house in George Street, Edinburgh, in the event of its being liferented by my wife in manner after mentioned, and also excepting my household furniture and others hereinafter directed to be given to my said wife and to my daughter Emily respectively. *Second*, My said trustees or trustee shall, from the produce of my said means and estate, heritable and moveable, pay all my just and lawful debts, and deathbed and funeral expenses, and the expenses of executing this trust. *Third*, My said trustees or trustee shall invest the surplus or residue of my said means and estate in their names in or upon any of the parliamentary stocks or public funds of Great Britain, or at interest upon Government or heritable securities within Great Britain aforesaid (but not in Ireland), with power to vary the said stocks, funds, and securities, or any of them, into or for other stocks, funds, or securities of the same, provided that, during the lifetime of my said wife, Harriet Fordyce Menzies, such investments or variations shall be made with her consent in writing. *Fourth*, I direct my said trustees or trustee to pay over to my said wife the free annual proceeds of my said whole means and estate during all the days and years of her life, or permit the same to be received by her during her life, and also the whole annual produce of whatever heritable estate in Scotland I may be possessed of at the time of my death other than my said house in George Street, Edinburgh, while the same shall remain unsold."

There then followed directions as to the disposal of the estate in favour of the children of the truster after the termination of his widow's liferent, as provided in the 4th purpose above quoted.

In the codicil there was found the following clause:—"And further, I declare that all moneys which shall be saved by my said trustees and my said wife out of the annual income payable to my said wife shall be given by my said trustees, after my wife's death, to my daughter Emily, for her sole use."