The Court pronounced this interlocutor:—

"Recal said interlocutor in so far as it sustains the objections stated in article fifth of the objections for Lord Blantyre, and now insisted in by the said William Arthur Baird as amended, and the finding as to the manner the rent or value of the lands referred to in articles fifth and sixth of said objections was to be ascertained: Find that the lands of Newmills, to the extent of 30 acres, were, by the report of the Sub-Commissioners of the Presbytery of Haddington dated 26th July 1630, valued for teind, and when said report is approved of, effect must be given to the valuation accordingly: Find that in ascertaining the rent or value of the unvalued lands belonging to Lord Wemyss, referred to in article sixth of the said objections, the same must be ascertained by taking one-fifth of the rent or annual value at which they were or could have been let in their actual condition, and with these findings remit to the Lord Ordinary to proceed with the cause: Recal said interlocutor in so far as it finds the objector William Arthur Baird entitled to expenses, subject to a deduction of one-fourth as a modification: *Quoad ultra* in respect the reclaiming note is not insisted in against said interlocutor, adhere to said interlocutor: Find no expenses due to or by either party, and decern."

Counsel for the Objector and Respondent — Chree — Hon. W. Watson. Agents — Dundas & Wilson, C.S.

Counsel for the Respondent and Reclaimer —Fleming, K.C.—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

COURT OF SESSION.

Saturday, May 26.

SECOND DIVISION.

SHIELL'S TRUSTEES *v.* SHIELL'S TRUSTEES.

Succession—Vesting—Liferent—Fee—Liferent Interest—Entail Amendment (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 84), *sec.* 17—*Construction.*

The Entail Amendment Act 1868, section 17, provides that it shall be competent to constitute by trust or otherwise a liferent interest in moveable estate in favour only of a party in life at the date of the deed (in the case of a testamentary deed the death of the granter), and where any moveable estate shall, by virtue of any deed dated after the passing of the Act, be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable estate shall belong absolutely to such party.

A testator, who died in 1875, by his trust disposition and settlement directed that the income of his estate should be divided equally among his four children, the issue of any who might predecease the period of the payment of the capital to receive their parent's share of income, under burden of an annuity to the widow or widower of such predeceasing child. On the death of all his children his whole means were to be divided among his grandchildren then alive, and the issue of such as might have predeceased, payment being made on their respectively attaining twenty-one years. In the event of any of his sons or daughters dying without issue, their portion of the income was to be divided among their surviving brothers and sisters, and the capital of such portions was to be equally divided among his grandchildren and their issue, as before provided, at the period of division.

The testator was survived by four sons, one of whom, A, died in 1895, survived by a widow and four sons, one of whom, B, born in 1878, died in 1905, after attaining majority. The income was paid by the trustees to the testator's four sons while alive, and after A's death his share of income, less an annuity to his widow, was divided among his four sons until the death of B.

In a special case brought to determine B's rights at the date of his death in his grandfather's estate, *held* that his interest under the trust disposition and settlement was not a liferent interest but a contingent right of fee, and that accordingly he had not acquired by virtue of section 17 of the Entail Amendment Act of 1868 an absolute right of property in any portion of his grandfather's estate when he attained majority.

Section 17 of the Entail Amendment (Scotland) Act 1868 enacts—"From and after the passing of this Act it shall be competent to constitute or reserve, by means of a trust or otherwise, a liferent interest in moveable and personal estate in Scotland in favour only of a party in life at the date of the deed constituting or reserving such liferent, and where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the passing of this Act (and the date of any testamentary or *mortis causa* deed shall be taken to be date of the death of the grantor, and the date of any contract of marriage shall be taken to be the date of the dissolution of the marriage), be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such party, and where such estate stands invested in the name of any trustees, such trustees shall be bound to deliver, make over, or convey such estate to such party: Provided always that where more persons than one are interested in the moveable or personal estate held by trustees as hereinbefore mentioned, all the expenses connected with the trans-

ference of a portion of such estate to any of the beneficiaries in terms of this Act shall be borne by the beneficiary in whose favour the transference is made."

This was a special case brought to determine certain questions which arose out of the trust-disposition and settlement of the late John Shiell of Smithfield, solicitor, Dundee, dated 25th July 1871, who died on 6th July 1875.

The *fourteenth* purpose of the trust-disposition was in the following terms:—"I direct my said trustees or trustee on my death to manage my said means and estate as a whole, and to apportion the free proceeds thereof, after deducting all needful costs and charges, and the annuities and others foresaid as follows, *videlicit*, the interest or revenue derived from a sum of £15,000 to be set apart and paid to each of my sons (subject to the foregoing deduction as to the Bank Street property if acquired by my son John) and my daughters, the issue of any of my children who may predecease receiving their parent's share, and that half-yearly, at the terms of Whitsunday and Martinmas during the lifetime of my sons and daughters, and to the issue of those who predecease, until their share of the capital of my said means and estate shall become payable to them as after mentioned, and the residue or remainder of the interest or revenue of my said means and estate shall be paid in equal portions to my said sons, Anthony George Shiell and John Shiell, during their lives, the issue of either or both of them who may predecease the term of division of my means and estate as after mentioned receiving the share of interest or income of their parents, and that at the said terms of Whitsunday and Martinmas, beginning the first term's payments of the said interest or income at the first term of Whitsunday or Martinmas occurring six months after my death, my said trustees or trustee making payments to my children or the said issue as interim allowances out of my said general means and estate until their right to the said interest or income shall become due, my intention being that my sons and daughters shall share equally in the said income or interest on the sum of £15,000 each, my sons during their lives, and their issue until the period of division after mentioned, getting in addition the interest on the remainder or residue of my said means and estate. On the death of all my children, then my said whole means shall be ascertained and apportioned amongst my grandchildren then alive and the issue of such as may have predeceased leaving issue *per stirpes* and not *per capita*, and their respective portions of my said means and estate shall be paid to such grandchildren and their issue on their respectively attaining twenty-one years of age, the interest of their respective portions being applied for the benefit of such minor grandchildren and their issue. In case any of my sons or daughters shall die without issue then their portion of the said interest and income shall become payable to and among their surviving brothers and sisters, and the capital of such portions shall be held to form a part of my means and estate at the period of division, and be equally divided amongst my grandchildren and their issue as before provided: Declaring that in case my sons or daughters shall die leaving issue, the share of the interest or income payable to such issue (less the annuity after mentioned) may be paid to their surviving parent to be applied for their behoof, or may be applied therefor by my said trustees or trustee themselves or himself: Declaring farther in case of my sons leaving widows or my daughters widowers, my trustees or trustee are hereby directed to pay to them as an alimentary provision an annuity during their widowhood out of the share of the interest and income of the means and estate which was enjoyed by their deceased spouse of two hundred pounds per annum, whether there be issue of the marriage or not; in case of issue such annuities shall form a burden on the share both of the income and capital falling to them under these presents: Declaring that the portions of the said interest and income of my said means and estate falling and payable to my children, and the interest or income and capital payable to my grandchildren, shall be, and the same are hereby declared to be, strictly alimentary provisions, and shall not in any way or under any circumstances be liable or attachable for the debts or deeds of my said children, or of any husband of my daughters or my granddaughters, their *jus mariti*, courtesy of Scotland, and all other legal rights competent to husbands being hereby expressly excluded and debarred; and the said provisions in favour of my said children and their issue shall not be assignable in any manner of way, and the receipts of my daughters and granddaughters without the consent of their husbands shall be a sufficient discharge to my said trustees or trustee: Declaring that the foregoing provisions to my children are in full, and shall be so accepted for all claims and demands they might otherwise have through my death or the death of their mother."

By codicil dated 23rd June 1874 the truster made the following alteration on the above purpose:—"With regard to article fourteenth of said deed I direct that the interest of my whole estate shall be liferented equally by my sons and daughters without distinction or limitation, and declare the provisions under said head to be carried out in all other particulars, the widows and widowers of my sons and daughters having four hundred pounds per annum in place of two hundred pounds during their viduity, as a strictly alimentary provision for themselves and my grandchildren, which shall not be arrestable or assignable for debts or deeds."

Mr Shiell was survived by four children, two sons and two daughters, all of whom were alive at the date of the special case with the exception of his son John Shiell junior, who died in 1895 survived by a widow and four sons. Of the latter all were alive

at the date of the special case except one son, John Anthony Shiell, who was born in 1878, and died unmarried on 2nd March 1905, leaving a trust-disposition and settlement, dated 13th February 1905, by which he conveyed to certain trustees his whole estate including any interest which had vested in him under his grandfather's settlement. The estate of Mr John Shiell had never been divided. Until the death of his son John in 1895 the income thereof was divided equally among his four children, and after John's death one-fourth of the income was paid to the latter's widow and family, the widow receiving £400 in satisfaction of her annuity and the balance being divided among the children. The income received by the deceased John Anthony Shiell the year previous to his death amounted to £155, representing the income of one-fourth of one-fourth share of the capital of the whole residue, less £100 per annum, being his one-fourth share of the annuity payable to his mother the widow of Mr John Shiell junior.

In consequence of the death of John Anthony Shiell in March 1905, a question arose as to his rights under his grandfather's settlement, and this special case was presented for the opinion of the Court, the trustees acting under the trust-disposition and settlement of the late John Shiell being the *first parties*, and the trustees acting under the trust-disposition and settlement of John Anthony Shiell being the *second parties*.

The second parties maintained (1) that apart from the operation of the Entail Amendment Act as after mentioned, the late John Anthony Shiell had at the date of his death a vested interest in one-fourth part of the fourth share of the capital of the whole estate of his grandfather, of which his father had drawn the income during life — that the first parties were bound to hold and administer the capital representing the said vested interest until the arrival of the period of division fixed by the testator, viz., the death of the last survivor of the testator's children, and that in the meantime, pending the arrival of said period of division, the second parties were entitled to receive from the first parties the interest accruing on the said share of capital vested in the said John Anthony Shiell; (2) alternatively, (*a*) that at the date of the death of the said John Anthony Shiell the first parties held for his behoof in liferent a moveable estate in Scotland by virtue of a deed dated after the passing of the Entail Amendment Act 1868, the said John Anthony Shiell having been born after the date of said deed and being at the date of his death of full age, and accordingly that in terms of section 17 of said Act said moveable estate belonged absolutely to the said John Anthony Shiell; (*b*) that the said moveable estate which so belonged to the said John Anthony Shiell consisted of a fourth part of one-fourth share of the whole moveable estate left by the testator, the said John Shiell of Smithfield, said fourth part being burdened with one-fourth part of the capital sum required to provide an annuity of £400 to his mother Mrs Katherine Guthrie or Shiell; (*c*) that accordingly the first parties were bound forthwith to pay over to the second parties the said estate which belonged absolutely to the said John Anthony Shiell, due security being found by the second parties for the said one-fourth part of the capital sum required to provide said annuity; or (*d*) that alternatively, and in any event, they were bound to hold and administer said moveable estate until the period of division fixed by the testator, and until the arrival of that period to pay the income accruing thereon to the second parties.

The first parties on the other hand maintained (1) that apart from the operation of the Entail Act of 1868 Mr John Shiell's estate, in terms of his testamentary deeds, had not vested in any of his grandchildren, and would not do so until the death of his last surviving child; (2) that the Entail Act of 1868 was not applicable to the interest enjoyed by the late John Anthony Shiell in his grandfather's estate, in respect (*a*) that the interest so enjoyed by him was not applicable to any definite part of the estate, and (*b*) that the said interest, not being for life, but being terminable upon the contingency of the death of third parties, was not a liferent within the meaning of the statute; (3) in any case, and whether or not the statute applied to the effect of vesting any right in the deceased John Anthony Shiell, that neither he nor his representatives were entitled to demand payment of any part of the estate before the period fixed by the testator, namely, the death of the last surviving child.

The following questions were, *inter alia*, submitted for the opinion and judgment of the Court:—"(1) Apart from the operation of the Entail Amendment Act 1868, had the late John Anthony Shiell a vested interest, and if so, to what extent, in the estate of his grandfather, the late John Shiell of Smithfield? (3) If the first and second questions are answered in the negative (*a*) Did the first parties, at the date of death of the said John Anthony Shiell, hold in liferent for his behoof, within the meaning of section 17 of the Entail Amendment Act 1868, any moveable or personal estate, which, in virtue of said section, belonged absolutely to him; (*b*) if so, of what did the said estate consist?"

Argued for the Second Parties—(1) John at the date of his death had, apart from the Entail Amendment Act 1868, section 17, a vested interest in a share of his grandfather's estate (this argument was stated *pro forma* but admittedly could not be maintained). (2) When John attained the age of 21 years he obtained an absolute right of fee in the share of his grandfather's estate held in liferent for him by the trustees by virtue of section 17 of the Entail Amendment Act 1868. It was said against him that his interest was not a "liferent interest" within the meaning of the Act, because (*a*) "liferent" applied only to the enjoyment of a subject for life and not for

a shorter period terminable upon some contingency; (*b*) his interest was not applicable to any definite part of the estate. As to objection (*a*) "liferent" merely meant usufruct or right to the fruits of a subject, the essential idea being that the right could not extend beyond life, but there being no reason why it should not apply to a shorter period—Dig. vii, 1 and 2; Institutes, ii, iv, 1; Cod. iii, 33, 5; Ersk. Inst. 2, 9, 39; Bell's Prin. 1037; Rankine on Landownership, 3rd ed. p. 630; *Chaplin's Trustees* v. *Hoile*, October 30, 1890, 18 R. 27, Lord Young at p. 31, 28 S.L.R. 51. As to objection (*b*) the mere fact that the exact amount of his interest was not ascertainable did not prevent vesting under section 17, as that section evidently expressly contemplated the case "where more persons than one are interested in the moveable or personal estate." The present case fell under the class of case struck at by the Act—M'Laren, Wills and Succession, sec. 564; *Suttie* v. *Suttie's Trustees*, June 12, 1846, 18 Jur. 442. The case of *Naismith* v. *Boyes*, July 28, 1899, 1 F. (H.L.) 79, 36 S.L.R. 973, was also alluded to in the course of the argument.

Argued for the First Parties—(1) Apart from the operation of the Entail Act 1868, nothing had vested in John. (2) The Entail Act 1868, section 17 (which applied to moveables the provisions of the Entail Amendment Act 1848, secs. 47 and 48, relating to heritage), was not applicable to and therefore could not affect John's case, which was not within the mischief struck at by the Act, viz., the limitation of the right of a person unborn at the date of the deed to a liferent. He had not a "liferent interest" in the sense of section 17, or indeed in any ordinary sense of the word, the only liferenters being the testator's sons and daughters and not his grandchildren. John's right was one of contingent fee. The passages already cited from Erskine's Institutes and Bell's Prin, together with Bell's Com. (M'Laren's edition) vol. i., p. 52, Bell's Dict. *voce* Liferent, showed that the idea of "liferent" postulated the enjoyment of the fruits of a subject for the period of a life, either that of the person enjoying or of another. Compare too the distinction in England between a tenant for life and a tenant for years—Settled Land Act 1882, secs. 2 and 58; *In re Atkinson*, 31 Ch. D. 577. Further, the statute evidently contemplated an interest in a definite sum of money, but here the interest of John could not be ascertained until the death of the last liferenter—*cf. M'Culloch's Trustees* v. *M'Culloch*, March 14, 1900, 2 F. 749, 37 S.L.R. 535, 6 F. (H.L.) 3, 41 S.L.R. 88; *Haldane's Trustees* v. *Haldane*, December 12, 1895, 23 R. 276, 33 S.L.R. 206.

LORD STORMONTH DARLING—The late Mr John Shiell, solicitor, Dundee, died in 1875, leaving a large estate, heritable and moveable, and survived by four children, two sons, and two daughters. One of the sons (John) died in 1895, survived by a widow and four sons. The other children of the testator survive, and so do the widow and three sons of John. But the other son of John, born in 1878, died in 1905 unmarried, but leaving a will by which he conveyed to trustees his whole estate, including any interest which had vested in him under his grandfather's settlement. It is between his trustees and the trustees of the testator that the present question has arisen.

The scheme of the testator's settlement was a comparatively simple one. Apart from certain legacies and annuities he directed that the income of his estate should be divided equally among his four children, and on the death of any of them before the term of division leaving issue, that the share of income which he or she had enjoyed should be continued to such issue, under burden of an annuity of £400 a-year to the widow or widower of such predeceasing child. On the death of all his children his whole means were to be "ascertained and apportioned among his grandchildren then alive and the issue of such as might have predeceased leaving issue *per stirpes* and not *per capita*," payment being made on their respectively attaining twenty-one years of age. But in the event of any of his sons or daughters dying without issue, then their portion of the income was to become payable among their surviving brothers and sisters, and the capital of such portions was to form a part of his means and estate at the period of division, and be equally divided among his grandchildren and their issue as before provided.

Under these provisions the fourth share of the income formerly received by his son John was, after his death in 1895, annually paid to his widow and family, the widow receiving £400 in satisfaction of her annuity, and the balance being divided among her children. The effect as regards the deceased John Anthony Sheill, in the year previous to his death, was to give him £155, representing the income of one-fourth of one-fourth share of the whole capital, less £100, being his one-fourth share of the annuity payable to his mother.

His trustees, by the first and second questions of law, raise the question whether and to what extent he had before his death taken a vested interest under the will of his grandfather. But no argument was addressed to us upon that head, for the obvious reason that there was a proper clause of survivorship among the grandchildren referable to the period of division which was fixed at the death of the testator's last surviving child, and therefore there could be no vesting before the period arrived. Accordingly the sole question which we have to consider is as to the effect of sec. 17 of the Entail Amendment Act of 1868 in producing an arbitrary period of vesting of the fee contrary to the plain provisions of the will, so soon as the supposed "liferent interest" came to be held by the testator's trustees for behoof of John Anthony Shiell, he being then of full age.

This section practically adopts, as regards personal estate, the declaration enacted, as regards land, by sec. 48 of the Rutherfurd Act of 1848, that "it shall be competent to grant an estate in Scotland limited to a

liferent interest in favour only of a party in life at the date of such grant." It sets out by providing that "from and after the passing of this Act it shall be competent to constitute or reserve, by means of a trust or otherwise, a liferent interest in moveable and personal estate in Scotland in favour *only* of a party in life at the date of the deed constituting or reserving such liferent;" and then the section goes on to enact that, where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the passing of the Act, be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such party, and where such estate stands invested in the name of any trustees, such trustees shall be bound to deliver, make over, and convey such estate to such party. The only variation in expression between the two Acts is that the older Act speaks of an estate in Scotland "limited to a liferent interest," while the later Act speaks of "a liferent interest in moveable and personal estate in Scotland." But it can hardly be supposed that the rather looser language of the Act of 1868, as applied to personal estate, meant anything different or less exacting than the more precise language of the Act of 1848 as applied to land; and therefore I take them both to mean the same thing.

What, then, is the true signification of a liferent interest, or an interest limited to a liferent, in moveable and personal estate in Scotland which cannot be constituted in favour of an unborn child, and must in certain circumstances be treated as a fee? Is it confined to the case of an interest limited to a liferent, in the sense that the beneficiary can never take more than a liferent whatever happens, and must his interest apply to a definite and severable estate in money? Or does it extend to the case of an interest which, by conception of the deed conferring it, is capable of being converted into a fee, and which cannot be so converted at an earlier period without interfering with the lawful interests of other parties? This alternative view applies to the case in hand, and without attempting to lay down any general rule for the construction of the section I think it must be answered in the negative. John Anthony Shiell's interest under his grandfather's will was in truth not a liferent but a contingent fee, and it would be impossible for the first parties to make over the estate, which the Act describes as "held in liferent," without anticipating the period of "ascertainment and apportionment" of the whole residue directed by the will, and so materially affecting the interests of the other beneficiaries. It is true that the section can never receive effect without depriving somebody of a fee which he would otherwise have got. But that does not justify interference with the rights of other parties interested in an undivided estate, and I cannot assent to Mr Cullen's ingenious argument that the first parties would satisfy their statutory obligation to "deliver, make over, or convey" the estate, which, he says, is the subject of a liferent, by simply continuing to hold it as they are doing at present.

There is so little authority on the construction of the Act (which is remarkable after the lapse of thirty-eight years from its date) that one is glad to find any judicial indication of the kind of case to which it applies. Such an indication is afforded by the case of *M'Culloch's Trustees* v. *M'Culloch*, 2 F. 749, *aff.* L.R. (1904), App. Cas. 55. That was a case with provisions in favour of grandchildren, very similar to the present except that the fee had admittedly vested in one of the grandchildren before the question arose. The decision on the main question was that this grandchild was not entitled under the will to immediate payment of the share which had vested in him, because the value of the share could not be ascertained till the period appointed by the testator for distribution. But the grandchild propounded an argument also on section 17 of the Act of 1868, founding on the fact that he was unborn at the date of the testator's death, that he attained majority in 1898, and that he had been in the enjoyment since his father's death in 1880 of the income of one-third of the undivided estate of his grandfather. The Lord Chancellor contented himself with saying—"This is not one of the cases to which the statute applies." But Lord Davey said a little more, and after referring to the statute as apparently "converting a person with a limited interest into one holding a larger interest," and as directing the trustees "notwithstanding any direction to the contrary in the will to transfer his share to him," ends by observing—"nor is there anything in the statute which in the least degree overrides any apt and competent provisions in a will for the purpose of fixing the period" (*i.e.*, of ascertainment and distribution). Now, if that could be said of a will which gave an immediate vested interest in the fee, much more, as it seems to me, does it apply to a will which postponed vesting to the period of distribution. There is nothing inept or incompetent in such a provision, and the view taken by the House of Lords seems to imply that the kind of "liferent interest" contemplated by the section is not to be extended beyond the simple case where, coming to be held by trustees for behoof of a person of full age, it is capable of being converted into a fee without interfering with the legitimate interest of others.

Lord Kyllachy—I concur, and do so on this ground. I am of opinion and think it clear that the so-called liferent possessed by the late J. A. Shiell was not in the sense of the statute or in any reasonable sense a liferent at all. On the contrary, it was, I think, really a right of a somewhat complex and quite innominate character, embracing as it did (1) a contingent fee in a certain share of the trust estate, and (2) a right, subject to certain burdens, to enjoy the income of the share in question until the right to the fee became absolute upon the

death of the last survivor of the truster's immediate children, J. A. Shiell's uncles and aunts. That was really the substance of the right, and being so, it appears to me that however it may be described, it cannot be described as a right of liferent. In one view it was more than a liferent, for it embraced as an essential element a right of fee—a contingent fee no doubt, but still a fee—while in another view it was less than a liferent. For it might terminate during the granter's life by the death which might have occurred at any time of the survivor of J. A. Shiell's uncles and aunts.

I cannot in such circumstances accept the ingenious and able, but I think somewhat strained, argument of the second parties, which would in my opinion extend the operation of the 17th section of the Entail Act of 1868 to a kind of case which it does not cover, and which certainly it did not contemplate.

LORD LOW—I am of the same opinion. The object of the 17th section of the Entail Act of 1868 was, I apprehend, to prevent the tying up of moveable estate by the creation of liferents, and it was accordingly enacted that it should be competent to constitute or reserve a liferent "in favour only of a party in life at the date of the deed." What was struck at therefore was the limitation of the right of a person unborn at the date of the deed to a liferent. There was, however, no limitation of the right of John Anthony Shiell to a liferent. On the contrary, he was given a fee of a portion of the trust estate in the event of his surviving the period of payment. It is true that in addition to the contingent right of fee the testamentary trustees were directed in a certain event which happened to apply for his behoof the income of the proportion of the trust estate which he would take in fee if he survived the period of payment. But it seems to me to be impossible to regard that direction as limiting the right given to John Anthony Shiell to a liferent. As matter of fact his right was not limited to a liferent, and the circumstance that he enjoyed the income for a time but died before the fee vested in him, was a mere accident which cannot qualify the nature of the right conferred upon him. I may add that it seems to me to be doubted whether the right to the income given to him can properly be described as one of liferent at all, but however that may be, I am satisfied that it was not a liferent within the meaning of the enactment in question.

That short view appears to me to be sufficient for the decision of the case, but I also concur in what your Lordships have said.

LORD JUSTICE-CLERK—That is my opinion also.

The Court answered the first branch of the first question and the first branch of the third question in the negative, and found it unnecessary to answer the other questions of law.

Counsel for the First Parties—Dean of Faculty (Campbell, K.C.)—Constable—A. M. Stuart. Agent—Thomas Henderson, W.S.

Counsel for the Second Parties—Cullen, K.C.—A. R. Brown. Agents—Cowan & Stewart, W.S.

Tuesday, August 15, 1905.

OUTER HOUSE.

[Lord Pearson.

THOMSON & GILLESPIE *v.* THE VICTORIA EIGHTY CLUB.

Club—Social Club—Liability of Members and of Committee-men—Goods Purchased on Credit by Clubmaster on Instructions of Committee — Liability Jointly and Severally of Committee.

Held per Lord Pearson (1) that the ordinary members of a social club, in the absence of special circumstances, are not liable for goods supplied to the club on the orders of the clubmaster; but (2) that the members of the committee, which passed the accounts for payment in ordinary course, and whose members had general knowledge that the supplies necessary for the club's existence were being given by the particular tradesman, were liable; and (3) that such liability was not *pro rata* but joint and several.

On 26th February 1904 Thomson & Gillespie, wine merchants, Edinburgh, and Alexander Scott Cairns, sole partner of that firm, raised an action against (1) the Victoria Eighty Club, 25 Dundas Street, Edinburgh, (2) Robert G. Armstrong and others, the members of the committee of the Club, and (3) the said Robert G. Armstrong and others, the known members of the Club, in which they sought to recover £165 (subsequently restricted owing to a payment to £120), the balance due to them on account of liquor supplied to the Club. Seventeen of the members called appeared to defend, including R. W. Millar, who was a member of committee. No appearance was entered or defences lodged for the Club or the Committee of Management. The conclusion of the summons against the Club was not insisted in, as it had apparently no funds.

The pursuers pleaded—"(1) The account sued for having been incurred for behoof of the members of the Victoria Eighty Club, and being due and resting-owing to the pursuers, and the second defenders being at present the committee having the management of the affairs of the said Club, the pursuers are entitled to decree in terms of the first conclusion of the summons with interest and expenses. (2) Such of the third defenders, the members of said Club, as were members of committee during the currency of said account, are conjunctly and severally, or severally, or in any view *pro rata*, liable as individuals in payment of