the fishings, and had there been complete eviction the matter would have been a very different one. But that is not so here—indeed the facts are just the opposite way. The Crown's title has been found to be perfect. All the authorities, which may be found in Hunter on Landlord and Tenaut, say, that only on eviction from any defect in the landlord's title can the tenant have any claim against the landlord. The failure here arose from a miscarriage of justice and not from any fault of the Crown. I think there could not be eviction unless the title of the landlord had been impugned and found defective.

However good in one sense this claim may be, I do not think it can be maintained in Court.

Lord Gifford—I sympathise much with Mr Stephen. We are, however, bound by the rule of law. Two grounds there are on which relief might have been claimed. The first of these is agreement or implied agreement. But of this there is no sign; on the contrary, the Crown warned the pursuer to expect no relief. The second ground of relief is at common law. Is there any relief in such a case as between landlord and tenant? No doubt the landlord's title was assailed, but it was assailed in vain. This is not a claim against the Crown for not giving what it ought to have given, or for warranting what it could not maintain for its tenant.

On the question of the sum recovered against Mr Stephen in the Small Debt Court I have more difficulty. Suppose the case had been one of interdict and not of an award, I should have been inclined to stretch the law so as to cover it, and even possibly to have held it an eviction, but there is no ground for that in the present case.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Balfour—Wallace. Agent—A. Morison, S.S.C.

Counsel for Defender (Respondent)—Solicitor-General (Macdonald)—Ivory. Agent—D. Beith, W.S.

Tuesday, December 3.

SECOND DIVISION.

SPECIAL CASE—MACKAY'S TRUSTEES.

Trust—Postponed Period of Division—Annuity—Vesting—Winding-up of Trust where Annuity Secured.

A truster directed his trustees to invest his means, and "from the free annual proceeds thereof" to pay a certain annuity; further, upon the death of the annuitant, to "divide my whole means and estate into seven shares," to be paid to certain beneficiaries, who were named. There was a substitution in the event (which did not happen) of any of the beneficiaries predeceasing the testator. The annuity did not exhaust the income. *Held* that, as the estate vested *a morte testatoris*, the sanction of the Court might be given to an arrangement between the beneficiaries and the annuitant under which the estate was to be divided on satisfactory security being given to the annuitant

John Mackay died on 18th April 1875 leaving a trust-settlement, in which, after certain other provisions, which had all been implemented, he directed his trustees "to invest the entire balance of my means and estate in such security as they may see best, in their own names, as my trustees, and to pay from the free annual proceeds thereof to my sister Mrs Sinclair, presently residing in Glasgow, the sum of £50 sterling per annum, payable half-yearly and in advance; and on the death of my said sister Ann Sinclair, my said trustees shall divide my whole means and estate into seven shares of equal amount," and pay these to certain named residuary legatees. There was also a substitution, but it was only to operate in the event of any of the residuary legatees predeceasing the testator, which event did not occur. The residuary legatees proposed that the estate should be divided at once, the annuitant for her interest consenting to this being done "upon the understanding that the trustees provide for the annuity of £50 bequeathed to me by my brother under his settlement either by purchasing an annuity from some responsible assurance company, to be approved of by me, or by retaining a sum in their hands sufficient to meet my annuity."

The trustees presented a Special Case to the Court, in which they asked an answer to the following question:—"Are the trustees entitled during the lifetime of the said Mrs Ann Mackay or Sinclair, the annuitant, and with her concurrence and consent, on an annuity being provided for her as above mentioned, to divide the remainder of the estate among the beneficiaries entitled to share in it after her death?"

Argued for the second and third parties, who were respectively the annuitant and beneficiaries,—The fund had vested; and the fact that the death of the annuitant was made the period of division was not enough to prevent the Court's anticipating the period if it was not inconsistent with the testator's intentions.

Argued for the trustees—They did not dispute the vesting. There seemed no reason why the truster had postponed the term of payment save that of making the annuity secure. And the direction to divide at that specified postponed time was clear. The case of *Jack* much resembled this.

Authorities—*Jack and Others*, November 5, 1874, 12 Scot. Law Rep. 42; *White's Trustees* v. *Whyte*, 4 Rettie 786; *Kippen* v. *Kippen's Trustees*, November 24, 1871, 10 Macph. 134.; *Pretty* v. *Newbigging*, March 1, 1854, 16 D. 667.

At advising—

Lord Justice-Clerk—In this case the parties are substantially agreed, and I do not see why the authority of the Court should not be interponed and sanction given to the proposed arrangement. In general when an annuitant or liferenter is *sui juris*, and where there is no limitation upon his or her right (as, for example, would be the case where it is made alimentary), the annuitant or liferenter together with the residuary legatee may come to any agreement as to the capital fund. I think therefore that where, as in the present case, the result is to remove an intermediate burden with the consent of the person in whose favour it is created, a division may at once be made. It is, however, quite a different matter where the person in right of the burden or incumbrance is in-

capable of acting independently or is put under restrictions by the terms of the gift or conveyance.

On the whole, I think this question should be answered in the affirmative.

LORD ORMIDALE concurred.

LORD GIFFORD—The question here, I think, really turns upon whether the beneficiary's interest in the residue has vested *a morte testatoris*, for if that be so the beneficiary is entitled to avail himself of the fund at once, provided all intermediate interests have been duly provided for. I think that the residuary legatees have had a vested right conferred on them in the present instance, and accordingly I agree with your Lordships in the decision arrived at.

The Court therefore answered the question in the affirmative.

Counsel for First Parties — Balfour — Mackintosh. Agent—John Gill, S.S.C.

Counsel for Second and Third Parties—M'Laren —Macfarlane. Agents — Morton, Neilson, & Smart, W.S.

Tuesday, December 3.

SECOND DIVISION.

SPECIAL CASE—PATERSON AND ANOTHER (MACFARLANE'S TRUSTEES).

Succession — Legacy — Falsa demonstratio — *"Brother James' Son," where there was only Daughter.*

A truster bequeathed one-sixth of the residue of his estate to "my late brother James' son." His brother James left no son but he left an only daughter. Another brother, however, named David, left an only son. Little or no correspondence passed between the testator and the families of these two brothers. *Held,* in the circumstances of the case—(1) that the bequest was not void on the ground of uncertainty; (2) that as it was more probable that the testator should have mistaken the sex of his brother's child than the name of his brother, James' daughter was entitled to the bequest.

By holograph will, dated 10th June 1875, Alexander Macfarlane directed the residue of his estate to be divided into six portions, as follows:—(1) One portion to his late brother John's three daughters; (2) One portion to his late brother James' "son;" (3) One portion betwixt his brother Henry's son and daughter; (4) One portion to William S. Macfarlane, his brother; (5) One portion to Peter Macfarlane, his brother; (6) One portion to George Macfarlane, his brother, which, if not claimed within three years, was "to be divided amongst the other five portions." In the case of the second portion a difficulty arose with respect to the legatee. The deceased's brother James had only one child, a daughter, Mrs Henderson. But the truster's deceased brother David Jobson Macfarlane, left an only "son," William Henry Macfarlane.

The trustees brought this Special Case in order to have it determined, *inter alia*, to whom they were to pay the bequest, or whether it was altogether void.

The third parties to it, Mrs Elizabeth Macfarlane or Henderson, the only child of the deceased James Macfarlane, the testator's brother, and her husband, maintained that she had the best right, as her father's name was distinctly mentioned and one child clearly indicated, and that the mistake in the sex was unimportant, the legacy being meant for James' child. Moreover, the testator in the settlement named his brothers in proper rotation of their ages, and James was named second, being second oldest.

The fourth party, William Henry Macfarlane, only son of the deceased's brother David Jobson Macfarlane, maintained that he had the best right as being the only son of a deceased brother of the testator named "David Jobson," but by mistake named "James" in the bequest, the legacy being undoubtedly intended for a son of a brother and not a daughter of a brother. David Jobson Macfarlane was further the only one of the deceased's brothers who had only one son. Otherwise, he maintained that the second portion fell to be treated as intestate succession.

The other legatees under the will, the second parties, maintained that the legacy was ambiguous and ineffectual by reason of uncertainty, and that the portion fell into the general residue, and was divisible among the legatees of the various portions in the same manner as was directed to be done with the sixth portion in the event of its not being claimed by George within the prescribed time; or otherwise, that it was not tested on.

Little or no intercourse or correspondence had ever passed between the testator and his deceased brothers James and David or their families. The testator had regular correspondence with his brothers William and Peter. There was nothing, however, that could be founded on to indicate the deceased's intentions under his settlement farther than the settlement itself bore.

Authorities cited—*Ryall* v. *Hannam*, July 1847, 10 Beavan, 536; *In re Rickit*, July 1853, 11 Hare, 299; *Lord Camoys* v. *Blundell*, July 1848, 11 Clark and Finelly's H. L. Ca. 778; *Drake* v. *Drake*, February 1860, 8 Clark and Finelly's H. L. Ca. 172.

At advising—

LORD JUSTICE-CLERK—The question is to whom the legacy left by the testator in favour of the son of his brother James belongs, or whether it is void from uncertainty? He had a brother James, who had no son, but had a daughter. He had another brother, David Jobson Macfarlane, who had a son. The question is—First, Whether the bequest can be read in favour of the latter? I am very clear that it cannot. A man might easily mistake or forget the name, or even the sex, of his brother's child, when separated, as here, by time and distance; but the names of his brothers he could not fail to remember while he remembered anything. Then, secondly, is there such uncertainty here as will void the legacy? I think there is reasonable certainty that he meant the legacy for his brother's child, and that the mistake in regard to sex is immaterial.

LORD ORMIDALE and LORD GIFFORD concurred.