and effect of the concealment from Mr Arrol of the sale of his whisky was to get him to interpose his credit by renewing the bills, and though he had to take up those bills in the end, and the whisky went to the person to whom it was sold, that, upon the statement of it, was not a fraud. Again, I cannot see upon the statement contained in this indictment why I should decline to allow the charge to go to the jury along with the other charges; and for these reasons, on the whole matter, I am of opinion that none of the objections stated to the relevancy of the indictment are well founded, and I therefore repel the objections.

The objections to the relevancy were repelled.

Both panels pleaded not guilty, and a jury was empanelled and evidence was led.

On Wednesday 17th July the jury by a majority found the panel Robert Paterson Pattison guilty as libelled of the whole four charges, and found the panel Walter Gilchrist Gray Pattison guilty of charges 2 and 4, and found charges 1 and 3 as against him not proven.

Robert Paterson Pattison was sentenced to eighteen months' imprisonment, and Walter Gilchrist Gray Pattison to nine months' imprisonment.

Counsel for the Crown—The Solicitor-General (Dickson) K.C.—C. K. Mackenzie, K.C. — M'Clure, A.-D. Agent — W. J. Dundas, C.S.

Counsel for Robert Pattison — Guthrie, K.C.—Clyde—W. J. Robertson. Agent—J. Campbell Irons, S.S.C.

Counsel for Walter Pattison—Ure, K.C. —T. B. Morison. Agent—J. Gordon Mason, S.S.C.

COURT OF SESSION.

Friday, July 19.

FIRST DIVISION.

KENNEDY'S TRUSTEES *v.* WARREN.

Succession—Trust—Direction to Purchase Annuities—No Provision for Continuing Trust—Right of Annuitants to Demand Payment.

A testatrix provided that her trustees, so soon as convenient after the death of a liferentrix, should realise the whole of her estate and pay and divide the same as directed by her; and directed them, *inter alia*, with one-third of the residue of her estate to purchase an annuity for life in an insurance company in name and for behoof of A, and with one-third of the residue to purchase a similar annuity in name and for behoof of B, declaring that the said annuities should be purchased by the trustees subject to the condition "that the same are for the personal support and subsistence only of the annuitants," and that they should neither be assignable nor subject to the diligence of creditors. She also directed them with one-sixth of the residue to purchase an annuity for the servant-maid in her service at her death, and to pay the remaining sixth to C. *Held* that as the testatrix did not contemplate or provide for a continuing trust, A and B were entitled to receive payment each of one-third of the residue, and that the trustees were not bound to purchase annuities.

Succession—Construction of Testamentary Writings—Casus improvisus—Gift-over in Event of Certain Beneficiary Failing to Take from Certain Causes Specified—No such Beneficiary ever in Existence.

A testatrix directed her trustees with one-third of the residue to purchase an annuity for A, with one-third to purchase an annuity for B, with one-sixth to purchase an annuity "for behoof of the servant-maid who may be in my service at the time of my death," and to pay the remaining sixth to C. She further provided that "should any of the annuitants after the provisions conceived in their favour have been intimated to them decline to accept, or fail to intimate their acceptance thereof, or should they die before the purchase of said annuities, then the portion or portions so set free shall be so set free for behoof of the survivors or survivor of themselves and C proportionately according to the above-mentioned provisions in their favour." The truster had no servant-maid in her service at the time of her death, and there was consequently no annuitant to fail by declinature or failure to accept, or death before purchase of the annuity destined to the servant-maid. *Held* that the sum so set free fell to be disposed of in terms of the provision in favour of survivors, and did not fall into intestacy.

Mrs Agnes Elizabeth Kennedy died on 28th June 1889, leaving a trust-disposition and settlement whereby she conveyed her whole estate, heritable and moveable, to trustees for the trust-purposes therein mentioned.

By the third purpose of this settlement she gave a liferent of her whole estate to Miss Ellen Macallister, her aunt, who had lived with her.

By the fourth purpose the testatrix directed as follows—"So soon as convenient after my death, or the death of the said Ellen Macallister should she survive me, and in any event within the period of three years of the latter of these events, my trustees shall realise the whole of my estate, and pay and divide the same as follows—With one-third part of the free residue thereof they shall purchase an annuity during all the days of his life in a Scottish insurance or other the like company of good standing, in name and for behoof of Aldred Kennedy Warren . . . with one-third part of the free residue thereof they shall also purchase an annuity

during all the days of his life in a Scottish insurance or other the like company of good standing, in name and for behoof of David Dunn . . . with one-sixth part of the free residue thereof they shall also purchase an annuity during all the days of her life . . . in name and for behoof of the servant-maid who may be in my service at the time of my death; the remaining sixth portion of my said estate my trustees shall pay to Margaret Welsh, . . . and it is hereby declared that the said annuities shall be purchased by my said trustees subject to the condition that the same are for the personal support and subsistence only of the annuitants, and it shall not be in their power to assign the same, nor shall they be arrestable or affectable by their debts or deeds of any description whatsoever. . . . *Lastly*, should any of the annuitants, after the provisions conceived in their favour have been intimated to them decline to accept or fail to intimate their acceptance thereof, or should they die before the purchase of said annuities, then the portion or portions so set free shall be so set free for behoof of the survivors or survivor of themselves and the said Margaret Welsh proportionately according to the above-mentioned provisions in their favour." . . .

Miss Macallister, the liferentrix, survived the testatrix, and died on 28th April 1900. After her death Aldred Kennedy Warren and David Dunn intimated acceptance of the provisions in their favour. It was ultimately admitted that at the date of the testatrix's death she had no servant-maid in her employment.

The testatrix had obtained decree of divorce against her husband in 1884, and he had accordingly no interest in her estate. Aldred Kennedy Warren represented the truster's heir-at-law and sole next-of-kin as at the date of her death. The truster's estate consisted partly of heritable and partly of moveable property.

Questions having arisen as to the true meaning and effect of certain provisions in the settlement, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were, (1) the trustees, (2) Aldred Kennedy Warren, (3) David Dunn, and (4) Miss Margaret Welsh.

The second and third parties maintained that they were entitled to payment of the capital of the shares of residue bequeathed to them.

The second party further maintained that the one-sixth part of the residue directed to be applied to the purchase of an annuity for the servant-maid had fallen into intestacy, and ought to be paid to him as in right of the whole interest therein pertaining to the testatrix's heir-at-law and sole next-of-kin.

The third and fourth parties maintained that the said one-sixth part of the residue was payable to them, and to the second party in the following proportions—viz., two-fifths to each of the second and third parties, and one-fifth to the fourth party.

The following were the questions of law:—"1. Are the second and third parties entitled to receive payment each of one-third of the free residue? or (2) Are the first parties bound to purchase therewith annuities for the second and third parties on the terms prescribed by the trust-disposition and settlement. (3) Has the one-sixth part of the said free residue directed to be applied to the purchase of an annuity for the 'servant-maid' fallen into intestacy and become payable to the second party; or (4) Are the second, third, and fourth parties entitled thereto proportionately according to the above-mentioned provisions in their favour? and if so, (5) Are the second and third parties entitled to receive payment of the said proportions of the said one-sixth share effeiring to them? or (6) Do the proportions of the said one-sixth share so effeiring to the second and third parties fall to be applied towards increasing the annuities to be purchased for them respectively?"

Argued for the first parties—The testatrix's direction was to pay and divide. There was no provision for a continuing trust. They could not maintain that they were entitled to retain the bonds of annuity themselves, and to pay the annuities to the beneficiaries. Nor had they any power to create a new trust for this purpose—*Christie's Trustees* v. *Murray's Trustees*, July 3, 1889, 16 R. 913, *per* Lord Justice-Clerk, at p. 915. The only way in which the wishes of the testatrix could be carried out by the trustees was the purchase of annuities on such terms as would create a trust for behoof of the annuitants in the Insurance Company. This was what they proposed to do, and they maintained that, in view of the authorities and the directions of the testatrix, this was the correct course for them to follow. See *White's Trustees* v. *Whyte*, June 1, 1877, 4 R. 786, *per* Lord President, at p. 790; *Dow* v. *Kilgour's Trustees*, January 31, 1877, 4 R. 403; *Jamieson* v. *Lesslie's Trustees*, June 19, 1889, 16 R. 807; *Christie's Trustees*, *cit.*

Argued for the second party—The testatrix had no servant-maid in her service at the time of her death. The words "so set free" in the last purpose of the truster's settlement meant set free by the declinature or failure to accept or death of an annuitant, and there never having been any annuitant to fail in the sense of this clause, there was intestacy with regard to the fund thus set free in a manner not contemplated by the truster. The old decisions referred to for the third and fourth parties threw no light upon the question, which was one of construction according to the intention of the truster and the circumstances of the case. Here the direction was to divide into two third parts and two sixth parts. One of the sixth parts was not disposed of through the failure of the beneficiary. There could be no clearer case of intestacy. Here the existence of a beneficiary who failed to take in one of the ways specified by the testatrix was a condition of the gift-over.

Argued for the third and fourth parties —Even admitting that the testatrix had no servant-maid in her service at the time of her death, it was nevertheless submitted that the intention of the testatrix was that on the failure of such a servant to take the annuity, no matter how that failure came about, the fund so set free should accrue to the other annuitants, because failure of an annuitant to exist at all was *a fortiori* of failure in any of the ways particularly specified by the truster — *Wedderburn* v. *Scrimgeour*, July 18, 1666, M. 6587; *Countess of Cromarty* v. *The Crown*, January 26, 1764, M. 6601; Theobald on Wills (4th ed.) 527; *Curius* v. *Coponius*, Cicero, *pro Cæcina*, 18, there cited; *Murray* v. *Jones*, July 26, 1813, 2 Vesey & Beames. 313, *per* Sir William Grant, M.R., at p. 322; *Flett's Trustees* v. *Elphinston*, December 12, 1900, 38 S.L.R. 564, and cases there cited.

At advising the following opinion was read by LORD ADAM in the absence of

LORD M'LAREN—Under this case two questions are raised with reference to the provisions of the will of Mrs Agnes Elizabeth Kennedy. By her will, a trust-disposition and settlement, Mrs Kennedy gave to her aunt Miss Macallister a general liferent of her estate, and directed her trustees after Miss Macallister's death to apply one-third of her estate in the purchase of an annuity for life in favour of the second party Mr Warren, another third thereof in the purchase of an annuity in favour of the third party Mr Dunn, and one-sixth of her estate in the purchase of an annuity in favour of "the servant-maid who may be in my service at the time of my death." These annuities, it was provided, should be purchased by the trustees subject to the condition "that the same are for the personal support and subsistence only of the annuitants," and that they should neither be assignable nor subject to the diligence of creditors.

The first question for consideration is, whether the second and third parties are entitled to demand payment of their shares of the residue in money, or whether they must submit to take the benefits conferred on them in the shape of a purchased annuity?

It is not disputed that where a trust is constituted with a direction to the trustees to hold the estate and pay over the income to a beneficiary for life, subject to the usual conditions of an alimentary trust, the beneficiary must be content to take the income under the conditions on which it is given. In the case supposed, the capital is protected by means of the trust, and the income being declared alimentary is subject to the rule that alimentary creditors have a qualified preference. But Mrs Kennedy's will does not contemplate a continuing trust for the protection of her legatees. The capital is to be employed in the purchase of annuities in their favour, and the only protection which she proposes to give them is that in each case the bond of annuity is to contain a condition in the terms already referred to. Now, if we suppose the directions to be carried out, it is clear that no one but the annuitant himself has any interest in the bond, and in the event of his being unable to meet his engagements, the bond is part of his estate, which may be attached by his creditors, who are in no way affected by the condition under which he receives it, that he is to treat it as an income-producing subject. It is, I think, also clear in principle that a purchaser of the annuity would not be bound by the condition, because he is not a party to the supposed contract between the testator and the legatee. That being so, the question is, whether the legatee ought to be put to the disadvantage of receiving the bequest in the form of an annuity which he can sell for something less than the sum expended in purchasing it, when he prefers to receive the bequest in money? It has been held by the other Division of the Court in a series of cases which were cited to us, that he ought not to be put to this disadvantage, and in the principle of these decisions I entirely concur. I know of no authority in support of the proposition that an alimentary interest can be secured in any way except by a continuing trust, and in principle it is clear that when an individual is put into possession of the full enjoyment of a fund of any kind, that fund is subject to his acts and deeds, and to the diligence of his creditors.

The only other point in the case relates to the right of succession to the one-sixth of the residue which the testatrix had intended to give to her servant-maid. From the narrative of the case it appears that the testatrix had no servant in her employment at the time of her death. By the last trust purpose it is provided, that "should any of the annuitants after the provisions conceived in their favour have been intimated to them decline to accept, or fail to intimate their acceptance thereof, or should they die before the purchase of said annuities," then the share of residue is to go to the survivors proportionately.

I think that the meaning of the words quoted is that should any of the bequests fail the share shall be divided proportionately. In point of fact, no one has claimed the bequest in favour of a maid-servant, and while it is true that there is no one in a position to make the claim, I am unable to attribute to the testatrix the intention that the gift-over is to take effect in the event of there being a legatee who waives his right, but that it is not to take effect in the event of there being no-one in a position to claim.

For these reasons I am of opinion that the first question in the case ought to be answered in the affirmative, and the second in the negative; and on the second head of the case I am of opinion that the fourth and fifth questions ought to be answered in the affirmative, and the third and sixth questions in the negative.

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

The Court answered the first, fourth, and fifth questions in the affirmative, and the

second, third, and sixth questions in the negative.

Counsel for the First and Second Parties —Dundas, K.C. — Macphail. Agents — Mackenzie & Black, W.S.

Counsel for the Third and Fourth Parties —Younger. Agent—J. C. Couper, W.S.

Friday, July 19.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

PUMPHERSTON OIL COMPANY, LIMITED *v.* WILSON.

Poor—Assessment—Valuation of Lands—Deduction—Average Annual Repairs—Landlord's and Tenant's Repairs—Poor Law Amendment (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 36—*Valuation of Lands (Scotland) Act* 1854 (17 *and* 18 *Vict. c.* 91), *secs.* 6 *and* 41.

Held that in estimating the value of lands and heritages for the purpose of assessment for poor rates a parish council is bound, under the provisions of section 37 of the Poor Law Amendment (Scotland Act 1845, as modified by the Valuation of Lands (Scotland) Act, sections 6 and 41, to deduct from the valuation appearing in the valuation roll "the probable annual average cost of the repairs, insurance, and other annual expenses necessary to maintain such lands and heritages in their actual state;" and that in making such deduction for repairs the parish council is bound to deduct the cost thereof whether such cost falls to be borne by the landlord or by the tenant.

The owners and occupiers of certain chemical works were assessed for poor rate on the annual value of the works as it appeared in the valuation roll, under deduction of 20 per cent. In a suspension of a charge for this assessment, *held* (*aff.* judgment of Lord Kyllachy, Ordinary), after a remit to a reporter (from which it appeared that the average annual cost of the repairs necessary to maintain the works in their actual state amounted to 80 per cent. of the annual value appearing in the valuation roll) that a sum amounting to 80 per cent. of that appearing in the valuation roll fell to be deducted for the purpose of assessment for poor rate in respect of the cost of such repairs.

Magistrates of Glasgow v. *Hall*, January 14, 1887, 14 R. 319, *followed*.

Certain chemical works at Mid-Calder, of which the Pumpherston Oil Company, Limited, were owners and occupiers, were entered in the valuation roll for the county of Mid-Lothian as of the annual value of £5400. The Parish Council of the parish of Mid-Calder assessed the Pumpherston Oil Company for poor-rates in respect of these chemical works on the said annual value of £5400 under deduction of 20 per cent. The company having refused payment, R. Straton Wilson, the collector of rates for the parish of Mid-Calder, upon a certificate obtained by him under section 97 of the Taxes Management Act 1880, obtained a warrant for collecting the said assessment by poinding and sale. Against this poinding the Pumpherston Oil Company brought a note of suspension and interdict. The amount of the rate in question was consigned in bank to await the orders of Court.

The complainers averred that they had called on the Parish Council to ascertain by a mutual remit to a man of skill the amount of the deductions falling to be made under section 37 of the Poor Law Amendment (Scotland) Act 1845 (quoted *infra*), in respect of the expenses necessary to maintain the subjects in their actual state, and that the Parish Council had refused this demand.

The complainers pleaded, *inter alia*—"(2) In estimating the annual value of lands and heritages for assessment the Parish Council are bound to take into consideration the actual and average cost of maintaining the lands, and the actual and average amount of the other deductions to be made from the annual value as fixed by the valuation roll, and are not entitled without investigation to make an arbitrary deduction which has no reference to the circumstances of the lands in question. (3) The deduction made from the said annual value being greatly less than the actual average amount of said repairs and others, the amount of said assessment is oppressive and unjust."

The Collector of Rates lodged defences, in which he pleaded—"(1) The action is irrelevant. (2) The assessment in question being legal, the note should be refused with expenses. (3) The Parish Council having after due consideration allowed an adequate deduction in terms of the statute, the assessment should be upheld and the note dismissed. (4) In ascertaining the annual value of lands and heritages for assessment the Parish Council are bound only to allow deduction for such repairs, taxes, and insurance as landlords expend in maintaining and insuring said lands and heritages, including all capital charges for the permanent repair or renewal thereof, together with landlords' taxes and insurance, and the complainers are not entitled to require the Parish Council to give deduction for the cost of such works or temporary repairs as they in their character of tenant of the said lands and heritages have executed in the conduct of their business for the acquisition of tenants' profits, or for tenants' taxes or insurance."

The Poor Law Amendment (Scotland) Act 1845 enacts—section 37—"In estimating the annual value of lands and heritages the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year, under deduction of the probable annual average cost of the repairs, insurance, and other expenses, if any, necessary to maintain such lands and heritages in their