that the proper verdict is at least double that found by the Lord Ordinary, I have no hesitation in concurring with your Lordships. I think it has been sufficiently proved that of the profit of between £4000 and £5000 proved in the evidence at least £3000 could and would have been earned by the pursuers.

LORD JUSTICE-CLERK—I concur, but I may add that, if I had been disposing of this case myself I do not think I would have held £3000 to be an adequate sum of damages.

The Court recalled the interlocutor of the Lord Ordinary, and ordained the defenders to make payment to the pursuers of the sum of £3000 damages.

Counsel for Pursuers and Reclaimers—Clyde, K.C.—Sandeman, K.C.—R. B. King. Agents—Webster, Will, & Company, W.S.

Counsel for Defenders and Respondents—Dean of Faculty (Scott Dickson, K.C.)—Macmillan, K.C.)—Normand. Agents—J. & J. Ross, W.S.

Tuesday, March 18.

SECOND DIVISION.

[Sheriff Court at Perth.

HIGHLAND DISTRICT COMMITTEE OF PERTHSHIRE COUNTY COUNCIL *v.* RATTRAY.

Road—Expense of Extraordinary Traffic—Recovery by Road Authority—Certificate of Surveyor—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 57.

The Roads and Bridges (Scotland) Act 1878 enacts—"Section 57. Where by the certificate of their surveyor or district surveyor it appears to the authority which is liable to repair any highway that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same or by extraordinary traffic thereon, such authority may recover in a summary manner before the Sheriff . . . . from any person by whose order the excessive weight has been passed, or the extraordinary traffic has been conducted, the amount of such extraordinary expenses as may be proved to the satisfaction of the Sheriff to have been incurred by such authority by reason of the damage arising from such excessive weight or traffic. . . ."

In proceedings under this section by a road authority, *held* that in granting a certificate under the section it is not necessary that the surveyor should have had regard to the average expense of repairing highways in the neighbourhood or should so state in his certificate, though it is necessary that the road authority before taking action should have such regard.

Road—Expense of Extraordinary Traffic—Recovery by Road Authority—Personal Bar—Road Less than Legal Width—Highway (Scotland) Act 1771 (11 *Geo.* III, *cap.* 53), *sec.* 1.

The Highway (Scotland) Act 1771 enacts—"Section 1. . . . The justices of peace and commissioners of supply for the respective shires and stewartries, and the commissioners and trustees of turnpike roads . . . shall have power, and they are hereby authorised and impowered, to make, repair, clear, widen, and extend, and to keep in good repair . . . the several highways and roads under their management and direction respectively, so as the same shall be in all places fully twenty feet width of clear passable road, exclusive of the bank and ditch on each side of such highway or road respectively."

Opinion (*per* Lord Salvesen) that a local authority was not barred from recovering the damage caused to a road by extraordinary traffic by reason that the road was of less than the statutory width.

Opinion (*per* Lord Dundas) *reserved.*

The Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), sec. 57, and the Highway) Scotland) Act 1771 (11 Geo. III, cap. 53), sec. 1, are quoted *supra in rubric.*

The Highland District Committee of the County Council of Perth, *pursuers*, brought an action in the Sheriff Court at Perth against William Rattray, wood merchant, Perth, *defender*, in which they claimed payment of £1010, 10s. in respect that defender, who had purchased a quantity of growing timber at Foss in the parish of Dull and County of Perth, did, during the period from April 1910 to 6th June 1911 by means of a traction engine and waggons, conduct excessive weight or extraordinary traffic over the highway between Foss Sawmill and Coshieville, whereby, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses were incurred by the pursuers in repairing the portions of the highway and bridges and culvert mentioned in the certificate by the pursuers' surveyor by reason of the damage caused by such excessive weight or extraordinary traffic, conform to the certificate by the pursuers' surveyor.

The surveyor's certificate was in the following terms—

"*Perthshire Highland District Roads.*

"Certificate by the Road Surveyor to the Highland District Committee as to damage by excessive weights on the road between Foss and Coshieville.

"I hereby certify that much damage has been done to the road and bridges from Coshieville to Foss Sawmill through excessive weights passing along the road in the haulage of timber to Aberfeldy by Mr William Rattray, and that extraordinary

expenses amounting to £1010, 10s. beyond the ordinary cost of maintenance has been expended in repairing the damage, being £965, 10s. in repairs on roads; £24 in repairs to Blair Rannoch Bridge; £15 in repairs on Whitebridge; and £6 in repairs on the culvert at the seventh mile stone.

"WM. BELL, Road Surveyor,
"Highland District.
"Aberfeldy, 19th October 1911."

The pursuers pleaded, *inter alia*—"The pursuers having incurred extraordinary expenses in repairing the highways, bridges, and culvert mentioned in the condescendence n consequence of the extraordinary traffic and excessive weight conducted thereon by the defender are entitled to decree against the defender for payment thereof, as craved."

The defenders pleaded, *inter alia*—"(1) The certificates by the district surveyor being awanting in specification and disconform to the requirements of the statute, the action should be dismissed. (4) The road between Foss and Daloist being one which it was illegal for the pursuers to maintain, as it was short of the statutory width, they can have no cause of action in respect thereof."

On 16th July 1912 the Sheriff-Substitute (SYM) repelled the defender's first plea so far as excluding the action, and as to the defender's fourth plea found "that the fact—assuming it to be the fact—that the pursuers have not a road 20 feet wide of passable width from Daloist to Foss does not exclude them from maintaining an action against one who is said to have caused wrongful damage to such road, and to that effect and extent" repelled the fourth plea, and before answer allowed a proof.

The defender appealed, and on 3rd January 1913 the Sheriff (JOHNSTON) refused the appeal and affirmed the interlocutor of the Sheriff-Substitute.

The defender appealed to the Court of Session, and argued—A claim for damage to roads caused by extraordinary traffic, under section 57 of the Roads and Bridges Act 1878 (41 and 42 Vict. cap. 51), must comply with the condition-precedent laid down by the statute, viz., the obtaining of a certificate by the road surveyor stating what the estimate of the damage was, and this by reference to the expenditure on neighbouring roads, which was the statutory criterion. In the present case, however, the certificate did not comply with the statute, because it was framed on a wrong basis, viz., by reference to past expenditure on the particular road in question and not to expenditure on neighbouring roads. It was not sufficient for the local authority, before instituting proceedings, to have regard to such expenditure. It must also appear *ex facie* of the certificate that the surveyor had considered it—*Wallington* v. *Hoskins*, 1880, 6 Q.B.D. 206; *Billericay Rural District Council* v. *Poplar Union*, [1911] 1 K.B. 734, 2 K.B. 801; *Colchester Corporation* v. *Gepp*, [1912] 1 K.B. 477; *Milne & Company* v. *Aberdeen District Committee*, November 30, 1899, 2 F. 220, 37 S.L.R. 171. The case of *Epsom Urban District Council* v. *London County Council*, [1900] 2 Q.B. 751, founded on by pursuers, was wrong. It was only the judgment of a single Judge, and was not before the Court in *Billericay Rural District Council* v. *Poplar Union* (*cit. sup.*). (2) The statute required 20 feet "of clear passable road," and there was no doubt that the road in question did not comply with the terms of the statute. That had been held to be imperative and not merely permissive—*Gray* v. *St Andrews and Cupar District Committees of Fifeshire County Council*, 1911 S.C. 266, 48 S.L.R. 409; *Walkinshaw* v. *Orr*, January 28, 1860, 22 D. 627. Being admittedly in default in the performance of their statutory duty, pursuers were not entitled to exact money from the defender in the very matter in which they were in default. The extent of the injury done to the road by extraordinary traffic depended on the width of the road, and part at any rate of that expenditure would have been obviated if the road had been of the statutory width. Reference was also made to *Morpeth Rural District Council* v. *Bullocks Hall Colliery Company, Limited*, February 14, 1913, W.N. 55.

Argued for the pursuers—The certificate was in valid form. There was no statutory form, and it met the essentials of the statute. It was not necessary for the surveyor to put into the certificate the expenditure on neighbouring roads. The local authority knew what they had spent on the roads, and whenever they got from the surveyor's certificate a statement that expense to a certain amount had been incurred on a particular road they knew whether extraordinary expense had been incurred. The English cases did not make expenditure on neighbouring roads a standard, but only an item of evidence—*Epsom Urban District Council* v. *London County Council* (*cit. sup.*); *Milne & Company* v. *Aberdeen District Committee* (*cit. sup.*); *Colchester Corporation* v. *Gepp* (*cit. sup.*). The case of *Wirrall Highway Board* v. *Newell*, [1895] 1 Q.B. 827, showed that it was the local authority that must have regard to such expenditure, and not that the certificate should show it *in gremio*. There was no case in either England or Scotland in which the form of the certificate was in issue which supported defender's contention, and the only support he could get was certain dicta in the case of *Billericay Rural District Council* v. *Poplar Union* (*cit. sup.*), where after inquiry the Judge had no material on which to go either by comparison with other roads or the previous state of the road in question, and therefore refused to award anything. (2) Even if the pursuers did not maintain a road of the statutory width, that did not entitle defender to damage it by extraordinary traffic, or bar him from recovering such damage.

At advising—

LORD DUNDAS—A good many questions of general interest and importance were

fully and ably argued at our bar, but I have come to the conclusion that it is neither necessary nor desirable to decide all of them at this stage of the case.

1. The defender's first plea-in-law seems to be directed in some measure against the relevancy of the action, but also largely against its competency. The latter aspect of the plea we ought to deal with here and now, and I think the learned Sheriff-Substitute, whose interlocutor was affirmed by the Sheriff, is right in repelling it "so far as excluding the action." The point involved is whether the surveyor's certificates are disconform to the statute, so as to be no certificates at all, in respect that they do not bear *ex facie* to have been framed by him "having regard to the average expense of repairing highways in the neighbourhood." I do not think that upon a just construction of section 57 of the Roads and Bridges (Scotland) Act 1878, in which the words quoted occur, it is a necessary qualification of a surveyor's certificate that it should include these words. I do not see what good their mere inclusion would do to the defender or to anybody concerned. I shall say something presently as to what I conceive to be the place and function of the certificate in a statutory proceeding of this nature. But so far as authority goes it appears that, though it is usual for the certificate to bear that regard has been had to the average expense of repairing highways in the neighbourhood, it is not essential that it should do so. This was directly decided in a considered judgment by Lord Mersey (then Bigham, J.) in *Epsom Urban Council* [1900] 2 Q.B. 751. It was there argued that "the surveyor's certificate is not in proper form because it does not show that the average expenses of repairing all the roads in the district have been taken into account, and not those merely of repairing the roads along the line of traffic." The report shows that the certificate expressly bore that the surveyor had had "regard to the average expenses of repairing highways along the line of traffic." His Lordship said—"I think nothing of this point. I am quite satisfied that the certificate did make it appear to the plaintiffs" (the road authority) "that extraordinary expenses within the meaning of the section had been incurred, and if it did that it was a certificate which complied with the requirements of the law." This point was discussed in the Scots case of *Milne & Company* (1899, 2 F. 220), and also the further point—which I think we ought now to decide—whether or not it is necessary that the surveyor should in fact have regard in framing his certificate to the neighbouring highways. The certificates there did *ex facie* bear that regard had been had to the average expense of repairing highways in the neighbourhood, but the pursuers sought reduction of the certificates and of the Sheriff's decree (which at that time was not subject to appeal), in respect that the former were false and fraudulent to the knowledge of the road authority, and were granted without any such "regard" being had in fact. The pursuers argued, *inter alia*, that the certificates were an essential preliminary to the action, and if they were not truly in terms of the statute the whole proceedings were bad. But their action failed, and I think the opinions of the learned Judges, which I shall presently refer to in some detail, were clearly to the effect that it is not an essential preliminary to the action—a condition *sine quâ non* of its competency—that the surveyor in granting his certificate should have had regard to the average expense of repairing highways in the neighbourhood. I should myself have reached the conclusion upon a construction of the statute and apart from authority (1) that it is not essential that a certificate should bear on its face that the surveyor had had regard in framing it to neighbouring highways, or that he should in fact have had such regard, and (2) that it is sufficient that the road authority should, with the certificate before them, and before raising action, have regard to the average expenses of repairing highways in the neighbourhood. The production of a certificate by the surveyor is certainly an essential condition precedent to an action like the present. It is, as Mr Macmillan put it during the discussion, the pursuers' ticket of admission to the law court. But it is not easy to define precisely the place and function of the certificate in the matter, or to realise the exact object of the Legislature in making it a condition precedent of legal proceedings and in introducing the words already quoted with reference to neighbouring highways. It is not necessary at present to commit oneself to a concluded opinion as to the object of the Legislature, or what amount of safeguard, and to whom, it designed to provide by referring to highways in the neighbourhood. But I agree with the learned Judges in *Milne's* case in holding, upon a construction of section 57 of the Act of 1878, that it is not essential that the surveyor in framing his certificate should in fact have had regard to the expense of repairing highways in the neighbourhood, although the road authority themselves, before commencing action, must have regard to it, whatever the precise nature and limits of such regard may be. The Lord Ordinary (Low) thought that one object of the words already quoted from the statute "was to secure that the only basis for determining whether there had or had not been extraordinary expenditure should not be the cost of repairing the road upon which extraordinary traffic had arisen." His Lordship considered that the words used were "designedly very general words, so as not to lay down any hard and fast rule, but to give considerable latitude so as to meet the varying circumstances of different cases." The Lord President (Kinross) thought that the direction in section 57, to have regard to the average expense in the neighbourhood, "is addressed, in the first instance at all events, to the road authority, and they are not enjoined to accept it as a final standard, but only to consider it

possibly along with other evidence bearing upon the question whether the expenses incurred by them in repairing the highway in question are or are not extraordinary." Lord M'Laren attached no importance to the argument relating to the certificate, which, he observed, "is not a formal legal document at all." Lord Kinnear was of opinion that "the surveyor's certificate is only necessary to set the local authority in motion." I am aware, however, that the views I have quoted are not in harmony with opinions expressed by some learned judges in England, particularly with some *obiter dicta* by Lord Moulton (then L.J.) in the *Billericay* case. For present purposes it is sufficient to decide that the action is not incompetent although the certificate does not bear on its face to have been framed, and may not in fact have been framed, "having regard to the average expenses of repairing highways in the neighbourhood," and to indicate the opinion that it is the duty of the road authority, before commencing an action like this, to "have regard" to the matter indicated. As to the extent and quality of such "regard" which it is necessary for them to have, or to what highways in the neighbourhood regard must be had, or in what fashion, I express no opinion. These questions may arise for decision if the case comes before us again on an appeal after the evidence has been taken. I think the Sheriff-Substitute dealt rightly with the defender's first plea-in-law.

2. The defender's second plea is that "the pursuers' averments being irrelevant, the action should be dismissed." The argument on this head was in two branches. Mr Macmillan contended, in the first place, with great force, that the pursuers' own record made it quite clear that neither the surveyor, in framing his certificate, nor the pursuers themselves before bringing the action, had in fact had any regard at all to the average expense of repairing highways in the neighbourhood. In the second place, he maintained that the record did not contain sufficient specification —equivalent to the "particulars" in an English suit—in regard to the two different roads with which the action is specially concerned. Mr Horne has now relieved the situation by making amendments on his record which go far at all events towards meeting both objections. The pursuers now aver that they have had regard to the average expense of repairing highways in the neighbourhood; and they state a number of particulars. The proof allowed is "before further answer," and the plea to relevancy will be neither sustained nor repelled *in hoc statu*. If the defender should consider himself entitled to any further particulars, the Sheriff-Substitute can deal with the matter before the proof.

[*His Lordship then dealt with another point with which this report is not concerned.*] 4. The defender's fourth plea-in-law is a somewhat singular one. It would, if sustained *de plano*, exclude the action so far as it relates to the road between Foss and Daloist. The theory is that that road, inasmuch as it does not afford a clear passable space at all parts of at least 20 feet, does not comply with the statutory obligation imposed on road authorities in Scotland, and therefore the pursuers are not in a position to recover from the defender any pecuniary loss they may have sustained from his use of it by way of excessive weight or extraordinary traffic. *Prima facie* this argument appears to involve something of a *non sequitur*, and the learned Sheriff indicates an opinion that the defence is irrelevant. But expiscation of the facts, as to which the parties do not seem to be agreed, may throw light upon the matter, and as there is to be a proof I am content to let this point be included in its scope for what it is worth.

For the reasons stated, I think we should affirm the interlocutors appealed against, and remit the case to the Sheriff Court for proof.

LORD SALVESEN — This action raises questions as to the construction of section 57 of the Roads and Bridges (Scotland) Act 1878, the language of which has been borrowed from an English statute and which has already been the subject of much judicial comment in England, and at least on one occasion in Scotland. There is a general consensus of opinion with regard to one point, viz., that the certificate of the surveyor or district surveyor is a condition precedent to an action being raised by a local authority for recovery of extraordinary expenses incurred in repairing a highway. The important question is whether the surveyor in granting it must have had "regard to the average expense of repairing highways in the neighbourhood," and must so state in his certificate. It was said with much apparent force, and the view has the support of so eminent a judge as Lord Justice Fletcher Moulton, that it cannot appear to the local authority which has to consider the matter that extraordinary expenses have been incurred, having regard to the average expense of repairing highways in the neighbourhood, unless that can be gathered from the certificate itself. If this is a statutory solemnity and the certificate is a nullity in consequence of its omission, then it would seem to follow that the whole proceedings must be commenced *de novo*; with the necessary consequence that the time limit would operate very much to the defender's advantage.

I do not stop to consider what the object of the Legislature was in providing that the certificate of the surveyor should be a condition precedent to the local authority raising any action. Various suggestions have been made, more or less conjectural. None of them seem to me to indicate that the certificate performs any really useful function. It may be assumed that a local authority would not embark upon litigation unless, at least, they were backed up

by the official whom they appoint to supervise the roads within their jurisdiction. Perhaps the draughtsman may have thought the surveyor was some independent official whose views might act as a check upon the rashness of the local authority. If so, he undoubtedly proceeded on a misapprehension. This much may be said, that if the surveyor in his certificate is to perform the functions that the defenders say the statute has laid upon him he has an extremely difficult task. He has in the first place to consider what is the meaning of "average expense." Over what period is the average to be taken? Is it the average of the period in respect of which the claim is made, which may be a broken period of a few months, or is it to be an average extending over a period of years, and, if so, how many? He has next to consider what is meant by the term "highways." Are all the roads to be included, or is it only similar or comparable roads to which he is to have regard, as the Court of Appeal held in the *Billericay* case? And what if there be no similar or comparable highways, as may well happen in a thinly populated district where there is only one main road and the rest are side roads differing entirely in width, formation, and solidity? Lastly, what is meant by the phrase "in the neighbourhood"? Does it extend to highways under a different jurisdiction with which the surveyor has no aquaintance, as where the road injured is very near the limit of his jurisdiction? And what area is to be covered by the phrase? All these matters the surveyor must apparently consider if the defender's argument is sound, and must come to a right legal result with regard to them if his certificate is not in the end to be treated as a nullity. I do not think that it was the intention of the legislature that such a burden should be cast upon the surveyor. The object of inserting the clause that I have referred to seems rather to be by way of warning to the local authority before taking action, and to the judge who has ultimately to decide the case, that it is not to be rashly concluded that because there has been more expense incurred in repairing a particular highway in one year than another that therefore that highway must have been injured by extraordinary traffic or excessive weights. Regard must be had to all the circumstances that may have effected similar highways in the district and which in a given year may have increased the amount expended on repairs. In short, the words "having regard to" might, I think, be translated "in view of," in which case it is the authority which must consider the figures stated in the certificate, and compare them with the general charges for maintenance incurred on comparable roads in the vicinity. This construction is supported by the fact that the amount recoverable against the person by whose extraordinary traffic the road has been damaged is not measured by the difference between the actual cost of repairing the road in controversy and the average expense of repairing similar roads in the neighbourhood for the same mileage. It is also, in my judgment, settled by authority both in England and Scotland. The exact point was decided by Bigham J. in *Epsom Urban District Council* ([1900] 2 Q.B. 751); and also, I think, impliedly in the case of *Milne* (2 F. 220) (a decision which is binding on this Court); and the *Colchester Corporation* ([1912] 1 K.B. 477). In the last two cases the certificate granted by the surveyor contained the formal words of the statute; but in each of them it was admitted that the surveyor had done no more than he certified in the present case; that is to say, that he had only ascertained what had been the average expense of repairing the highways in respect of which the claim was made, and had not applied his mind to the average expense of repairing similar highways in the neighbourhood. Now I cannot conceive that the formal statement that compliance has been made with the statutory provision, when in fact it is admitted that that statement is untrue, can make a certificate which would otherwise *ex hypothesi* be a nullity a good and valid certificate; or that a certificate should be any the worse because it did not contain an admittedly false statement. When a surveyor has accurately ascertained over a period of years the average expense of repairing the roads affected by the alleged extraordinary traffic, I think both he and the local authority may well draw the conclusion that this will fairly represent the average expense of maintaining similar roads; for they cannot be similar if their annual upkeep is not approximately the same. Further, it may be assumed that the local authority as well as the surveyor will have a general knowledge of what it has cost them to repair similar roads per mile; and if it is found that the expense of repairing a particular road has been out of all proportion to the ordinary expense of its maintenance, I think it may well appear to the local authority, "by the certificate" to use the statutory language, that they have a *prima facie* cause of action. It is not to be left out of view that the surveyor in this case did certify that extraordinary expenses had been incurred, and the figure at which he stated these expenses might well justify the local authority in thinking that they were in duty bound to the ratepayers in the district to take proceedings for their recovery. On these grounds, I have reached the opinion that even if the matter were open, as I conceive it is not, the certificate of the surveyor is not a nullity because it does not contain a statement that he has had regard to the expense of repairing similar highways in the neighbourhood, or has in fact not applied his mind directly to the question at all.

The only other matter which it is necessary to decide at this stage is that which is raised by the defenders' fourth plea-in-law. It was decided by this Court in *Gray* (1911 S.C. 266) that road trustees are in breach of their statutory duty if they have failed to

provide in the case of a statute labour road a clear passable road of not less than 20 feet in width. I see no ground for doubting the soundness of that decision, although it may be that road trustees have in many cases not strictly conformed to their statutory duty. But it is one thing to say that they may be liable as for negligence where an accident arises through their failure to provide a road of the statutory width, it is a totally different thing, and does not by any means follow, that they cannot recover for damage caused to a road of less than the statutory width by reason of extraordinary traffic. The statute does not impose any obligation upon them to have the road metalled so as to carry heavy traction engines for any patricular width. If it had I could have seen some plausibility in the argument maintained. As matters stand I am prepared to hold—agreeing on this point with the Sheriff—that it is irrelevant for the defenders to plead that the road was not the statutory width. It is admitted that logically the argument would be precisely the same although the road was 19½ feet at only a single point throughout its course and for the rest complied with the statutory conditions. The argument for the defenders seems to have been drawn from the domain of the law of contracts and to have no application to a case such as the present. I am content however, as the facts are in dispute, that this point, and the others to which Lord Dundas has more fully referred, should meantime be included in the inquiry and should not be made the subject of formal decision.

LORD DUNDAS intimated that t e LORD JUSTICE-CLERK, who was absent at the advising, concurred in the opinion of the Court.

LORD GUTHRIE, who was present at the advising, delivered no opinion, not having heard the case.

The Court dismissed the appeal and affirmed the interlocutors appealed against.

Counsel for the Pursuers and Respondents—Horne, K.C.—Lippe. Agents—Erskine Dods & Rhind, S.S.C.

Counsel for the Defender and Appellant Macmillan, K.C.—J. G. Jameson. Agents—Carmichael & Miller, W.S.

Tuesday, March 18.

FIRST DIVISION.

JACKS' TRUSTEES AND OTHERS *v.* JACKS AND OTHERS.

Succession—Election—Forfeiture—Equitable Compensation.

Question whether a widow who had elected to claim her legal rights and had surrendered testamentary provisions expressly declared to be in full thereof, has forfeited these provisions absolutely, or only in so far as necessary to make equitable compensation to the beneficiaries under the will.

Macfarlane's Trustees v. *Oliver*, July 20, 1882, 9 R. 1138, 19 S.L.R. 850, and *Gray's Trustees* v. *Gray*, 1907 S.C. 54, 44 S.L.R. 39, *commented on.*

Succession — Will — Election — Approbate and Reprobate.

A testator directed his trustees to pay to his wife the income of the residue of his estate, and on her death to pay various legacies, the provisions in favour of his wife being expressly stated to be in full of her legal claims. Power was, however, conferred upon her to surrender her liferent over all or any of the legacies so as to admit of these being paid at once. The widow elected to take her legal rights.

Held that she could not thereafter exercise the power of consenting to anticipation of payment.

Succession—Legacy—Vesting—Surrender of Liferent—Acceleration—Date of Payment.

A testator directed his trustees to pay to his wife the free annual income of the residue of his estate, and on her death to pay various legacies, some of which were absolute and not subject to any contingency, and others coupled with a clause of survivorship and conditional institution of issue. He further directed that the surplus residue should be at the absolute disposal of his trustees, to apply it as they might think fit in augmenting any of the legacies or helping kindred institutions to those favoured in the will. Power was conferred on the wife to surrender her liferent over all or any of the legacies so as to admit of immediate payment. The widow elected to take her legal rights, and thereafter executed a deed of ratification by which she irrevocably surrendered her liferent, and also consented, so far as she competently could, to the exercise of the power of anticipation.

Held that, as the non-contingent legatees had a vested and indefeasible interest in their legacies, they were entitled—if and when the trustees had funds in their hands sufficient to pay all the legacies vested and contingent—to immediate payment; but (*diss.* Lord Johnston) that, in the case of the contingent legacies, vesting, and therefore payment, was postponed till the widow's death, her repudiation of the liferent not having the effect of accelerating the period of vesting.

Succession—Legacy—Condition—Date of Payment.

A testator directed his trustees to pay to his wife the free annual income of the residue of his estate, and on her death to pay amongst others the following legacy—to the University of Glasgow to endow a chair, a legacy of £20,000, "declaring that should either