to bring up the last interlocutor of the Dean of Guild on appeal *pro forma*, and have it taken to the House of Lords, for no operative judgment could be obtained while that interlocutor stood.

Argued for petitioner—The judgment of the Court was interlocutory, in respect that it was given in a Dean of Guild process, and something remained to be done to exhaust the cause after it had been pronounced. It was true that the more correct course might have been to bring up the Dean's last interlocutor on appeal, but it was the constant practice of the Court to grant leave to appeal when the process was not here, *e.g.*, when a Lord Ordinary granted leave to reclaim, the process remained with him, but the Court might grant leave to go to the House of Lords. Even if the appeal were competent without leave, the Court might grant leave *ob majorem cautelam*.

LORD M'LAREN—This is an application for leave to appeal against a judgment of this Division of the Court which, it is admitted, exhausted the conclusions of the Court of Session process, viz., the appeal from the Dean of Guild Court. The application to the Dean of Guild Court was not disposed of by one interlocutor, because it is not in accordance with our practice to pronounce operative decrees granting authority to build. It is always necessary after the questions of law in dispute have been disposed of that a remit should be made to the Dean of Guild in order that he may see that the practical requirements of which his Court has cognisance are complied with—stability of structure, drainage, and other matters which may be said to constitute the merits of the ordinary run of such cases.

Now, by our judgment we determined the legal question which was raised by the appeal, and remitted the case to the Dean of Guild with instructions to grant the application in part, and *quoad ultra* to refuse it. Under the 15th section of the Act of 1810, it is provided that hereafter no appeal shall be allowed against interlocutory judgments of the Court of Session unless where leave has been granted or where there was a difference of judicial opinion. In my opinion our judgment was not an interlocutory judgment in the sense of that section. It appears to me that if an appeal from our judgment is competent, leave to appeal is unnecessary—if an appeal is no longer competent in consequence of the case having gone back to the Dean of Guild, then our leave will not make it competent. I think, therefore, that the petition should be refused, and it will be for the parties to consider whether they should appeal from our final judgment without leave, or whether they should bring up the decree of the Dean of Guild *pro forma*, in order to have the material for an appeal to the House of Lords.

LORD ADAM and LORD KINNEAR concurred.

LORD PRESIDENT—Two views may be taken of this case, both leading to the same result. The one is that stated by Lord M'Laren and adopted by your Lordships, viz., that our former judgment was a final disposal of the case, against which an appeal is competent without leave. The other is that it was an interlocutory judgment in a process brought here on appeal from the Dean of Guild Court, which has gone back there. If this latter view be tenable, the present application is open to the fatal objection that we are invited to allow a futile appeal against an interlocutory judgment which has been followed by a final judgment, which last stands unappealed.

The Court refused the prayer of the petition.

Counsel for the Petitioner—Ure, Q.C.—Cooper. Agent—Robert Stewart, S.S.C.

Counsel for the Respondent—Sol.-Gen. Dickson, Q.C.—Guy. Agent—A. D. Vert, S.S.C.

Friday, May 27.

FIRST DIVISION.

BOYES AND OTHERS (HAMILTON'S TRUSTEES) *v.* BOYES AND OTHERS.

Succession—Terce and Jus Relictæ—Approbate and Reprobate—Intestacy.

A testator provided to his wife a liferent of the residue of his estate subject to the declaration that that provision should be in full of all that his wife could claim in the name of terce, *jus relictæ*, or otherwise. Through the death of the fiars before vesting took place the residue fell into intestacy of the testator.

Held that the widow was entitled to her legal rights of terce and *jus relictæ* out of the estate which had fallen into intestacy, without forfeiting her liferent provision under the testator's settlement.

By trust-disposition and settlement Mr James Hamilton, Glasgow, who died on 29th January 1892, conveyed his whole estate, heritable and moveable, to trustees for certain purposes. Among these was the provision of an alimentary liferent to his widow of the residue of his estate, restricted to one-half of the free yearly income and annual proceeds of the residue in the event of her second marriage. The fifth purpose was as follows — "After answering the purposes foresaid, I direct my trustees to hold and apply the said rest, residue, and remainder of my estate for behoof of the whole children of the marriage between me and the said Annie Hall M'Casland Yuill or Hamilton, and the issue of such as may have predeceased, *per stirpes*, and to pay or apply the free yearly proceeds thereof to or for behoof of such children, and the lawful issue of such of them as

may have predeceased, *per stirpes*, until the youngest of said children shall have attained the age of twenty-one years, and upon that event to divide, pay, and convey the said rest, residue, and remainder of my estate among the children of the marriage between me and the said Annie Hall M'Casland Yuill or Hamilton who may then be in life, and that equally among such children then surviving, and the issue of such as may have predeceased, *per stirpes*, that is, such issue taking only the share which their parent would have taken if in life; declaring, notwithstanding what is before written, that it shall be in the power of my said trustees, should they think it judicious, but only with the special consent of my said wife, to advance to any of the beneficiaries in the fee of the residue of my estate, in the case of males upon their going into business, and in the case of females on their being married, such sums, not exceeding one-half of their then presumptive interests in my estate, as my said trustees may think proper, such advances being imputed as to account of the share of residue of the beneficiary receiving the same."

The truster explained that he had by his settlement made no provision for Minnie Arthur Hamilton, his only child by a previous marriage, in respect that he had already invested for her the sum of £3000. There followed the declaration—"And I declare the provisions hereby made for my wife and the children of our present marriage, and the provisions previously made for the said Minnie Arthur Hamilton, to be in full of all that my said wife can claim in name of terce, *jus relictæ*, or otherwise, and of all that my said children can claim in name of legitim, portion natural, bairns' part of gear, or otherwise, in respect of my death."

Mr Hamilton was survived by a widow, the said Mrs Annie Hall M'Casland Yuill or Hamilton, by the said Minnie Arthur Hamilton, and by two children of his marriage with the said Mrs Annie Hamilton. These two children died in pupilarity in May 1892. Miss Minnie Arthur Hamilton married Mr Naismith in 1895, and the widow Mrs Annie Hamilton married Mr Boyes in 1896.

The heritage left by the testator amounted in value to £1600, his moveable estate to £5407, 3s. 5d.

This Special Case was presented to determine certain questions arising under the trust-disposition and settlement by Mr Hamilton's trustees, first parties, Mrs Boyes and her husband, second parties, and Mrs Naismith and her husband, third parties.

The second parties contended, *inter alia*, that Mrs Boyes was entitled to a liferent of one-half of the income of the residue, and that if the fee of the residue did not vest in her children *a morte testatoris* it lapsed and fell into intestacy as at the date of the truster's death, and that she was accordingly entitled to her legal rights of terce and *jus relictæ* therein. The third parties maintained that Mrs Naismith was entitled under intestacy, subject to the liferent provisions in the settlement, to the whole residue of the truster's estate. All parties were agreed that one-half of the fee of the residue was now available for distribution between Mrs Boyes and Mrs Naismith.

The following questions of law were submitted to the Court:—"1. Did the residue of the truster's estate vest under his trust-disposition and settlement *a morte testatoris* in the two children now deceased of the marriage between the truster and his second wife? If not, 2 (*a*) Did the whole residue of the truster's estate, subject to the liferent provisions in favour of his widow contained in the said trust-disposition and settlement, fall into intestacy? and if so, (*b*) Did it pass to the truster's heirs in intestacy as at the date of his death? Or, (*c*) Did it pass to the truster's heirs in intestacy as at the date of death of the survivor of the truster's said children? 3. In the event of question 2 (*a*) being answered in the affirmative—(*a*) Is the truster's widow entitled to her legal rights of terce and *jus relictæ* out of any estate which may have fallen into intestacy in addition to the liferent provisions conferred on her by the truster's settlement? or (*b*) Does the whole of the residue of the truster's estate, subject to the liferent provisions contained in the settlement, fall under intestacy to his daughter by his first marriage Mrs Naismith?"

It is unnecessary to report the debate on the first and second questions.

On the third question, argued for the second parties—Assuming that there was intestacy as regards the residue, there could be no doubt the testator had expressly excluded his widow from participation in any benefit to be derived from his estate beyond the liferent provision; but the meaning of the will could not be imported into the distribution of what turned out to be intestate succession. The declaration was exclusively applicable to an effective disposition of the whole of the residue, which the testator must be presumed to have believed that he had made. [Lord M'Laren referred to *Macfarlane's Trustees* v. *Oliver*, July 20, 1882, 9 R. 1138.] There was nothing here making the exclusion from terce and *jus relictæ* a condition of the widow taking the liferent provision; nor did her claim to her legal rights in any way interfere with the purposes of the settlement. There was no inconsistency between the claim set up by the second parties and the disposition of the estate under which she took her liferent. The widow was entitled to her conventional, or rather testamentary, provision out of the property disposed of, and to her legal provision out of property undisposed of —*Buntine* v. *Buntine's Trustees*, March 16, 1894, 21 R. 714; *per* Lord M'Laren, 721.

Argued for the third parties—The widow was not entitled both to her liferent provision and to her legal rights in the property undisposed of. If there had been no intes-

tacy it would have been plain that the widow could not take both. It was quite true that children might take a provision in full of legitim and yet claim legitim *ab intestato*. The reason of that was because they were heirs. The fallacy of the second parties' contention lay in supposing that a widow was an heir in the sense that children were. It was well-settled law that she was not—*Inglis* v. *Inglis*, January 28, 1869, 7 Macph. 435. Lord M'Laren's remarks in *Buntine, ut sup.*, proceeded on the assumption that there was no express exclusion of the legal rights. In *Macfarlane's Trustees, ut sup.*, there was no question as to the rights of a wife; children alone were concerned; and there was no express exclusion of legitim.

At advising—

LORD M'LAREN—The questions in this case relate to the effect of a partial intestacy arising from circumstances unforeseen by the testator. Under Mr Hamilton's will the residue of his estate is given conditionally to the two children of his second marriage, with the explanation that he had provided for the child of his first marriage by investing a sum of money in her name. The gift is in the form of a direction (upon the youngest child attaining majority) to divide, pay, and convey the residue amongst the children of the second marriage "who may then be in life." The two favoured children died in infancy. The direction is unambiguous, and makes the gift of residue conditional on one at least of the children attaining majority. There is no ulterior destination, and it follows that, in the event which has happened, the testator died intestate with respect to the residue of his estate.

Although the intestacy only disclosed itself on the death of the survivor of the two younger children, some months after their father's decease, yet it must be held that the testator died intestate as to the residue of his estate; and if he died intestate it follows that the heirs and personal representatives who are entitled to take up the succession at his death are the persons to whom the residue results. If there ever was any doubt on this subject the decision of the House of Lords in the case of *Gregory's Trustees*, 16 R. (H.L.) 10, makes the point perfectly clear. These considerations suffice for the disposal of the first and second questions in the case.

The third question raises a point of general importance, and I am not sure that it has been the subject of express decision. But in principle it is perfectly clear. Mrs Hamilton, now Boyes, has drawn her annuity under her first husband's trust for four and a-half years, and it is not said that she was under any misapprehension as to her legal rights. She is therefore not in a position to make any claim contrary to the scope and intent of Mr Hamilton's trusts. But through an oversight on the part of the testator the greater part of his estate has fallen into intestacy. We have no means of knowing what would have been his wishes as to the disposal of the residue if he had contemplated the case of his two younger children dying in minority. He might have wished in that event to give his wife a share of the capital, or he might not. He does declare in express terms that the trust provisions are to be in full of legitim and *jus relictæ;* but it can hardly be supposed that this exclusion was meant to operate in favour of the Crown. There are no heirs or personal representatives other than the wife and children, and I think we must apply to this clause of exclusion the ordinary and time-honoured principle of construction, that such clauses are intended to enable full effect to be given to the testator's testamentary dispositions by putting all persons who take benefit from the will under a disability to put forward legal claims which would have the effect of withdrawing something from the estate disposed of. As regards all that remains over when the provisions of the will are satisfied—in this case the whole residue—the law of intestacy takes effect upon it, just as if it had been formally excepted from the will, and I am of opinion that the residue, in so far as consisting of personal estate, is subject to the usual threefold division, and that the residue of the heritable estate is subject to terce.

I propose that we should answer the first question in the negative, answer the second question by affirming heads (*a*) and (*b*), and answer the third question by affirming head (*a*).

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court answered the first question in the negative, and heads (*a*) and (*b*) of the second question in the affirmative; and also answered head (*a*) of the third question in the affirmative.

Counsel for the First Parties — Cook. Agents — Graham, Johnston, & Fleming, W.S.

Counsel for the Second Parties — Ure, Q.C.—A. S. D. Thomson. Agent—A. C. D. Vert, S.S.C.

Counsel for the Third Parties—Dundas, Q.C.—P. Balfour. Agents—Carmichael & Miller, W.S.