place to capital, and what to income. I should be very sorry to interfere with such a reasonable intention of the testator, so well expressed. I am therefore of opinion that this Special Case should be refused.

The other Judges concurred.

Agents for the Trustees—Pearson & Robertson, W.S.

Agent for the Beneficiaries—M'Ewen & Carment, W.S.

Thursday, July 13.

SPECIAL CASE—MRS ANN MOFFAT OR ROPER AND OTHERS.

Succession—Legacy—Fee and Liferent—Vesting. A testatrix provided a fund to a woman in liferent, and at her death to be divided among her children in equal shares; the sons to take a fee, but the daughters a mere liferent, and their children the fee. One of the daughters survived the testatrix, but predeceased her mother, never having had any children. *Held* that the share destined to her and her children fell to the surviving legatees of the fund.

Mrs Margaret White or Wilson died on 15th April 1854, leaving a trust-disposition and settlement. After providing for certain legacies and annuities, she directs her trustees to pay the free annual proceeds of one-half of the residue of her estate to her husband's sister, Mrs Isabella Wilson or Grieve, in liferent, and upon her death to divide the fee among her children who survive the testatrix. The other half of the residue is provided to her husband's other sister, Mrs Mary Wilson or Moffat, in liferent, and after her death the trustees are directed to divide the said half among Mrs Moffat's children in equal shares, viz., one share to Mrs Elizabeth Moffat or Purves in liferent only, and her children in fee; one share to Mrs Ann Moffat or Roper in liferent only, and her children in fee; and one share to each of Mrs Moffat's three sons, William, Walter, and John, "and to the survivors of the said Mrs Elizabeth Moffat or Purves, Mrs Anne Moffat or Roper, William Wilson Moffat, Walter Grieve Moffat, and John Moffat, at my decease, and the children of such as may have then predeceased leaving lawful issue, such issue only succeeding to the share which would have belonged to their deceased parent, and that also equally among them; declaring always that the shares of the said Mrs Elizabeth Moffat or Purves and Mrs Ann Moffat or Roper shall be strictly alimentary," &c.

It will be observed that while all the children of Mrs Grieve who survive the testatrix take a fee, the daughters of Mrs Moffat are restricted to a bare liferent, to take effect on their mother's death, the fee of their shares going to their children.

Mrs Moffat died on 28th January 1870, survived by all her children except Mrs Purves, who never had any children, and died on the 16th July 1861, having thus survived the testatrix, but predeceased her mother. The share destined to Mrs Purves in liferent and her children in fee was claimed by—(1) The surviving residuary legatees of the half of the residue liferented by Mrs Moffat. (2) The next of kin of Mrs Purves. (3) The next of kin of the testatrix, who claimed the share as undisposed of by her trust-deed, and therefore falling to be dealt with as intestate succession of the testatrix.

J. Marshall and Maclean for the *First* Parties.

J. M'Laren for the *Second* Parties.

Lee for the *Third* Parties.

At advising—

Lord President—The general intentions of the testatrix with regard to the disposal of the residue of her estate are easily understood. She intended to divide it into two halves, one for a family of Grieves, and the other for a family of Moffats. There is no difficulty about the half given to the Grieves. Mrs Grieve, the mother, is to have the liferent, and upon her death the fee is to be divided among her children alive at the death of the testatrix. The children, both sons and daughters, are all made fiars. But with respect to the half which is given to the Moffats, there is this peculiarity, that the testatrix has restricted the share of the two daughters to a liferent, and given the fee to their children. This is how the question arises. I cannot think that by restricting the daughters' shares to a liferent the testatrix intended to carry away from the Moffats any part of the residue destined for them, or, in other words, to leave any part of it in intestacy. She may have done this without intending it, but the presumption is very strong against her intending to do so. We must endeavour to construe the clause so as not to land in intestacy. The children of Mrs Moffat, among whom the share liferented by their mother is to be divided, are to be the children who survive the testatrix. The period of division is the death of the liferenter. The rule of division is equal shares, not specified by number. The effect of the directions is that the number of shares into which this half is to be divided depends on the condition of matters when the trustees proceed to exercise their office. *Prima facie*, it must be a number of shares corresponding with the number of children who survive the testatrix. As all the children survived the testatrix, the number of shares is apparently five. When the period of division arrives, the trustees find themselves in this position. Mrs Purves survived the testatrix, but no right ever vested in her. She was confined to a bare liferent, which could only commence at her mother's death. She predeceased her mother, so that she never had anything vested in her. The trustees will consequently act in accordance with the intention of the testatrix, if they divide this half of the residue among the children of Mrs Moffat, excluding Mrs Purves. It is quite plain that the Moffat family are intended to get the half. It is a *casus improvisus* (though that is a somewhat perilous phrase to use where the heirs *ab intestato* are in the field), in the sense that the particular thing which has occurred has not been made matter of special direction. The question then is, whether in the general scope of the settlement there is not enough to guide the trustees. This view excludes intestacy. As to the next of kin of Mrs Purves, their case is quite hopeless; she never had anything vested in her.

The other Judges concurred.

The Court decided the following question in the affirmative:—

"Whether, under the said deed, the parties of the first part are entitled, as surviving residuary legatees of one-half of the residue of the trust-estate of the deceased Mrs Margaret White or Wilson, liferented by the late Mrs Mary Wilson or Moffat, to that share of said

residue destined by Mrs Wilson's trust-deed to Mrs Elizabeth Moffat or Purves in liferent, for her liferent use allenarly, and to her children in fee?"

Agents for Mrs Ann Moffat or Roper, &c.,—Duncan, Dewar, & Black, W.S.

Agent for Mrs Purves' Representatives—John Rutherfurd, W.S.

Agents for John White, &c. (Mrs Wilson's next of kin)—H. W. Cornillon, S.S.C.

Thursday, July 13.

SECOND DIVISION.

PITTS *v.* WATSON.

Obligation—Agent. A business was carried on by deputy, who was paid by a weekly salary, and had the full control both of ordering the goods and selling them—*held* that the deputy, after the principal's bankruptcy, was personally liable for goods ordered by him for the business, whether he ordered them in the name of the principal or his own.

This was an action at the instance of Edward Kemble Pitts, glaziers' patent diamond manufacturer, London, against Robert Boyle Watson, of No. 165 New City Road, Glasgow, for payment of £29, 10s., being the amount of an account for diamonds furnished by the pursuer to the defender. The defender admitted that he had ordered and received the goods in question, but pleaded that they had been supplied solely on the credit of the Nailsea Glass Company, now bankrupt, but formerly carrying on business at Bristol, for whom the defender acted as agent in Glasgow.

A proof having been led, the Lord Ordinary (ORMIDALE) decerned against the defender, on the ground that the diamonds had been furnished to him on his individual account and credit, and not as agent for the Nailsea Glass Company. From the proof it appeared that the defender had, when in London at the beginning of 1868, ordered the diamonds, partly for his son and partly for himself. At this time he had charge of the Glasgow warehouse of the Nailsea Glass Company; was paid by salary; and rendered to the Company weekly or monthly accounts of the sales. It appeared, however, that while the defender had full power to buy diamonds and other articles in the line of the Company's business, the Company had no means of ascertaining the purchases made on their account, except from the receipts sent in by the defender of the accounts settled by him. There was no proof, beyond the defender's own statement, that the diamonds in question had been sold on the Company's account.

The defender reclaimed.

R. V. CAMPBELL for him.

BLACK and BEGG for the respondent.

The Court unanimously adhered, on the ground that the defender had not acted *factorio nomine*, and indicated opinions that, even if the goods had in the pursuer's knowledge been ordered on the Company's account, the exceptional character of the defender's agency would have rendered him personally liable. He was clearly the *dominus* of the business, as he ordered the goods and sold them on his own responsibility. This was not an ordinary case of agency. The goods were no doubt sent with an invoice to the defender, and it was his duty to show that they were not sent to him on his own account, and he had failed to do so.

Agents for the Pursuer—Morton, Whitehead, & Greig, W.S.

Agent for the Defender—J. Knox Crawford, S.S.C.

Friday, July 14.

FIRST DIVISION.

COUNTESS OF CROMERTIE, AND MACKENZIE OF KILCOY *v.* THE LORD ADVOCATE.

Teinds—Titular—Bishops' Teinds — Crown—Error—Condictio Indebiti — *Repetition — Interest.* Teinds had been erroneously regarded as bishops' teinds, and on that belief had been paid to the Crown for a series of years. In an action of declarator and repetition at the instance of the true titular and of the heritor jointly, the Crown allowed decree to pass in terms of the declaratory conclusions, and agreed to repay to the heritor the principal sum erroneously paid by him. *Held* (altering judgment of Lord Gifford, and *diss.* Lord Deas) that the pursuers were not entitled to interest on the said sums, except after the date of formal demand for repayment.

Till recently, it was believed that the teinds of the lands of Drumderfit and Wester Kessoch, in the parish of Kilmuir Wester, and county of Ross, belonging to Charles Mackenzie, Esq. of Kilcoy, were bishops' teinds, and consequently that the surplus teinds belonged to the Crown. In 1854 the Crown demanded payment of the surplus teinds of these lands from Mr Mackenzie, and threatened legal proceedings. In consequence, arrears from 1839 were paid. Mr Mackenzie continued to pay the surplus teinds to the Crown down to 1864.

In 1864 the Duchess of Sutherland and Countess of Cromertie discovered that the teinds in question were not bishops' teinds, and that the Crown had no right whatever to them; but, on the contrary, that they belonged to her (the Countess), as patron of the parish of Wester Kilmuir. It appeared that by charter of erection and donation, dated 3d February 1588, which narrates that the teinds of the church of Kilmuir belonged to the Dean of the diocese of Ross, James VI. gifted the patronage of the church of Kilmuir Wester to Sir William Keith. The teinds were by this charter reserved to the then Dean of Ross for his life, and provided to the minister of the parish after his death. The patronage ultimately came into the Cromertie family, who acquired right to the teinds by the Act 1690, c. 23. In the early part of this century a dispute arose between the Crown and the Laird of Cromertie in regard to the patronage of the church of Kilmuir Wester. After a lengthened litigation the right of the Cromertie family to the patronage was sustained by judgment of the House of Lords, dated 27th July 1814. Although these proceedings disclosed the true state of the titularity, for some inexplicable reason it seemed to be taken for granted by all parties that the teinds belonged to the Crown.

On discovering her rights the Countess of Cromertie intimated them to Mr Mackenzie of Kilcoy, who, in consequence, refused to pay any more surplus teinds to the Crown. A formal demand was made upon the Crown on 12th March 1868, and on 26th April 1870 the present action