of two interpretations the Court should lean to the one which favours immediate vesting; the more especially as there was no apparent reason for postponing vesting, payment being only postponed for the purpose of securing the provision to the testator's widow, which would terminate either on her death or second marriage. I observe that exactly the same form of expression is used in a bequest which undoubtedly vested *a morte*—"Two hundred pounds to Mr Gordon Watt and his wife Mrs Watt, equally between them, and to the survivor of them, but declaring that if the survivor of them should predecease me, then to their children," &c.

Of course our judgment proceeds on the ground that the earlier words of the clause which undoubtedly would involve postponement of vesting if they stood alone, are controlled by the part of the clause, which follows.

I am therefore for adhering.

The Court adhered.

Counsel for the Pursuers and Nominal Raisers and Claimants, the Trustees—Gloag. Agents—P. Morison & Son, S.S.C.

Counsel for the Claimants and Reclaimers John Webster and William Webster—W. Campbell, Q.C.—T. B. Morison. Agents—P. Morison & Son, S.S.C.

Counsel for the Claimant and Respondent Neil—Ure, Q.C.—Guy. Agents—Gordon Petrie & Shand, S.S.C.

Friday, March 2.

SECOND DIVISION.

[Sheriff of Argyleshire.

ALLAN *v.* MACLACHLAN.

Servitude — Road — Obligation to Repair Servitude Road—Real Burden.

An obligation to keep in repair a servitude road imposed upon the servient owner does not transmit against singular successors in whose titles the obligation is not repeated.

A sold certain lands to B. In the disposition it was declared that A and his heirs and successors or assignees should have right of ingress and egress to and from his other lands by the existing road through the lands disponed, and that the expense of the repair and upkeep thereof should be borne by B and A mutually. This declaration was not constituted a real burden on the subjects.

B sold the lands to C. In the conveyance to C there was no mention made of any obligation to repair and upkeep the servitude road.

In an action brought by A against C *held* that C was under no obligation to contribute towards the repair and upkeep of the servitude road.

By disposition dated 1st and recorded 15th May 1879, Alexander Allan of Aros, Mull, disponed to William Lang of Glengorm certain parts of the estate of Aros called Arrois and Kilmalen. This disposition contained a clause in the following terms: "Declaring that I and my heirs and successors or assignees shall have a right of ingress and egress to and from my other lands by the existing road through the lands hereby disponed, and that the expense of the repair and upkeep thereof shall be borne by my said disponee and me and my foresaids mutually." This declaration was not however constituted a real burden on the subjects. Thereafter William Lang granted various bonds and dispositions in security over the lands. The bondholders sold the lands by public roup on 15th December 1897 to Dugald Cameron MacLachlan and granted him a disposition dated in January and February and recorded 12th March 1898. The obligation as regards the expense of repairing and upkeeping the road did not appear and was not referred to in the disposition to MacLachlan.

In December 1897, Allan, on the ground that the road had fallen into disrepair, requested MacLachlan to concur with him in having the road put into repair. MacLachlan maintained that he was not bound to co-operate with Allan in having the road put into a better state of repair. The parties being unable to come to any arrangement, Allan raised against MacLachlan in the Sheriff Court at Oban an action for decree authorising the pursuer to execute all repairs necessary upon the road in question, and to put the road into a state of thorough repair, the work to be executed, should the defender so require, at the sight of a man of skill to be appointed by the Court, and thereafter, upon completion of the said necessary repairs, to ordain the defender to pay to the pursuer £100, or such other sum as should be ascertained to be one-half of the cost of the repairs.

The pursuer pleaded—"(1) The defender is, in terms of the title upon which he holds his said property, liable in one-half of the cost of repairing the said road. (2) The said road being in a state of disrepair, the pursuer is, in the circumstances condescended on, entitled to have decree as craved, authorising him to proceed with the necessary repairs at the joint expense of the parties."

The defender averred "that the road in question belongs to the defender. He is the sole judge of what, if any, repairs should be executed upon it. Neither in his title nor otherwise has the pursuer any right in or control over said road except a right of ingress and egress."

He pleaded—"(1) The action is irrelevant. (2) It is incompetent to authorise the pursuer at the defender's expense to execute repairs upon a road belonging to the defender. (3) The defender being owner of the road in question, and his title containing no clause authorising the pursuer to execute any operations thereon, the present action ought to be dismissed. (4) The defender being the judge of what, if any,

repairs are necessary upon the road in question, the action is incompetent."

On 21st September 1898 the Sheriff-Substitute (MACLACHLAN) pronounced the following interlocutor:—"Repels the whole pleas-in-law for the defender: Finds it admitted that the road in question . . . is not in a proper state of repair, and remits to George Wolfe Brenan, C.E., Oban, to inspect said road, and report as to what repairs are necessary upon said road to make it suitable for the pursuer's requirements as an access to and for the use of his said lands and farm of Lettermore, and to report *quam primum*."

The defender appealed, but on 25th October 1898 the Sheriff (FERGUSON) refused the appeal.

Mr Brenan in his report, as approved of by the Sheriff-Substitute on 27th January 1899, considered necessary the following work:—"(1) Clean 877 roods of side drains. (2) Cut 2166 roods of new side drains in peat, soil, or gravel. (3) Cut 75 roods of new side drains in rock. (4) Open up, clean, re-cover, and make up bottoming and surface over nine cross drains. (5) Open up road and build new cross drains, and re-fill and re-form new surface thereon 290 lineal feet. (6) Laying track and cover 15 yards 4 inches spigot and faucet earthenware pipes 2 feet below surface across gate openings. (7) Repair faces of existing stream culverts in different situations, 21 square yards. (8) Rebuild with new dressed stones part of face wall of large culvert at 62 chains 10 square yards. . . . (11) Re-fill bottoming in wheel ruts, 8633 lineal yards. (12) Metal surface of road with local quarried rock broken down *in situ* to proper size, and sorted and sized and evenly laid to an average of 4 inches thick, picking sides near verges before laying, 14,360 square yards."

On 12th April the Sheriff authorised the pursuer to accept the offer of Michael M'Kinney, road contractor, to execute the repairs in terms of Mr Brenan's report for £243, 7s. 7d. and ordained the defender, on completion of the work to the satisfaction of the Court, to pay the pursuer £121, 13s. 9½d., or such other less sum as should be one-half of the sum actually expended on the repairs.

On 16th October 1899 the Sheriff-Substitute found that the repairs to the road were completed, and decerned against the defender for payment of £121, 13s. 9½d., being one-half of original contract price to which the cost was limited by the Sheriff's interlocutor of 12th April.

The defender appealed, and argued—There was no obligation to contribute to the cost of repairing this road imposed on him by his title. The obligations in the original disposition to Lang had not been transmitted to him. An obligation to uphold a road was not a known servitude—*Nicolson* v. *Melvill*, Feb. 19, 1708, M. 14, 516—and would not transmit against singular successors unless it was declared a real burden in the titles. If this obligation had been declared a real burden it would have been binding on him—*Tennant* v. *Napier Smith's Trustees*, May 31, 1888, 15 R. 671. But not having been constituted a real burden, it was merely a personal obligation binding on Lang, but not transmitted to the defender. Even if it were held to have been transmitted, it would not bear the construction that the pursuer put upon it. The true meaning was that if the defender thought it necessary that the road should be repaired, and did repair it, he was to be entitled to recover half of the cost from the disponer and his successors. In any event, the work done in terms of Mr Brenan's report was not repair at all. It was making a new road—changing this private farm road in a remote part of the Highlands into a modern highway with all the latest improvements. The defender could not be asked to pay for such work under an obligation to repair.

Argued for pursuer—The repair of the road was part of the servitude right constituted by the titles. It was an incident of the servitude, and the obligation passed as such to the defender without the necessity of making it a real burden. He could not take the lands and repudiate the servitude and the obligation to repair incidental thereto. The repairs carried out were those which an experienced contractor thought necessary for the upkeep and repair of the road. The judgment of the Sheriffs should be upheld.

At advising—

LORD TRAYNER—I think the Sheriffs have taken a wrong view of the case. The pursuer when he sold the lands now belonging to the defender reserved to himself a right to use a road running through these lands as a means of egress and ingress to his other lands. This gave him a servitude right of passage along the road in question, but puts no obligation on the defender to maintain the servitude road. But this obligation to maintain the servitude road (contrary to the recognised rule of law which puts the burden of maintenance on the holder of the dominant tenement) is said to be imposed by virtue of a contract between the pursuer and Mr Lang, the defender's author (but not immediate author) in the lands, because in the disposition by the pursuer to Mr Lang there is a clause which is said to put on the pursuer and Mr Lang an obligation to keep up and repair the road at their mutual expense. I think that contractual obligation is not binding on the defender. It does not appear and is not referred to in the conveyance to him. It is not therefore binding on him as a contract to which he was an original or acceding party. If not a contractual obligation, it is not an obligation imposed on the defender by the common law, which puts the burden of maintaining a servitude road on the holder of the dominant tenement alone. I think therefore the defender is entitled to absolvitor. But I must add, that even if I had thought otherwise with regard to the defender's obligation, I could not have agreed in the opinion that under an obligation to keep up and maintain an existing road, the defen-

der could have been called upon to pay for what has been done here under the authority of the Sheriff, which exceeds largely anything that could properly be called repair or upkeep.

LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court recalled the interlocutor of the Sheriff-Substitute of 21st September 1898, and all subsequent interlocutors, sustained the defences, and assoilzied the defender from the conclusions of the action, and decerned.

Counsel for the Pursuer—Jameson, Q.C. —Cullen. Agent—F. J. Martin, W.S.

Counsel for the Defender—Dundas, Q.C. — Cook. Agents — Simpson & Marwick, W.S.

Saturday, March 3.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

GUNN'S TRUSTEES *v.* MACFARLANE.

Succession — Bequest of "Free Residue" — Reduction of Amount of Bequest by Legitim Claims — Equitable Compensation.

A testatrix left the free residue of her estate to be divided into three shares, and held for her three sons, A, B, and C in liferent, and their children in fee, one share to each son and his children, these provisions being declared to be in full of all their claims against her estate. She was survived by A, B, and C, and by three daughters. The three daughters claimed legitim. A repudiated the settlement, and also claimed legitim. B and C accepted the provisions in their favour. Before any division of the estate had been made, A and B died without issue, and the shares provided for them and their children fell into intestacy. In a multiplepoinding raised to ascertain the rights of the parties, C contended that he and his children were entitled to the share of the residue bequeathed to them without any deduction being made to meet the claims for legitim, or alternatively, that they were entitled to receive as equitable compensation, out of the sum set free by the death of his brothers without issue, such a sum as would make his and his children's share equal to what it would have been before the residue was reduced by payments of legitim.

Held that the free residue of the testator's estate consisted of what remained after the claims for legitim had been satisfied, and that if C and his children got their share of the free residue so ascertained, they got all that the will gave them, and thus no room was left for the application of the principle of equitable compensation.

Mrs Agnes Jane Goodsir or Macfarlane or Gunn died on 17th May 1895, leaving a trust-disposition and settlement dated 11th August 1893. By the third, fourth, and fifth purposes of the deed she left the free residue of her means and estate to her three sons in liferent and their children in fee, in the following proportions:—four-tenths for Malcolm David Macfarlane and his children, three-tenths for Alexander Goodsir Macfarlane and his children, and three-tenths for William Macfarlane and his children. The foregoing provisions in favour of the three sons were declared to be in full of their whole claims against the truster's estate, and any son repudiating the settlement was to forfeit for himself and his issue all claims to a share of the truster's estate, and have right only to his legal provisions.

Mrs Gunn was survived by six children, viz., the three sons named in the deed, and three daughters, Mrs Agnes Goodsir Macfarlane, Mrs Helen Macfarlane or Horne, and Miss Eliza Macfarlane.

Before the residue of the trust-estate had been ascertained Malcolm David Macfarlane died without issue on 25th September 1895 leaving a trust-disposition conveying his whole estate to trustees. His trustees repudiated the settlement, and claimed his legal rights, The three daughters of the truster also claimed legitim. Alexander Goodsir Macfarlane and William Macfarlane accepted the provisions in their favour in the truster's settlement as in full of their claims against her trust-estate.

Questions as to the division of the trust-estate having thus arisen, Mrs Gunn's trustees on 19th August 1896 raised an action of multiplepoinding for their determination.

During the dependence of the action Alexander Goodsir Macfarlane died on 6th March 1898 without leaving issue, and an executor-dative was appointed to administer his estate. By the death of Malcolm David Macfarlane and Alexander Goodsir Macfarlane, both without leaving issue, seven-tenths of the capital of the truster's estate became undisposed of by her settlement. William Macfarlane, the remaining son of the testator, was a widower, and had two sons both in pupillarity.

Claims in the multiplepoinding were lodged by Mrs Gunn's trustees, the marriage-contract trustees of Mrs Agnes Goodsir Macfarlane on her behalf, the marriage contract trustees of Mrs Helen Macfarlane or Horne on her behalf, Miss Eliza Macfarlane, the trustees of Malcolm David Macfarlane, the executor-dative of Alexander Goodsir Macfarlane, and William Macfarlane.

By a series of interlocutors, the last of which was dated 2nd December 1899, the Lord Ordinary (KINCAIRNEY) ranked the claimants in the trust-estate by findings which by implication showed the following results:—The three daughters of the testator and the trustees of Malcolm David