mentioned in the same position as mercantile agents for the true owner.

It may be, although I do not think so, that it was intended by the enactments on which the reclaimer relies, to place delivery-orders and warehouse warrants in the same position to all intents and purposes as bills of lading, and in particular to enact that, in order to the completion of the real right of pledge, it should not be necessary to intimate to the warehouse-keeper the transfer of such documents of title. But in my opinion this has not been effected by any of the statutory provisions in question.

On the whole case, I think that the Lord Ordinary has rightly sustained the claim of Robertson & Baxter, and that his interlocutor should be affirmed.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the cause, with the opinions of the Consulted Judges, in conformity with the opinion of the majority of the whole Judges of the Court, refuse the reclaiming-note against the interlocutor of Lord Kyllachy dated 20th March 1896: Adhere to the interlocutor reclaimed against, and decern: Find the claimants and respondents Messrs Robertson & Baxter entitled to additional expenses, and remit," &c.

Counsel for Claimants and Respondents, Robertson & Baxter—Salvesen—Younger. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for Claimant and Reclaimer, Inglis—Balfour, Q.C.—Ralston. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Pursuers and Real Raisers — Younger. Agents — Morton, Smart, & Macdonald, W.S.

Saturday, January 9.

OUTER HOUSE.

[Lord Kyllachy.

LEES' TRUSTEES *v.* FINGZIES.

Succession—Provisions to Children—Legitim—Election—Equitable Compensation—Thellusson Act (39 and 40 Geo. III. cap. 98).

The doctrine of equitable compensation instead of forfeiture is admitted where a child claims legitim in lieu of a provision made to him in his parent's settlement, and not expressly declared to be in satisfaction of legitim. If, however, in an estate which vests *a morte testatoris*, legitim is claimed by a liferenter, the fiar is entitled to demand that the remaining capital should be paid at once, unless it can be alleged that there is a reasonable probability that the accumulation of the liferent surrendered will more than compensate the estate for the amount of the legitim.

Question, whether in considering this latter point, the limitation of accumulations of income imposed by the Thellusson Act is to be taken as a basis of calculation.

A truster directed her trustees to hold the residue of her estate for behoof of her daughter in liferent and her grandchildren in fee, with an express declaration that the fee should vest *a morte testatoris*. The daughter claimed legitim, and on receiving it discharged her liferent. Upon the fiars' coming of age, a multiplepoinding was brought by the trustees, in which the fiars claimed immediate payment of the estate, and the daughter maintained that the trust must be kept up during her lifetime to meet the possibility that the liferent might revive by the accumulations of income exceeding the legitim. *Held* (*per* Lord Kyllachy), distinguishing *Macfarlane's Trustees* v. *Oliver*, July 20, 1882, 9 R. 1138, that as the estate vested *a morte testatoris*, and as there was no probability that the accumulations of income would equal the amount of the legitim either during the probable lifetime of the daughter, or during the twenty-one years allowed for accumulation of income by the Thellusson Act, the fiars were entitled to succeed.

This was an action of multiplepoinding brought by the trustees of the late Mrs Jane Jack or Lees, under circumstances which appear sufficiently in the opinion of the Lord Ordinary. The fund *in medio* was claimed by Mrs Jane Lees or Fingzies, the daughter of the truster, on the one hand, and by Jane Purves and John Turnbull Purves, grandchildren of the truster, on the other.

On 9th January 1897 the Lord Ordinary (KYLLACHY) pronounced an interlocutor finding the claimants Jane Purves and John Turnbull Purves entitled to the whole fund *in medio*.

Opinion.—"This is a multiplepoinding which is brought by the trustees under the settlement of the late Mrs Lees, and the question to be determined is whether the truster's two grandchildren, who are the fiars of her estate, and have now come of age, are entitled to have the estate at once paid over to them. The opposing claimant is their mother, the truster's daughter, who under the settlement had a liferent of the estate, but sometime ago claimed and received her legitim thereby repudiating the settlement, and diminishing *pro tanto* the capital of the estate. What she (the liferentrix) contends is, that the trustees are still bound to retain the remaining capital, because it may happen that before she dies the accumulations of income may recoup the amount withdrawn to meet her legitim, and so compensate the fiars without requiring the complete surrender of her liferent. She founds on the case of

Macfarlane's Trustees v. *Oliver*, 9 R. 1138.

"The fiars do not dispute that according to the decision in that case, the principle to be applied in determining their and and their mother's rights is not forfeiture but equitable compensation. But they point out that in *Macfarlane's* case vesting was postponed until the death of the liferentrix, and that therefore, there was no room for compensation taking the shape of an accelerated payment to the fiars of the diminished fee. There was consequently they say there, no difficulty in allowing the liferentrix to in effect postpone her final election until it appeared which was more valuable—her legal or her conventional rights—but that here, on the other hand, the fee is expressly vested *a morte testatoris*, and there is consequently here no obstacle to immediate payment of the capital if the burdening liferent is once out of the way. They contend accordingly that in this case there is no reason why their mother's election should not be made now and finally, or why, if she surrenders, as she must surrender, her liferent in whole or part, anything less than a complete surrender should be accepted as affording adequate compensation.

"On the question thus raised my opinion is in favour of the fiars. The case is not, I think, within the rule of the case of *Macfarlane's Trustees* v. *Oliver*. It is rather within the reservation expressed in that case by Lords Adam and Kinnear, and also, I think, by Lords Rutherfurd Clark and M'Laren. It is, I think, ruled, I do not say by the decisions, but by the grounds of judgment in the cases of *Annandale*, 9 D. 1201, and *Muirhead*, 17 R. (H. of L.) 48. The important points are, I think, these (1) that the shares of the fiars are expressly declared to be vested and transmissible *a morte;* and (2) that it is not alleged—and cannot be alleged as certain or more than possible—that a surrender even of the whole liferent will more than compensate the fiars. It appears to me that having regard to these two facts, it would be both against principle and against equity that the mother repudiating the settlement and carrying off half of the fiar's capital, should be allowed—upon the mere chance that by accumulation of income for a period short of her lifetime the withdrawn legitim may be replaced—to deprive the fiars of that immediate payment of the diminished capital, which, if their mother died soon, would be the only compensation they could obtain. The fiars may of course benefit in the result. That is to say, they may, if their mother lives long enough, be more than fully compensated. But on the other hand, it is quite possible that the result may be the other way. And it does not appear to me to be equitable compensation which leaves the risk to one party and the benefit—if benefit there be—to the other.

"There is another point made by the fiars which materially enhances the difficulty of the liferentrix's contention. It was conceded to be the result of the authorities that the Thellusson Act forbids any accumulation subsequent to twenty-one years from the death of the truster. Unless, therefore, it can be shown at the lowest that at the end of that period the capital will be fully recouped, there is no reason for witholding now from the fiars the payment of capital to which *ex hypothesi* they must in twenty-one years be entitled. Now, it was, I think, practically conceded that, assuming any normal rate of interest, the capital of the estate cannot possibly be recouped in twenty-one years from the death. This, I confess, seems to me to be at least a serious difficulty. The liferentrix no doubt suggests that after the lapse of the twenty-one years the income of the trust may be paid to the fiars, and paid to them for such time as might complete the amount of their compensation. But unless the fiars would at the end of the twenty-one years be the persons entitled to the capital, the unlawful accumulations would go not to them, but to the truster's next-of-kin, viz., to the liferentrix, and that would, to say the least, produce a situation which would not be readily extricable.

"I have not considered, because nothing of the kind is proposed, whether the fiars might not be compensated to their mother's advantage by means of a policy of insurance on the latter's life, the premiums of insurance being paid out of the income of the trust-estate. It may be that something less than the annual income would suffice for this purpose, leaving a yearly balance available for the liferentrix. But if such a proposal were made, it would require to be considered (1) on what terms the liferentrix's life was insurable; (2) how far the trustees could accept a policy of insurance as a certain security; and (3) whether such a transaction would not be in effect an accumulation forbidden by the Thellusson Act. I have not, as I have said, felt called upon to apply my mind to any of those questions. Taking the case as presented on the record, I am of opinion that the claim of the fiars should be sustained, and that they should be ranked and preferred to the whole of the fund *in medio* accordingly."

Counsel for the Trustees — Macfarlane. Agent—William Finlay, S.S.C.

Counsel for the Claimant Mrs Lees—Guy. Agents—Patrick & James, S.S.C.

Counsel for the Claimants Jane Purves and John Turnbull Purves—Watt—Sandeman. Agent—A. C. D. Vert, S.S.C.