the Glasgow Royal Infirmary liable in expenses since said 11th December 1908, and remit the account thereof to the Auditor to tax and report: *Quoad ultra* find that the defenders the trustees of the deceased James Wright are not entitled to charge any expenses connected with the reclaiming note against the trust funds of the said deceased James Wright."

Counsel for Reclaimers (Defenders) — Blackburn, K.C. — Moncrieff. Agents — Webster, Will, & Company, S.S.C.

Counsel for Respondents (Pursuers) — Cullen, K.C. — Ingram. Agent — Henry Robertson, S.S.C.

Thursday, May 27.

FIRST DIVISION.

BAXTERS *v.* BAXTER'S TRUSTEES.

Succession—Liferent Interest—Party Born after Date of Deed—Right to Payment in Fee—Date of Valuation of Share—Entail Amendment (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 84), *sec.* 17.

The Entail Amendment (Scotland) 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 grantor), 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 1871 directed his trustees to apportion his estate among his children, declaring that the shares should not vest in them or their children (his grandchildren) but that they should only receive the interest, the fee of a share on a grandchild's death to be paid to his or her issue (testator's great grandchildren). The funds, however, were to be held by the trustees as one *cumulo* fund. Certain of his grandchildren, born after his death and having attained majority, founding on the Entail Amendment (Scotland) Act 1868, claimed payment of their shares in fee.

Held (1) that the Act applied, and that they were entitled to payment—*Shiell's Trustees* v. *Shiell's Trustees*, May 26, 1906, 8 F. 848, 43 S.L.R. 623; and *MacCulloch* v. *M'Culloch's Trustees*, November 24, 1903, 6 F. (H.L.) 3, 41 S.L.R. 88, *distinguished;* and (2) that the valuation of their shares fell to be made as at the date of payment.

The Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. cap. 84), section 17, 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. . . ."

On 21st November 1908 Miss Evelyn V. Baxter and Captain N. E. Baxter, the children, who had attained majority, of the late John Henry Baxter of Gilston, Fife, *first parties;* Charles W. Baxter and Ralph F. Baxter, his remaining children, who were still in pupillarity, and their tutors and curators, *second parties;* and Edward G. Baxter of Teasses, Largo, Fife, and others, trustees of the late Edward Baxter of Kincaldrum, Forfarshire, father of the said John Henry Baxter, *third parties*, brought a Special Case for the determination of the first and second parties' rights in the estate of the said Edward Baxter of Kincaldrum, their grandfather.

By his trust-disposition and settlement the late Edward Baxter of Kincaldrum, who died on 26th July 1871, directed his trustees to "set aside, divide, and apportion the whole residue and remainder of my said means and estate . . . and that among the whole of my children . . . in the following proportions. . . . Declaring that the shares of my said means and estate set apart to my said children other than the said William Edward Baxter, and any accretions to such shares, shall not vest in them or their children (my grandchildren). . . . And I accordingly appoint my trustees to pay to my said children . . . during their respective lives the interest, dividends, and yearly profits of their said respective shares or portions of the said residue . . . so divided and set apart. . . . Declaring that in case any of my children . . . shall die, whether before or after me, leaving lawful issue, then such issue shall be entitled to payment of the interest of their deceased parents' shares of my said means and estate and all accretions thereto, and shall also be entitled to the interest of all subsequent accretions as in the room of their deceased parents. . . . Notwithstanding of the rights of my sons other than the said William Edward Baxter being hereby restricted to a liferent merely, yet I do hereby specially authorise and empower my trustees . . . to pay such son or sons the fee of one-

third of their said respective shares or portions and all accretions thereon so soon as they shall attain the age of twenty-one years, . . . and on my sons attaining the age of twenty-five years complete . . . I hereby further specially authorise and empower my trustees to pay to my said sons a further sum not exceeding one-third of the share of my said means and estate. . . . I direct my trustees, on the death of my grandchildren, to pay to their issues (my great-grandchildren) the principal sum of the shares of such deceasing grandchildren, including all accretions as aforesaid, equally among them, share and share alike, and that on such issue (my great-grandchildren) attaining majority or being married, and in the event of any such issue (great-grandchildren) being in minority or unmarried at the time of their parent's death, I direct my trustees to apply the interest of their respective shares for their support, maintenance, clothing, and education, so long as they shall respectively be minors or remain unmarried." With the view of simplifying accounts the testator directed that the whole of his estate remaining in the hands of his trustees from time to time should be managed and invested as a common or aggregate fund.

In exercise of their discretionary powers the trustees paid over to John Henry Baxter the fee of two-thirds of his share. At the time of his death, viz., 30th March 1908, the said John Henry Baxter was entitled to the income of the balance of his share representing a capital sum of about £24,000.

In these circumstances the first parties *maintained* that, having been born subsequent to the date of the death of the truster (the said Edward Baxter, their grandfather) and both being of full age, they were each entitled to the fee of one-fourth of their father the said John Henry Baxter's share of the trust estate of the truster, and that they were entitled to receive from the third parties immediate payment of their said respective shares thereof (so far as the same were presently exigible) together with the accrued income thereon.

The second parties maintained, that having been born subsequent to the date of the death of the truster (the said Edward Baxter their grandfather) they had each acquired a vested right to one-fourth of their father the said John Henry Baxter's share of the trust estate of the truster, and that they were entitled to receive payment thereof, so far as might be exigible, together with the accrued income thereon, upon their respectively attaining majority.

The third parties maintained that they were bound, in terms of the said Edward Baxter's trust-disposition and settlement, to hold the share of the said trust estate of the truster falling to the children of the said John Henry Baxter, for their liferent alimentary use and for their respective issue in fee.

The third parties further maintained that in the event of the first parties being found entitled to the fee of their respective shares of the portion of the trust estate effeiring to their said father John Henry Baxter they (the third parties) were bound to value said shares as at the date of the said John Henry Baxter's death, and to pay over the same so valued to the said first parties. And in the event of its being found that the second parties had each acquired a vested right to their respective shares of said portion of the said Edward Baxter's trust estate, the third parties maintained that they were likewise bound to value said shares as at the date of the said John Henry Baxter's death, and to set aside and hold for behoof of the second parties particular securities representing the value of their said respective shares. The first and second parties contended that the value of their shares or portions fell to be ascertained and fixed as at the date of payment.

The *questions of law* included the following:—"(1) Have the first parties an absolute right, within the meaning of section 17 of the Entail Amendment (Scotland) Act 1868, each to one-fourth share of that part of the moveable and personal estate of the truster, the said Edward Baxter, liferented by the said John Henry Baxter, and if so, are the third parties bound to make over to the first parties the said shares of said estate? (2) Have the second parties a similar absolute right to one-fourth share each of the said part of said estate, or have they any vested right to said shares? In the latter event, are the third parties bound to hold said shares for behoof of the second parties until they respectively attain majority, in terms of the 17th section of the Entail Amendment (Scotland) Act 1868? . . . (4) In the event of the first question being answered in the affirmative, does the value of the first parties' portions of the trust estate of the said Edward Baxter, effeiring to the said John Henry Baxter, fall to be ascertained and fixed as at the date of the death of the said John Henry Baxter or at the date of payment?"

Argued for first and second parties—(1) As regards the major children the Entail Amendment (Scotland) Act of 1868, section 17, was directly in point, and they were therefore entitled to the capital of their shares in fee. (2) As regards the minor children the case was admittedly premature, and would not now be insisted in. (3) The valuation fell to be made as at the date of payment, otherwise the result would be, where the estate had diminished in value, to debit the remaining beneficiaries with the loss.

Argued for the third parties—(1) Section 17 of the Entail Act was inapplicable as its effect would be to interfere with the interests both of the younger children and of the ultimate fiars. The interests of the former would be prejudiced by the risks attending the investment and management of a smaller capital sum. The section therefore did not apply — *Shiell's Trustees* v. *Shiell's Trustees*, May 26, 1906, 8 F. 848, 43 S.L.R. 623. (3) The date of valuation should be that which is least burdensome to the remaining beneficiaries, whose common

law rights were being interfered with. That date in the present instance was the date of J. H. Baxter's death.

LORD PRESIDENT—This question arises under the settlement of the late Edward Baxter of Kincaldrum. By the twelfth purpose of his trust-disposition and settlement he left certain shares of his estate to his sons and daughters. He then told his trustees to set apart certain shares for behoof of his sons and daughters, and declared that the shares so set apart should not vest in either his sons or daughters or in their children. He provided that his immediate children should have a liferent of the shares, and then he provided that after his children died their children should be entitled to payment of the interest of the same shares which their fathers and mothers had enjoyed. Eventually he provided for the estate being paid over to his great-grandchildren upon their attaining the age of majority. He allowed the trustees, notwithstanding that, to advance a certain amount of each share, not exceeding two-thirds, to each son with the exception of William Edward Baxter who was to get his whole share in fee. One of his sons was John Henry Baxter. He had an advance made to him to the extent of two-thirds, but one-third of the share, representing, roughly speaking, a sum of about £24,000, is still in the hands of the trustees. There was a provision by which the trustees might manage the whole investment as a composite fund, and therefore that figure which I have given is, I suppose, a valuation as at the date of his death. John Henry Baxter was twice married, and the children by his first marriage are the first parties to this case, and have both attained majority. The children by his second marriage are the second parties, and they are still in minority. The first parties appeal to the 17th section of the Entail Amendment (Scotland) Act 1868, which provides that it shall be competent to create liferents in favour of persons existing, but not in favour of persons not born at the date of the deed creating the liferent, and that if such liferents are created in favour of non-existing persons, then—I now quote textually from the Act—"Where any moveable or personal estate in Scotland shall by virtue of any deed dated after the passing of this Act"—I pass over the clause dealing with how the date of the deed is to be fixed—"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." Now the first parties to this case say that they are exactly in this position. They are persons born after the date of the deed and after the date of the Act, and they have held for them an estate vested in the name of trustees for their own behoof in liferent. Accordingly, they now ask that that estate shall be held to belong to them in fee, and ask also for a transmission of it.

I do not think there is any answer to that demand, because the case seems to be precisely the case contemplated by the statute. The only authority which was quoted against that was the case of *Shiell's Trustees* (1906, 8 F. 848), which proceeded upon the case of *M'Culloch's Trustees* (1903, 6 F. (H.L.) 3) in the House of Lords. Now as I read *M'Culloch's Trustees*, the reason why an immediate conveyance was not there granted was that the interests of third parties would have been affected—and by the interests of third parties I mean not merely the interests of persons who would have eventually become fiars, but the interests of parties who would during their lifetime have taken some of the shares if the provisions of the testator were allowed to be carried out. In both these cases the testator had himself fixed a period of division at which the interests of certain persons, *inter se*, were to be fixed, and therefore, of course, if you took away a share before that period came, you frustrated the possibility of certain beneficiaries getting the shares which they would otherwise get. Now the House of Lords has held that that is not struck at by the Act, and accordingly to apply the Act to such a case as that would be to defeat the perfectly proper object of the testator, which it was not intended to defeat. Here there was nothing of that sort, because the shares vesting in each family are not affected by any survivorship clause in favour of anyone. No doubt, in one sense, of course, somebody must always be defeated by allowing a liferenter to take a fee instead of a liferent, because if he had only taken a liferent there would have come in somebody else entitled to take the fee. That must always be. Accordingly I think this is clearly a case where the statute applies.

There was a question put originally about the younger children, but that was quite properly given up, because the simple answer is that the statute does not apply to them, as they are not in a position to make the demand, they not being of full age.

Then there is a supplementary question whether the estate is to be valued as at the death of the said John Henry Baxter or as at the date of payment. Quite apart from the provision that the whole estate was allowed to be managed *in cumulo*, I think it is clear that the date of valuation must be the date of payment, because otherwise there might be a most obvious injustice. In the present case the estate seems to have increased in value. But supposing it had decreased in value, then the effect of allowing the valuation to be made as at the date of the death of John Henry Baxter would really be to debit the unfortunate beneficiaries who are left with the whole of the losses in the *cumulo* trust estate. That is quite out of the question. If that is true with regard to an estate which has fallen in value, it is equally true of the reverse. The share of the estate to be taken must therefore be valued as at the date when the demand is made.

Accordingly, I am of opinion that we should answer the first question in the affirmative, the second in the negative, the fourth (in its second branch) in the affirmative, and find all the others superseded.

LORD PEARSON—I concur with your Lordship.

LORD DUNDAS—I agree, and have nothing to add.

LORD M'LAREN and LORD KINNEAR were absent.

The Court answered the first question of law in the affirmative, the second question in the negative, the fourth question in the affirmative of its second alternative, and found it unnecessary to answer the other questions.

Counsel for First and Second Parties—Craigie, K.C.—King. Agents—Henderson & Jackson, W.S.

Counsel for Third Parties—Blackburn, K.C.—D. Anderson. Agents—W. & J. Cook, W.S.

Friday, May 28.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

INGRAM-JOHNSON *v.* CENTURY INSURANCE COMPANY, LIMITED.

Insurance—Contract—Policy—Surrender—Offer and Acceptance—Locus Pœnitentiæ.

A, the holder of a policy of insurance which contained the following clause—"At any time after five years' premiums have been paid, this policy may be surrendered for a cash payment,". . . —wrote to the company as follows:—"I have decided that I will accept the surrender value of my full return policy, and shall be glad to have the money as soon as possible. If there are any special forms to fill up, kindly forward them to me." In reply, the secretary of the company wrote asking A to forward the policy, and stating that a cheque would be sent in a day or two. Shortly thereafter the secretary again wrote returning the policy for signature of the endorsement thereon, and stating that on its receipt duly completed the surrender value would be sent. Before any formalities connected with the surrender had been executed, or the surrender value paid, A claimed under the policy, maintaining that it was still in force.

Held that the clause in the policy was a standing offer by the company which the pursuer had accepted by his letter, thus constituting a concluded contract to surrender, and that the company were thereafter only liable for the surrender value.

On 27th March 1908 Dr Ingram-Johnson, South Moor, Durham, brought an action against the Century Insurance Company, Limited, Edinburgh, in which he sought declarator that a certain insurance policy issued by them to him was still in force. He also claimed payment of a sum alleged to be due thereunder.

The following narrative is taken from the opinion (*infra*) of the Lord President—"This is an action brought by the holder of a sickness and accident policy, called a Full Return Policy, against an insurance company, in which he seeks to recover certain benefits which are said to be due under that policy in respect of sickness. There is no dispute as to the facts in the case, and though there has been no formal proof, a correspondence has been put in upon which the Lord Ordinary has sisted the case in order to allow the pursuer to go to arbitration as provided by the policy. But the defence which is made to the action is that the policy was surrendered, and that the only claim competent to the pursuer is a claim for a definite money payment, which has been tendered. The policy is printed, and is a policy by which in respect of certain payments, which were duly made, the holder of it, the assured, is to be entitled, if he is unfortunately the victim of sickness or accident, to certain weekly payments, and then, if at the time he has attained the age of sixty-five years he has duly paid the premiums agreed upon, he, or, in the event of his death, his executors, will be entitled to a return of the premiums paid. There are various conditions and provisions incorporated with the policy, and one of these, which is admittedly a part of the contract, is as follows—'At any time after five years' premiums have been paid this policy may be surrendered for a cash payment which in no case will be less than one-third of the whole premiums received, and will increase with the duration of the policy.' Now I read that as part of the contract, and as a part of the contract it is a standing offer on the part of the Insurance Company that if a person chooses to surrender he may do so, and if he does so he will be entitled to a cash payment in no case less than one-third of the whole premiums, and which will increase with the duration of the policy. This gentleman did pay five premiums, and then he wrote to the Insurance Company asking to know what the surrender value that he would be entitled to was. He also asks certain questions as to whether he could commute the policy for other policies. His inquiries were duly answered, and then, on 12th December 1906, he wrote to the resident secretary of the company the following letter—'Dear Sir, I have decided that I will accept the surrender value of my Full Return Policy, and shall be glad to have the money as soon as possible. If there are any special forms to fill up kindly forward them to me.' That letter was acknowledged as follows—'Your note to hand this morning requiring surrender value on the above policy. You might kindly forward me your policy by return, and cheque will be forwarded you in the course of a day or two.' Upon 18th Dec-