LORD ARDMILLAN — If there were no defence such as has been stated in this action, no dispute could have been raised. In this case the legal question is raised entirely by the defender's plea. He says "I don't dispute that my lands are thirled to your mill, but it is only to the extent of the corn actually ground at the mill." The pursuer, on the other hand, says that he is entitled to thirlage dues upon *omnia grana crescentia*.

Now I feel very strongly that the claim of the pursuer is one for which the law has no favour, and it cannot be given effect to without strong proof, and the milder form of thirl must be preferred unless there is very good ground for setting up the heavier. I admit the pursuer has strong ground on the decreet-arbitral, and a very good foundation; and, in the second place, I think a good aid to this is the fact that the titles of the other side are susceptible of a reading which by no means necessarily supports the defender's contention.

That being the case, mainly upon the composite view of the evidence which I have indicated, I think the miller has, on the whole, discharged himself of the heavy burden of proof which unquestionably lay upon him.

LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:—

"Recall the interlocutor of the Sheriff-Substitute of 12th July 1872: Find that the pursuer (appellant) is tenant of the Mill of Snaid under a tack for nineteen years from Whitsunday 1866: Find that the defender's (respondent's) lands are thirled to the said mill: Find that for a period past the memory of man the defender has payed multures to the tenant of the said mill upon all grain grown on the ground of the said lands, excepting seed and horse corn, at the rate of 1-25th grain of multure, besides 1-32d grain as knaveship, or has paid a sum of money annually as a commutation of the said rates on all grain grown on the said lands: Find that the defender has refused to pay any multures for the years 1866, 1867, 1868, 1869, and 1870; Find that the quantities of grain on which multures at the above rate are payable are, for the year 1866, 135 bushels of oats; for the year 1867, 70 bushels of barley and 160 bushels of oats; for the year 1868, 9 bushels of barley and 219 bushels of oats; for the year 1869, 10 bushels of barley and 16 bushels of oats; and for the year 1870, 328 bushels of oats: Find that the value in money of the 1-25th and 1-32d of said quantities of barley and oats, according to the fiars prices of the respective years mentioned, would have been, for crop 1866, £1, 10s. 5¾d.; for crop 1867, £3, 2s. 10¾d.; for crop 1868, £2, 15s. 6¾d.; for crop 1869, 6s. 0½d.; and for crop 1870, £3, 5s. 2¾d.; amounting in all to the sum of £11, 0s. 2½d. sterling: Therefore repel the defences, and decern against the defender for payment to the pursuer of the said sum of £11. 0s. 2½d. sterling, with interest as libelled: Find the defender liable in expenses, both in this Court and in the inferior Court; allow accounts thereof to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for Appellant — Watson and Balfour. Agents—Tawse & Bonar, W.S.

Counsel for Respondent — Solicitor-General (Clark) and M'Kie. Agents — Scott, Bruce, & Glover, W.S.

Friday, March 14.

FIRST DIVISION.

[Lord Jerviswoode, Ordinary.

FRASER *v.* LORD LOVAT.

Entailed Estate—Relief — Executry—Vouching of Accounts.

Circumstances in which an executor was *held* entitled to relief against an entailed estate for various accounts paid by him as executor.

In this case there were conjoined actions of declarator and relief, whereby the pursuer, Mr Fraser of Abertarff, sought to have it declared that certain debts alleged to have been paid by him as representing his grandfather were to be charged as burdens on the entailed estate of Abertarff, to the relief of the executry. The claim arose under a clause in a deed of 1808, by which the estate was declared to be subject to the burden of payment "of all my just and lawful debts due and addebted, or which may be due or addebted, by me at my death." The questions now under consideration related to the proofs of the debts being (1) due at the death of the entailer in 1815; (2) paid by or on behalf of the pursuer. A report was made by Mr Gillies Smith, C.A., on a remit from Lord Jerviswoode, and both parties raised various objections to it, chiefly on questions of vouching.

Lord Jerviswoode pronounced the following interlocutors:—

"*Edinburgh, 9th January* 1872.—The Lord Ordinary having heard counsel on the objections to the Accountant's Report, and on the whole cause, and having made avizandum with the debate, productions, and whole process, and considered the same—Finds, 1st, That the several sums, amounting in all to £7043, 8s. 2²d., as reported under Head I. of the Report, are established as debts of the deceased Honourable Archibald Fraser of Lovat, due by him at the date of his death, and paid by or on behalf of the pursuer, as set forth in the Report: 2d, That the further sum of £82, 12s. 3d., as reported under Head II. of the Report, is also sufficiently vouched as there stated; 3d, That the sums forming the items stated in Head III. of the Report are debts which were incumbent on the said deceased at his death (though not then paid), to the amount of £4333, 11s. 3½d., and that to said extent the said debts are to be held as paid by or on behalf of the pursuer; 4th, That the several items contained in Head IV. of the Report, and of which the sum of £1708, 5s. 5⁶d. is composed, are sufficiently instructed as debts of the deceased, and as paid by or on behalf of the pursuer; 5th, That the debt stated as paid to Sir William Fraser, Bart., and amounting, with interest to 11th November 1815, to £2438, 2s. 7d., is to be in like manner dealt with as due by the deceased at the date of his death, and paid by or on behalf of the pursuer; 6th, That the several items falling under the 6th branch of said Head IV. of the Re-

port, and amounting in all to the sum of £3045, 16s. 0⁶d., are also to be held as debts of the deceased, due by him at the date of his death, and paid by or on behalf of the pursuer; 7th, That the item forming the 7th branch of said Head IV. of the Report is also to be dealt with as a debt due by the deceased at the date of his death, and paid by or on behalf of the pursuer; 8th, Further, Finds that the items forming the 8th branch of said Head IV. of the Report are not proved as debts due by the deceased at the date of his death, and paid by or on behalf of the pursuer; 9th, That the sum of £2241, 11s. 3d. falling under the 9th branch of said Head IV. of the Report, is to be dealt with as a debt of the deceased due at the date of his death, and paid by or on behalf of the pursuer to the extent of £292, 16s. 3d., as brought out on page 9 of the printed Report; and 10th, That the several sums referred to and reported by the accountant under Head V. of his Report, as amounting in all to £13,325, 12s. 4⁴d., must be disallowed: And with reference to the preceding Findings, remits back to the accountant, to remodel his Report, having regard thereto; reserving meanwhile all matters of expenses, in so far as the same remain undisposed of.

"*Note.*—The Lord Ordinary would have felt considerable satisfaction had he been able to come to conclusions here on some of the matters which still remain at issue between the parties; but it has appeared to him, after consideration, that he cannot, in the present condition of the process, with safety go farther. The grounds on which the judgment so far rests do not, as the Lord Ordinary thinks, call for special notice or explanation on his part, as the parties are fully instructed in relation to the views for which they respectively contend, and on the consideration of which the Court will doubtless be moved by them to enter."

"19*th January* 1872.—The Lord Ordinary, on the motion of the pursuer, grants leave to him to reclaim against the preceding interlocutor of 9th January current.

"*Note.*—The Lord Ordinary thinks it right, while he is of opinion the pursuer is warranted in moving at this stage of the cause for leave to reclaim, to take the opportunity of mentioning that an error has been committed on his own part in framing the interlocutor of 9th current, in so far as he omits from the 4th finding therein the sums forming the 1st, 2nd, and 3d branches of Head IV. of the Accountant's Report, and amounting together to £883, 10s. 3d., and that, according to the Lord Ordinary's view, the said finding ought to have been expressed thus—'4th, That the several items contained in Head IV. of the Report, and of which the sums of £883, 10s. 3d. and £1708, 5s. 5⁵d. are composed, are sufficiently instructed as debts of the deceased, and as paid by or on behalf of the pursuer.' "

The pursuer reclaimed.

At advising—

Lord Ardmillan—In this very important, complicated, and unusual action, embracing an extensive accounting, and involving several questions of difficulty, it is necessary to ascertain correctly, and to bear in mind steadily, the true position of the parties, and the peculiar relations and obligations out of which the questions to be disposed of have arisen.

This is not an ordinary case of competing right or disputed liability between heir and executor. The principles usually applicable to the ascertainment of free executry, or to the legal incidence of debts, do not apply here. This is a very peculiar case, depending on the construction and application of most singular and anomalous provisions in the deeds of the Honourable Archibald Fraser of Lovat in 1808 and 1812. The import of these deeds has now been judicially decided in this Court and in the House of Lords. This Archibald Fraser, whom we call Lovat, and who died on 8th December 1815, conveyed in July 1813 all his property, except what was entailed as aftermentioned, to the pursuer Archibald T. Frederick Fraser, now of Abertarff, whom he appointed his sole executor. He executed a deed of entail of the estate of Abertarff, and he therein imposed on the lands of Abertarff, entailed as directed, the burden, in relief of his executry, of payment of all his "just and lawful debts due and addebted by him at his death." If the deed had stopped there, the intention of Lovat that all his debts should be charged on the entailed estate would have been clear. But he removes all possible doubt on that point, for he adds the proviso that said debts should in nowise affect or diminish his executry, or other funds, property, and effects. Now, nothing can be clearer than this provision. The whole executry free from, and not to be diminished by, all charge of debt, is given to the pursuer, and at the same time all the debts of Lovat are to be planted or charged upon the entailed estate.

Under these very singular provisions the pursuer found himself sole executor, with right to the whole executry estate, and at the same time heir in possession of the entailed estate, with a right to obtain relief of the executry to the full extent of all Lovat's debts at his death, by charging them, when paid by him, as burdens upon the entailed estate.

It is very obvious that the ordinary rules in regard to the interests of heir and executor are not in such circumstances at all applicable. The executor was of course liable to the creditors, and bound to pay the debts of Lovat. But he had a right to complete relief; and he was, to the full extent of all his payments to Lovat's creditors of Lovat's debts, entitled to charge the same on the entailed estate, so that the executry should not be diminished.

His position was thus a very peculiar one. He had an anomalous and unusual right of relief; but there rested on him a corresponding duty. He was bound to be cautious in the recognition and payment of debts, and of course he was bound to act in entire good faith towards the heirs of entail, whose interests he affected by placing burdens on the entailed estate. There is no reason to doubt that he acted in good faith. But it is for him to instruct the existence of the debts and the fact of payment. Still, if he paid what were truly debts of Lovat's at the date of his death, he is entitled to the relief, and the true question is, Whether the payments by the pursuer have been instructed, and whether the debts which he paid have been proved to be debts of Lovat, by evidence reasonable and sufficient under the circumstances?

There are a few points of general importance which we must consider in dealing with the evidence applicable to the debts alleged to have been paid.

1. *Mr Thomson's Report.*—This report was prepared under a remit from the Court in 1822-23, in

a process of multiplepoinding, the object of which was to ascertain the debts of Lovat, and to investigate the administration and transactions of the Honourable Mrs Fraser, his widow. She was one of Lovat's trustees, and was curatrix for the young Abertarff, then a minor, and she was paying, or professing to pay, Lovat's debts, on the part and for behoof of the pursuer, as Lovat's executor. The report of Mr Thomson was considered and approved of by the Court; and it appears to have been carefully framed. The question arises,—Is it to any extent admissible as evidence in this action? We are of opinion that it is not admissible as of itself conclusive evidence against the defender Lord Lovat, who was not a party to the multiplepoinding. It is not to be received as sufficient *per se* to instruct the payment by the executor of a debt of Lovat's. Standing alone, it is not a sufficient voucher. But where there is, apart from the report, some reasonable evidence of payment by the pursuer, or by Mrs Fraser for the pursuer, of a debt of Lovat's, and where that payment is stated in Mr Thomson's report to have been sufficiently instructed to his satisfaction, then we are not prepared to exclude the report altogether. The accountant Mr Thomson may have received explanations, of which, after the lapse of years, we cannot have the benefit.

It is understood that this is the view of the report which the Lord Ordinary has taken.

2. *Mr Girvan's Report.*—This report is in very much the same position. It relates to the transactions of Mr Peter Anderson, who was one of Lovat's trustees, and agent for the trustees. Standing alone, it is not conclusive as a voucher. But it is not to be altogether excluded, and may be taken into consideration as corroborative evidence wherever there is any reasonable proof of Anderson's payment, on behalf of the executor, of any of Lovat's debts.

3. *Triennial Prescription.*—The question whether the executor was bound to propone the plea of triennial prescription as a defence against the demand for payment by a creditor of Lovat, must be answered differently, according to the position of the alleged debts.

1st, When Mrs Fraser, who during Lovat's life had been *preposita negotiis*, and who must be presumed to have known something of his affairs, and about these claims, paid the debt herself, she must be presumed to have paid what she knew to be due; and the executor in these cases was not bound to plead prescription.

2d. Where the years of triennial prescription had run before the death of Lovat, and the debt was paid after Lovat's death by the pursuer or by Anderson, then the plea of prescription ought to have been proponed by the executor.

3d. Where an account was current up to the date of Lovat's death, and three years had elapsed since the death before payment, we are of opinion that the executor, knowing that he had not himself made payment of the debt owing upon an account which was current at the death, and of which payment during the currency of the account is not presumed, was not bound in that case to plead prescription.

4th. Where there was no account current at the date of the death of Lovat, but where part of the period of prescription had run during Lovat's life, so that payment before Lovat's death was reasonably possible, and therefore fairly presumable, we are of opinion that the executor ought to have stated the plea of prescription.

In considering this question of the duty of the executor to plead prescription, where he believed the debt to be due, it is, however, right to bear in mind the position in which he stood; for it has been decided in the House of Lords that the costs incurred by the executor in defending the executry against creditors cannot be charged by him on the entailed estate. If so, it appears rather hard to lay upon the executor the obligation, not only to litigate with the creditors at his own cost, but to propone for judicial determination, to be discussed at his own cost, a plea which he personally knew to be contrary to truth and justice. Therefore, we think that debts paid by Mrs Fraser should be sustained, though prescription might have been pleaded, and that, when the years of prescription had run after Lovat's death on an account current at Lovat's death, the pursuer was not bound to plead prescription, but may take credit for the debt which he paid.

4. *Stamps.*—There are many items for which the executor takes credit which do not require written vouchers. Servants' wages, labourers' allowances, and such like, and also the fee to Dr Nicol, a physician, require no such voucher. Where vouchers are necessary, they must be stamped. The Court cannot receive as a voucher any document without the appropriate stamp. The attempt to escape the objection of the want of stamp by urging that the writing is only used for a collateral purpose, cannot succeed. If it is not used as a voucher, it does not prove the payment. If it is used as a voucher, it must be stamped.

5. *Compensation.*—Dealing with this point as involving a question of construction and a question of intention of the deeds, we are of opinion that, where Lovat was debtor in one sum, and creditor in another sum, separate and distinct, in the course of transactions with the same party, no plea on the principle of compensation is here applicable. It is excluded by the deed which conferred on the pursuer the right to relief from the debts and at the same time the right to the executry. The debt due to Lovat formed part of the executry estate, and that estate was conferred on the pursuer. The debt due by Lovat to a creditor was payable by the executor, but on being paid it formed part of the burden which, according to the directions of Lovat, the executor was entitled to lay on the entailed estate, and it was so directed to be laid on the entailed estate, for the purpose of protecting from diminution the executry estate, or the other funds of Lovat. Therefore compensation,—the setting off the one debt against the other, or the striking of a balance between the two separate debts—does not under these circumstances apply. We think it is excluded by the terms of the deeds—giving to them a sound construction; and this view is supported by a careful consideration of the judgment of the House of Lords.

If this is correct, as we think it is, the principle applies to several cases; for instance, it applies to the case of Anderson, solicitor, Inverness, except in so far as it relates to his proper factorial account; and it applies also to the debt to the Bank of Scotland. But it does not apply to a factorial account.

The costs of a factor in gathering rents for Lovat, or recovering a special debt for Lovat, stand in a different position. These costs do not consti-

tute a separate debt against Lovat. They must be viewed in connection with the estate and the rent factorially managed; and must form a deduction from the sum recovered; and the true asset brought in is the sum recovered under that deduction.

The item of debt said to be due to Mr Robert Dundas, W.S., is in a peculiar position. There is only one account here kept by Mr Dundas. It does not appear to have been rendered during the life of Lovat. But we have it as an account current,—a debit and credit account—from 18th November 1814 to 11th November 1815, and again continued till the date of Lovat's death. The whole transactions between Lovat and Mr R. Dundas appear to be entered in this account. All the sums due by Lovat appear on one side; all the sums due to Lovat appear on the other side. There is not a separate account for cash transactions, and another for law business, or general agency. All are kept together in one book and one account. and on the face of that account a balance of £1755, 12s. 6d. is brought out as due by Mr Dundas on 11th November 1815, after giving him credit for the sum of £7745, 7s. 11d., due to him by Lovat. Large payments and remittances, appearing on the account, reduced and ultimately extinguished this debt, and turned the balance the other way. It is now proposed to treat this sum of £7745, 7s. 11d. as a debt due by Lovat, and to charge it on the entailed estate. It appears to the Court that this cannot be sustained. There are not here two separate, or even separable, debts. All are within one account and one series of transactions, out of which a balance in favour of Lovat is ultimately drawn. To take all the items on one side of the account, omitting the items on the other side, and to present the sum of these items as a debt due by Lovat, when they were more than met and balanced by the items on the other side of the account, is a proceeding which cannot be sanctioned. It is not just or reasonable. It does not fall within the scope or meaning of the principle, which, on construction of the deeds, we have applied to two separate debts.

6. *Drawback.*—The pursuer is, in our opinion, entitled to credit for whatever sum he actually paid for a debt of Lovat, with interest from the date when he paid it. Till payment is made he can claim no interest. Therefore we think that the sums so paid and taken credit for by the pursuer are not subject to a deduction for discount back to the date of Lovat's death.

7. *Post-dated Vouchers.*—Where a receipt, discharge, or obligation, otherwise unobjectionable, is produced as evidence of payment, it is not a good objection that the writing bears a date posterior, perhaps long posterior, to the date of payment. If the person signing the document is entitled to acknowledge receipt, and to discharge the debt, that is sufficient. There are several items to which this remark is applicable.

8. *Funeral Charges.*—In the question with which we are dealing, the funeral charges must be considered as debts payable by the executor as debts of the deceased. These are in law preferable debts of the deceased, and in the same position as deathbed expenses, of which they may be considered the final complement. Assuming payment to be instructed, we think that funeral expenses are debts which under these deeds can be charged on the entailed estate.

9. *Missing Documents.*—We have no doubt that under the circumstances these documents must be held as lost while in the hands or charge of the defender or his agents; and that the secondary or inferior evidence, which has been produced instead of the lost documents, should receive effect. The defender cannot be allowed now to lead proof in order to instruct that the writings lost while in charge of his own agents were insufficient vouchers.

10. *Meliorations.*—The claims of the pursuer on this head are presented under varied circumstances. There can be no inflexible rule. Where the two facts—the fact that meliorations were made for which Lovat was bound to pay, and the fact that for the true value of these meliorations the pursuer, as executor, has paid—have been instructed, that seems sufficient to support the claim, even though payment was not immediately prestable at the date of Lovat's death.

11. *Forehand Rents.*—We are disposed to think that the word "debt," as used in the deeds before us, is not correctly applicable to this matter. The forehand or anticipated rent was a fruit gathered by Lovat on the chance of survivance. If he survived the proper season for fruit, it was his own. If he did not survive that period, the sum prematurely drawn was not in his hands as a proper debt, but drawn on a contingency—on a hope which was not fulfilled. It was rather in his temporary custody—held in trust for the true owner.

12. *Merkinch Rents.*—Lovat was bound, as sub-tenant under a sub-tack to him by Anderson and Kinloch, tacksmen of Merkinch, to pay £78, 15s. a-year for 293 years, from 5th March 1811. The principal tack was for 300 years by Fraser of Torbreck in favour of Anderson and Kinloch, from 1804.

Of this sub-rent, £292, 16s. 3d. was due at the date of the death of Lovat. There is no doubt that that sum was a debt of Lovat. It was paid by the pursuer. It seems to be a sum which, to that extent, is properly charged on the entailed estate; and it has been so found, and we think rightly found, by the accountant and by the Lord Ordinary.

The pursuer, besides paying the sum due at Lovat's death, paid this sub-rent from Whitsunday 1816 to Martinmas 1830, and the sum so paid during that period, deducting £10 a-year drawn from the subjects, was £996, 17s. 6d.

In 1832 Anderson and Kinloch, the principal tacksmen, having failed to pay rent, the proprietor, Fraser of Torbreck, raised action against the pursuer, and got decree for £137, 10s., which was paid.

An arrangement was made by the pursuer with Mrs Kinloch, widow of the tacksman, by which, for an annuity for her life of £50 a-year, the long subtack was renounced. She died in 1848. The sum paid for her annuity was £775.

The question here raised is, Whether an obligation to pay a rent for this heritable subject for 293 years can be considered as a debt of Lovat's due at his death, under the meaning of this deed?

The words of Lovat's deed are very wide, and the meaning of the deed has been already judicially recognised. The pursuer's relief by charging the landed estate is commensurate with the actual amount of Lovat's debts paid by the pursuer as executor. This debt was paid. But, then, was it a debt due by Lovat which the pursuer, as his executor, was bound to pay? Unless it was, it cannot be charged against the entailed estate.

If the tack on which this rent was due passed to the pursuer under the general conveyance, the ob-

ligation to pay rent would be the counterpart of the possession. If the tack had been valuable, the pursuer—not as executor, but as succeeding to the tack—must have enjoyed the possession and paid the rent. Therefore the rent is a condition of the possession rather than a debt exigible from the executor. Whoever succeeded to the tack must have paid the rent. The pursuer succeeded to the tack, but not as executor—as tacksman the rent was due. It seems to have been an unprofitable lease — indeed, a losing transaction. Had it been otherwise, the annual returns would have been under deduction of the rents. We are of opinion that, except to the extent of the sum due for rents at the date of Lovat's death, being £292, 16s. 3d., this claim in respect of the Merkinch rents, as due annually for 293 years, cannot be sustained as a charge against the entailed estate.

The amount of the whole items of debt which we consider to be instructed by the pursuer as debts of Lovat at his death, and to be proved to have been paid by or for the pursuer, and to be chargeable on the entailed estate, is £17,750, 14s. 6⁶d., and that sum has been allowed accordingly, with interest from the respective dates of payment.

A state has been directed to be put into process explanatory of this judgment, shewing the pecuniary result of the findings in the interlocutor of the Court.

The whole other claims by the pursuer have been disallowed.

The Court have derived most valuable assistance from the reports and states prepared by the accountant Mr Gillies Smith, in this elaborate and complicated accounting.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Recall the said interlocutor, and, *primo*, Find that, *first*, the sums stated in article first of the state No. 1217 of process, prepared by the Accountant, and which the Lords have appointed by interlocutor of this date to form part of the process, and amounting, the said sums, to £9655, 0s. 6⁸d.; *second*, the sums stated in article second of the said state, and amounting to £275, 3s. 11⁶d.; *third*, the sums stated in article third of the said state, and amounting to £181, 12s. 5⁶d.; *fourth*, the sum of £10, 10s., stated in the fourth article of the said state, being a fee to Dr Nicol, physician, Inverness; *fifth*, the sums stated in the fifth article of the said state, and amounting to £545, 11s. 6⁶d.; *sixth*, the sums stated in the sixth article of the said state, and amounting to £32, 12s. 8d.; *seventh*, the sums stated in the seventh article of the said state, and amounting to £1779, 6s. 8⁶d.; *eighth*, the sums stated in the eighth article of the said state, and amounting to £4978, 0s. 5d.; *ninth*, the sum of £292, 16s. 3d., stated in the ninth article of the said state—have all, as respectively above specified, been instructed to be debts of the deceased Honourable Archibald Fraser of Lovat, due by him at the date of his death, and paid by or on behalf of the pursuer as executor of the said Lord Lovat: *secundo*, Find that the said sums, amounting in all, as appears on the said state, to £17,750, 14s. 6⁸d., being debts of the said deceased Honourable Archibald Fraser of Lovat, and paid by the pursuer as his executor, with interest on the said sums from the respective dates of payment thereof by the said pursuer, are sums which the pursuer is entitled to charge against the entailed estate, in terms of the deeds of the said Honourable Archibald Fraser: *tertio*, Find that the other claims by the pursuer, and the other sums alleged by him to be debts of Lovat paid by him as executor, have not been sufficiently instructed, and therefore disallow the same: With these findings, remit the cause to Lord Shand in place of Lord Jerviswoode, as Lord Ordinary: Find the pursuer and defenders conjunctly and severally liable in payment of the expense of the reports and states by the Accountant: *Quoad ultra* reserve the question of expenses."

Counsel for Pursuer—Millar Q.C., and Strachan. Agents—Macbean & Malloch, W.S.

Counsel for Defender—Balfour and Pearson. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Tuesday, March 18.

FIRST DIVISION.

SPECIAL CASE—JAMES MERRY AND ROGER DUKE AND OTHERS.

Annuity — Apportionment — Legacy — Discretion of Trustees.

In a case where a truster left an annuity to his sister "during all the days and years of her life," and a legacy "for their liferent alimentary use allenarly" to each of her daughters, to be paid when the trustees should find it "suitable and convenient,"—*held*—(1) that though the sister died during the currency of a term her representatives were not entitled to any share of that term's annuity; (2) that the trustees were not bound to make immediate payment of the capital of the legacies.

This was a Special Case presented for the opinion of the Court by James Merry of Belladrum, M.P., and others, trustees of the late Alexander Cuningham of Craigends, of the first part, and Roger Duke and others, of the second part.

The questions submitted to the Court were (1) Whether Mrs Duke's annuity was payable in advance, from the 11th November 1866? or, Whether a proportional part is due for the period from 15th May 1871 till 27th October 1871, the date of her death? (2) Whether Mrs Duke's daughters are entitled to payment of the lagacies to them at once, on their own receipt and discharge? or, Whether the trustees are bound or entitled to continue to hold the capital?

The parties of the second part contend (1) that Mrs Duke having died during the currency of the term from Whitsunday to Martinmas 1871, her representatives are entitled to a proportionate part of the annuity which would have been payable to her at the term of Martinmas had she survived till that term; and (2) that the female legatees are each entitled to payment of the legacy of £1000 at once, on her own receipt and discharge, and that the trustees are bound to make immediate payment thereof.

The parties of the first part contend (1) that