Court to restrict the burden accordingly. Under these provisions of the statute there cannot, I think, be any doubt that these bonds affect the rents, and therefore that the interest of them must be deducted in estimating the amount of the year's rent three times, which is the limit of the burden. And such I believe to have been the uniform understanding of the profession. I gather this from our Institutional writers. Mr Duff, in his work on Entails, says that the interest of provisions to wives and children must be deducted. Mr Bell, in his Lectures, states it still more clearly. He says that the free rent is to be ascertained in the same way as that directed in the first clause as regards the widow's annuity. Now, it is matter of express decision in the case of *Boyd*, 13 D. 1302, that the interest on provisions granted under the 4th section must be deducted in ascertaining the free rent, in order to fix the amount of the widow's annuity. Mr Ross also so states the law.

What thus seems to have been the practice is so far borne out by decision that I have not found that it ever was questioned judicially. It was argued to us that the word "provision" did not even include provisions granted under the power of the entail. But Lord Curriehill's opinion in the case of *Lockhart*, 15 D. is conclusive on this point, and he lays down the contrary as the undoubted construction of the statute. On the question whether provisions under the 4th section do or do not affect the rents, I think the case of *Cochrane*, 9 D. 127, sets that matter at rest. That case related to a provision which burdened neither the estate nor the rents, but had been found in the House of Lords to be a personal burden on the successive heirs of entail. The question which arose in this case was, whether the interest of this provision ought to be deducted in fixing the amount of free rent under a bond granted in virtue of the 4th section of the Aberdeen Act? It was found that it should not, because, unlike provisions under the Aberdeen Act, it was purely a personal debt, and did not affect the rents, and that the debt could not be kept up against the rents by the heir on payment, as can be done under the Aberdeen Act. The opinions of Lord Justice-Clerk Hope, Lord Moncreiff, and Lord Cockburn, clearly establish that a provision under the Aberdeen Act does affect the rents, not merely because it is a personal debt of the heir of entail, but because *vi statuti* it is a burden on the rents, into whose hands soever they may come, and therefore can be kept up against the succeeding heirs.

The Lord Ordinary seems to have thought that the provisions of the 6th section might lead to an opposite conclusion, and that somehow the result of deducting the interest in question would give rise to a double deduction of it. I think this is a mistake. The 6th section does not relate to the mode of ascertaining the free rent. It has no connection with that subject. It relates exclusively to the capital sum after it has been ascertained under the 4th section, and only applies in the special case of the bond of provision, along with sums already laid upon the estate under the 4th section of the Act exceeding that sum. It provides that no greater burden than the three years' free rent shall burden the rents or the heir in possession, and that therefore the last bond must be limited to the sum which will complete that amount, until part of the prior burden is paid off or extinguished. It has no other object or effect. It never comes into operation at all unless the margin has been exceeded, and, when it has, it only postpones the excess as a charge on the rents, until they are relieved of the prior and existing burden. In cases in which it applies it cannot receive effect until the capital sum of free rent has been previously ascertained.

LORDS COWAN and BENHOLME concurred.

LORD NEAVES—I differ. I think the true interpretation of clauses 4 and 6 of the Aberdeen Act is this, that the first heir may burden up to the extent of three years' free rental, and the succeeding heirs may keep that burden up to the amount of three years' rental so far as there remains free any portion thereof, the outstanding provision having been previously deducted. Suppose an estate having £1000 of free rental; £3000 would be the limit of burdens by the first heir: if £1000 of this have been paid off, *that* will be the limit of the next heir's burdening power. There is no new calculation required, and every succeeding heir can supplement a partial exercise of his powers by a former heir. The words of the 4th section are not nearly so explicit as those of the first, where children's provisions are expressly included. Section 4 gives us no explanation as to what these provisions are. I think these deductions must be made at starting, after which section 6 regulates, and it appears to me that any provisions not filled up by one heir may be supplemented (to the full extent unfilled up) by the next. There is nothing in the 4th clause to supersede the regulations in the 6th, and it appears absurd to say that while one heir of entail may burden to the full extent, say of £1000, the whole burden could only be £900 if there were two series of heirs.

The following interlocutor was pronounced:—

"Recall the said interlocutor in so far as it finds that, in estimating the free annual rental, the sum of £45, 13s. 6d., being a year's interest on that sum of £1141, 16s., which is the balance of the prior bond affecting the entailed estate, should not be deducted from the free entail: Find that the said sum must be deducted: Find that the pursuers are entitled to decree in this process for the sum of £1668, 8s. 2d.: Find the pursuers liable in expenses since the date of closing the record; and remit to the Auditor to tax the same, and to report: *Quoad ultra* continue the case."

Counsel for Pursuers—Solicitor-General (Clark) Q.C. and Sheriff Chrichton. Agents—D. Crawford & J. Y. Guthrie, S.S.C.

Counsel for Defenders—Marshall and Blair. Agents—Hunter, Blair, & Cowan, W.S.

Thursday December 5th.

SECOND DIVISION.

(Before seven Judges.)

SPECIAL CASE—LADY MASSY AND OTHERS

Succession—Fee and Liferent—Trust—Power of disposal.

A testatrix directed her trustees "to make payment, at the first term of Whitsunday or Martinmas after my death," of certain legacies

to the persons therein named, and *inter alia* to A, "and her heirs, the sum of £5000 sterling, to be settled by my said trustees on herself and her issue, with power to her of disposal in case of no issue, and failing issue and disposal by her, to return to her own heirs, excluding those of her husband."

Held that this gave to A the right to the fee of the £5000, and to her children a right of succession which she could not defeat or prejudice by any gratuitous act or deed, and which, in event of her death, would give to the children a *jus crediti* against her solvent estate.

Held that the trustees were bound to invest the proceeds of the said legacy on securities taken to and in favour of A, exclusive of the *jus mariti* of the husband, and after her death to her children equally among them also in fee, subject to the condition that the right of the children should not be defeated or prejudiced by any gratuitous act or deed of A's; with power to her, failing such children, to dispose of the proceeds of the legacy by any testamentary writing; and failing such children and such exercise of the power of disposal, to return to the heirs of A, exclusive of those of her husband.

The parties to this case were (1) Lady Massy and (2) the Trustees of Mrs Scott, and the following is the Special Case which was presented to the Court:—

"By trust-disposition and settlement, dated 14th June 1869, and registered in the Books of Council and Session 14th February 1872, the said Mrs Jane Cuninghame or Scott, of No. 8 Ainslie Place Edinburgh, relict of George Scott, Esquire, sometime Lieutenent-Colonel of the 3d Regiment of Foot, gave, granted, disponed, and assigned to and in favour of Sir William Hanmer Dick Cuninghame of Prestonfield (who predeceased the testatrix); William Allason Cuninghame, Esquire of Logan; John More Nisbett, Esquire of Cairnhill; the Honourable Bouverie Francis Primrose, 22 Moray Place, Edinburgh; and Alexander Stevenson, writer to the signet, Edinburgh; and to the acceptors or acceptor, and last survivor of the persons thereby named, as trustees and executors for executing the trust, and to the assignees of the said trustees, the whole heritable and real and moveable and personal estates which should belong to her at the time of her death, and wherever situated, in trust for the ends, uses, and purposes therein written. Mrs Scott added five several codicils to her said trust-deed, dated respectively 1st October 1869, 15th February 1870, 9th August 1870, 10th May 1871, and 11th July 1871, and registered along therewith in the Books of Council and Session 14th February 1872.

"By the second purpose of Mrs Scott's trust-disposition and settlement it is directed 'that my said trustees shall make payment, at the first term of Whitsunday or Martinmas after my death,' of certain legacies to the persons therein named, and *inter alia*, 'to Isabella More Nisbett, now Lady Massy, my grandniece, and her heirs, the sum of £5000 sterling, to be settled by my said trustees on herself and her issue, with power to her of disposal in the case of no issue, and failing issue and disposal by her, to return to her own heirs. excluding those of her husband.' The said Isabella More Nisbett, Lady Massy, is the party hereto of the first part.

"Mrs Scott died on 8th February 1872, and the trustees appointed by her, being the parties hereto of the second part, have entered upon the administration of her trust-estates, which are of large amount and amply sufficient for payment in full of the whole legacies and others bequeathed by her trust-deed and codicils.

"Lady Massy, who is in her forty-third year, has been married since January 1855, without having any children; and questions of law have arisen between the parties to the present case in regard to the foresaid legacy of £5000.

"The questions of law on which the opinion of the Court is requested are:—

"1 Whether Lady Massy, the party of the first part, is entitled to the fee of the said legacy of £5000, and to have the same now paid to herself absolutely?

"2. Whether Lady Massy is entitled to have the legacy of £5000 invested on securities taken in name of herself 'and her issue, with power to her of disposal in the case of no issue; and failing issue and disposal by her, to return to her own heirs, excluding those of her husband?'

"3. Whether the trustees, the parties of the second part, are entitled or bound to retain said legacy during Lady Massy's life, or to invest the said legacy in securities taken in name of themselves or other persons, as trustees for behoof of the said 'Lady Massy in liferent for her liferent use allenarly, and her issue in fee, with power to her of disposal in the case of no issue; and failing issue and disposal by her, to return to her own heirs, excluding those of her husband,' the interest or annual proceeds of said legacy being always paid to Lady Massy during her life?"

In addition to the clause of the trust-disposition set forth in this case, there were other provisions of the testatrix which had an important bearing on the decision of the point raised in this case. The last purpose of the deed was a direction to the trustees to apportion and divide the free residue to and among certain persons specified, and then followed this provision—"declaring, notwithstanding of what is herein above-mentioned, that my said trustees shall have full power, if they think proper, to refuse to pay or convey any share of the residue of my said estates to any person or persons entitled thereto, and to retain and settle and secure said share, or lay it out for any residuary behoof, in such manner as that the same may be free from the power of such residuary, and not be assignable nor attachable in any way by his, her, or their creditors or assignees." Again, in a codicil to the trust-disposition there was this provision:—"I, Mrs Jane Cuninghame or Scott before designed, hereby direct the trustees appointed by my trust-disposition and settlement to invest and settle the legacy of £18,000 sterling provided to my nephew, John Dunbar, in said settlement, in such manner as to secure the liferent of the said sum to the said John Dunbar, and the fee to his children equally; and for that purpose I empower my said trustees and their foresaids to act as trustees themselves in regard to said legacy, or to appoint other trustees for that special purpose."

It was argued for the first parties that there was in the deed no warrant for the trustees retaining the money during Lady Massy's life, or investing it in their own name. There was no express direction in the deed to that effect, and it was contrary

to the intention of the testatrix. The direction in the deed was to the trustees to pay the money to the legatees at a particular time, and this implied (1) that the trustees were to be denuded to the amount bequeathed; and (2) that the legatees were to receive payment of that sum. No doubt there were certain words limiting Lady Massy's right in some degree, but they amounted merely to a qualification of the manner in which payment was to be made to the legatee. The money was to be paid at a certain time, and the trustees were to settle the sum on Lady Massy and her issue. Now this might mean, not that the trustees were to hand the money over to Lady Massy, but that they were to invest it in security. In that case the trustees must invest it, not in their own name, for that would not be making payment, but in the name of the legatee herself. It was provided by the last purpose of the deed that the trustees might refuse payment and create a trust in regard to the residuary legatees, and it was provided in the codicil by which £18,000 was left to John Dunbar, that the trustees should have power to appoint others for the purposes there set forth. This showed that the truster's views, as regarded the power of trustees to hold money or to appoint others, were quite clear and distinct, and when there was no mention of any such powers in regard to Lady Massy, they were not to be inferred. Then there was nothing which could be held to import that only a liferent was given to Lady Massy. The money was to be paid to Lady Massy and her heirs, and nothing could import a more direct conveyance of the fee. It was only inferential that there was no right to disposal in case of issue, and it would be strange if that inference should be held to do away with what would otherwise be undoubtedly a fee. There was only a provision that Lady Massy should not disappoint the succession, and although this was a limitation on the fee, it did not negative the fee—*Edwards* v. *Shiell & Small*, 14 Feb. 1848, 10 D. 685; *Gunn* v. *Grant's Trustees*, Feb. 28, 1833, 11 S. 484.

It was argued for the second parties, that this was not a case in which the testatrix had given a precise order as to the terms of the settlement, all that was given was a general direction. In such a case it was the duty of the trustees to see that the intention was carried out although the means were not in precise accordance with the words of the deed. The direction to "pay" and the direction to "settle" were in the same clause of the deed, so the question was which of them was to take effect. The absolute direction at the beginning of the clause must yield to the limitation later on. The clause was not a direction to convey in particular terms, but to settle on particular persons. The destination was to settle on Lady Massy and her issue, and if there had been nothing more this would have imported a fee to Lady Massy and not even a *spes successionis* to her children. But this destination must be taken with what follows, viz., the power of disposal. Now if it had been the intention of the testatrix to give Lady Massy the absolute property of the £5000, it would have been absurd to have further given her the power of disposal thereof. It would defeat the intention of the testatrix to give Lady Massy an estate which she could dispose of at once, and that would be the result of holding that Lady Massy had the fee and not merely the liferent with the power of disposal—*Glenorchy* v. *Bosville*, 1 White and Tudor, p. 18; *Sprott* v. *Sprott*, May 22, 1828, 6 S. 833; *Gordon* v. *Gordon's Trs.* March 2, 1866, 4 Macph. 501; *Graham* v. *Lord Lynedoch's Trs.* March 15, 1853, 2 Macq. 295; *Murray* v. *Graham*, 6 Bell's App. 441; *Sheratt* v. *Bently*, 1834, 2 Mill and King, 149; *Pursell* v. *Elder* (H. of L.), 3 Macph. 68.

At advising—

LORD PRESIDENT—In this case we are called upon to fix the construction of that part of the trust-disposition and settlement of Mrs Scott in which she bequeaths £5000 to Lady Massy. The duty of the Court therefore is, in the first place, to endeavour to ascertain what was actually the intention of the testatrix, and in the second place to give effect to that intention, if it is of such a nature that the law can recognise it.

Now it has been argued, on the one hand, that the meaning of the testatrix was to settle £5000 on Lady Massy in liferent and on her children in fee; while, on the other hand, it was contended that Lady Massy is entitled under the deed to the fee of the £5000, and to have that sum paid over to her. It is difficult to give effect to either of these contentions, looking at the words used by the testatrix. These words are—"That my said trustees shall make payment, at the first term of Whitsunday or Martinmas after my death, of certain legacies to the persons therein named, and *inter alia*, 'to Isabella More Nisbett, now Lady Massy, my grandniece, and her heirs, the sum of £5000 sterling, to be settled by my said trustees on herself and her issue, and failing issue and disposal by her, to return to her own heirs, excluding those of her husband." Now if the clause had contained no more than the direction to pay to Lady Massy and her heirs, that would have been a simple bequest to Lady Massy and her heirs, and there would have been no difficulty about the matter. The difficulty arises from the words which follow, viz. to be "settled" by my said trustees on herself and her issue, with power to her of disposal in the case of no issue. Now what is the meaning of this word "settled." It was argued that it meant the money should be settled on Lady Massy in liferent, but there is no mention of liferent here, and it is quite plain that the testatrix knew perfectly well how to give a liferent when she wanted to do so. This is shown by the following circumstances. In the trust-deed Mrs Scott leaves a legacy of £18,000 to John Dunbar, and failing him, to his child or children, but in a codicil she distinctly limits this bequest to a liferent, directing her trustees to invest and settle the £18,000 so as to secure the liferent of the sum to John Dunbar, and the fee to his children. Now this shows that Mrs Scott knew perfectly well the distinction between liferent and fee, and if she intended only to give a liferent to Lady Massy why did she not say so? She leaves a legacy of £5000 to Lady Massy in the words which I have already read, and no mention of liferent is made there, and no mention of liferent is made in connection with this legacy elsewhere, either in the deed or in any codicil. Not only is there no mention of liferent in reference to Lady Massy, but there is no machinery provided for carrying it on. It is not said that the trustees are to retain the money in their own hands, nor is it said that they are to invest it and take the securities payable to the parties in liferent, nor are there any provisions whatever for carrying on a liferent; and yet when Mrs Scott intends that the trustees should retain money, or to pay it over, she knows per-

fectly well how to provide for that being done, as is evident from the provisions of other parts of the deed and from the codicils. I cannot therefore spell out of this clause any intention on the part of the testatrix to limit the right to a mere liferent in Lady Massy with a fee in her children. So I think that the third question should be answered in the negative.

Now it was, on the other hand, argued that Lady Massy is nothing more than a simple legatee, but I cannot concur with this opinion, for, after instructing the legacy, the testatrix adds that the sum is to be settled. We must now see how it is to be settled. It is to be settled on herself and her issue. Now I don't think there is any difficulty in understanding a settlement on a person and issue, without that person being merely a life-renter. The person first called is a fiar, if the other provisions of the deed do not negative this conclusion. So let us see if the other words of the clause harmonise with this view. These words are "with power to her of disposal in the case of no issue, and failing issue and disposal by her, to return to her own heirs, excluding those of her husband." I may here remark that the power of disposal here given with the bequest, must mean of testamentary disposal. Then failing disposal, the £5000 is to return to her own heirs, excluding those of her husband, and this suggests that the *jus mariti* is excluded in regard to the legacy, and indeed this necessarily follows, otherwise the children could not succeed. So the idea of the testatrix is that the husband is to be entirely excluded, but that the issue are to have the right of succession. A right of succession of this sort is well known in the law of Scotland, and nothing is more common than that the fee should be left to the parent, and the right of succession to the children at the parent's death.

Now we know what the nature of such a right is. It does not limit the right of the parent to dispose for an onerous cause, or to spend the money, but the parent cannot disappoint the children by a purely gratuitous alienation, and, on his death, the children are creditors against his solvent estate for the sum or for the property, or for an equivalent.

It is very unusual to establish a right of this kind by testament, and I do not remember having seen it done before, but I can see no reason why it should not be done—there is no principle why, if such a right may be created by marriage-contract, it should not also be created by making it the condition of a gift. The testatrix here makes a gift to Lady Massy under certain conditions as to her children succeeding. This gives her right to use the money—to dispose of it for an onerous cause, or to spend it in any way she likes—and it gives a *jus crediti* to her children.

So I am of opinion that the first question should be answered in the negative; and, in regard to the second question, I am of opinion that the parties of the second part, the trustees acting under the trust-disposition and settlement of the testatrix, are bound to invest the proceeds of the said legacy of £5000, and to take the securities therefor to and in favour of the said Lady Massy in fee, exclusive of the *jus mariti* of her present or any future husband, and, after her death, to her children by the present and any future marriage, equally among, them also in fee, subject to the condition that the right of succession of the said children to a sum equal to the proceeds of the said legacy on the death of their mother Lady Massy, shall not be defeated or prejudiced by any gratuitous act or deed done or executed by her, whether *inter vivos* or *mortis causa*; with power nevertheless to the said Lady Massy, failing such children, to dispose of the proceeds of the said legacy by any testamentary writing, and failing such children and the exercise of such power of disposal, then to the heirs of the said Lady Massy, exclusive of those of her husband.

Lord Justice-Clerk—I concur with the proposed judgment, in so far as it holds that Lady Massy was not restricted to a mere liferent. I think there is no ground for holding that it was the intention of the testatrix so to limit the beneficiary named and favoured for behoof of her unborn issue.

With regard to the second point, however, I have more difficulty. The effect proposed to be given to the limiting words, viz., to confer a right of credit in the possible issue, protecting the destination or substitution to unborn issue against gratuitous alienation, is a novelty. It is a right familiar enough under marriage-contracts, but I am not aware of any instance in which such effect has been given to a testamentary bequest, and that by an implied prohibition against testing, to the prejudice of a destination or substitution *in mobilibus*.

Had the bequest been direct to the legatee in these terms, I should have thought that the destination was not effectually protected. Some meaning, however, must be given to the direction to settle, and I am not disposed to carry my doubts so far as to differ from the judgment proposed. It is plain that without the exclusion of the *jus mariti* it would altogether fail to have the effect intended, and it illustrates the difficulties in the way of the course we are going to take—that we are obliged to insert an exclusion which is certainly not expressed in the settlement. But I am reconciled to the judgment, on the ground that it probably more nearly approaches what the testatrix really meant than any other result.

Lord Cowan—Two questions have to be considered by the Court in answering the queries submitted for our opinion in this Special Case—(1) The meaning and effect of the legacies bequeathed to Lady Massy and her heirs, and appointed to be "settled" on herself and her issue, with power to her of disposal in case of no issue, and failing issue and disposal by her, to return to her own heirs, excluding those of her husband. These words appear to me to exclude the idea of unlimited and absolute right to the fee of the legacy being conferred on Lady Massy, the amount being appointed to be settled on her and her issue, and failing issue, on her own heirs, excluding those of her husband, unless in the case of no issue the power of disposal conferred on her Ladyship should be exercised. A right of succession is thus given to the issue of Lady Massy which she cannot gratuitously disappoint, although by her onerous deeds and debts the fund may be attached or spent and lost. This limited right in the possible issue will require to be kept in view in the settlement of the fund by the trustees; and, farther, the nature of the bequest, and the terms in which it is given, are such as to require that the *jus mariti* should be excluded. In the view stated by your Lordship, therefore, in this branch of the case, I entirely concur.

On the second question, it appears to me that the trustees are called upon and bound to settle this legacy upon Lady Massy in such terms and under such conditions as to secure full effect to the protected succession of the possible issue of Lady Massy, and I am of opinion that the form of settlement which your Lordship has proposed is in all respects, suitable to the circumstances.

Entertaining these views, I concur in the answers proposed to be returned to the several queries.

Lord Deas—This is entirely a question of intention, and it is clear that the testatrix did not mean the sum to go absolutely to Lady Massy, for that would have carried it to her husband. It is intended to go to Lady Massy and her children under certain limitations, and the question is what these limitations are.

One would expect the bequest to be to Lady Massy in liferent and to her children in fee, if there had been nothing in the deed contrary to that destination. But we see from the codicils that when the testatrix intended a liferent she knew perfectly well how to provide for it, and so we cannot presume that she intended only a liferent here.

Then, this destination being barred, one would have expected the intention of the testatrix to have been that the money should remain in the hands of the trustees. But in the codicils we find that she also provides for this when such is her intention.

So I think that the limitations suggested by your Lordship come as near as possible to what must have been the actual meaning of the testatrix. I agree also with your Lordship that there is no difficulty in point of law in holding that this sort of right may be created by a testament as well as by a marriage-contract.

Lord Benholme—I do not think that the course proposed by your Lordship exactly meets this case. The destination is "to Lady Massy and her heirs," "to be settled by my trustees on herself and her issue, with power to her of disposal in the case of no issue, and failing issue and disposal by her, to return to her own heirs, excluding those of her husband." Now I think that under this destination the intention of the testatrix is that there should be no power of disappointing the rights of the children. So the trustees ought to satisfy this purpose entirely and completely, if possible. But the only way of doing this would be for the trustees to hold the fund in their own persons until the contingency of children being born no longer existed. If that were done it would fulfil the intention of the testatrix, for I think that it is intended that in case of issue there should be no power of disposal. The great difficulty in following this course, however, is to know how long the trustees are to hold the funds, for there is no period fixed at which the law holds the contingency of children no longer to exist. If there was any such period fixed by law, I should be of opinion that the trustees should hold the money until that period had elapsed, and if there were children, that they should hold it so long as any child remained, or until they succeeded.

In dealing with the residue of her property, the testatrix gives the trustees power to retain if they shall think proper. Now, if this provision had applied to the legacy which we are now considering, the clear course, I think, would have been for the trustees to reclaim the fund, but as the provision only applies to the residue, and no such power is given in regard to this legacy, I do not think they have any power to do so.

So, although I do not think that the course proposed by your Lordship quite carries out the intention of the testatrix, I am constrained to say that I think it goes as far as we have power to go. I cannot see that we can do any more.

Lord Neaves concurred.

Lord Ormidale—In the present, as in every case involving the construction of a testamentary writing, the important question is—What was the intention of the testatrix? for that intention ought to be given effect to so far as practicable.

The terms in which the legacy in question has been left are undoubtedly somewhat perplexing. I have no hesitation however in holding that by the expression "to pay," the testatrix did not intend that the amount of the legacy should on her death be at once handed over to Lady Massy to be at her absolute disposal without qualification or restriction. The whole terms of the bequest when read together, and in connection with the deed of settlement generally, exclude such a construction. The expression, again, "to be settled," as it is not followed by a specification of any precise form of settlement, must be held, I think, to be a matter which the testatrix intended that her trustees should be left to carry out and give effect to in a mode sufficient to secure and satisfy the object of the testatrix.

What then must be held to have been the true object of the testatrix as regards the legacy in dispute? It appears to me that her object was to give Lady Massy a right to the capital of the £5000, but subject to a certain restriction or limitation which it is the duty of her trustees to attend to.

Although Lady Massy had been for some time married at the date when the legacy in question was left to her, the testatrix says nothing about her existing or any future husband. I am not prepared therefore to hold that she intended that any restriction or limitation should be imposed as regards the right which might arise to him. But I think it is impossible to read the whole terms of the bequest, and especially the direction of the testatrix to her trustees to settle the legacy on Lady Massy "and her issue, with power to her of disposal in case of no issue," without being satisfied that the trustees were and are restricted from now paying the legacy to Lady Massy irrespective of the contingent interests constituted in favour of her children. On the contrary, it appears to me that her trustees are bound to see that these contingent interests are so protected that, in the event of their ever emerging they shall be given effect to. In this view, I am unable to arrive at the conclusion that the trustees are either bound or entitled now and at once to pay the legacy of £5000 to Lady Massy, absolutely and unqualifiedly, or to give it to her in the form of security expressed in terms of the bequest, with the addition, which as I have already said I can find no warrant for, of an exclusion of her husband's *jus mariti*. It appears to me that such a mode of proceeding, while it may create considerable trouble and expense, would offer no real protection to the contingent interests in question, for on Lady Massy

obtaining right to the legacy in any such form as that suggested, she would have it in her power whenever she pleased to convert it into money, and so to put an end to all semblance even of protection.

Although, therefore, I cannot assent to such a mode of proceeding as that to which I have just alluded, I think there is a mode by which the trustees may be enabled at once to discharge their duty, taking care that the contingent interests in question are sufficiently protected, and also to pay over the amount of the legacy to Lady Massy. I think that this may, in accordance with the principle which was recognised and given effect to in the case of *Scheniman*, June 25, 1828, 6 Sh. 1019, the case of *Shaw* there referred to, and the case of *Blackwood*, June 11, 1833, 11 Shaw 699, be very well done by Lady Massy, as a condition of receiving payment of the legacy, finding caution or security that, in the highly improbable, although possible, event of her yet having children, their interests will be provided for. But, of course, if such caution or security is not found, the trustees must I think, retain the legacy in there own hands or power, so long as there may be a possibility of the contingent interests emerging.

With these explanations, I am of opinion, in answer to the three questions submitted to the Court in the Special Case, that the trustees are bound to retain the legacy in their own hands or power so long as there is a possibility in any reasonable sense of Lady Massy having issue, paying to her ladyship, in the meantime, the income arising from the same; and it being always in the power of Lady Massy and her husband to obtain payment of the legacy on finding caution or security to the satisfaction of the trustees that the contingent interests of her issue, in the event of her having any, will be duly provided for.

The Court pronounced the following interlocutor:—

"Find and declare, in conformity with the opinion of the seven Judges, in answer to the first question, that Lady Massy, party of the first part, is entitled to the fee of the legacy of £5000, bequeathed to her by the testatrix, subject to the qualification after expressed; but that she is not entitled to have a sum of £5000, or the proceeds of the said legacy, now paid to herself absolutely.

"Find and declare, in answer to the second question, that the parties of the second part, Trustees acting under the trust-disposition and settlement of the testatrix, are bound to invest the proceeds of the said legacy of £5000, and to take the securities therefor to and in favour of the said Lady Massy in fee, exclusive of the *jus mariti* of her present or any future husband, and after her death to her children by the present and any future marriage, equally among them also in fee, subject to the condition that the right of succession of the said children to a sum equal to the proceeds of that legacy on the death of their mother, the said Lady Massy, shall not be defeated or prejudiced by any gratuitous act or deed done or executed by her, whether *inter vivos* or *mortis causa*, with power nevertheless to the said Lady Massy, failing such children, to dispose of the proceeds of the said legacy by any testamentary writing, and failing such children and the exercise of such power of disposal, then to the heirs of the said Lady Massy, excluding those of her husband.

"Find, in answer to the third question, that the said Trustees are neither bound nor entitled to retain the said legacy during the said Lady Massy's life, nor to invest the proceeds of the said legacy in securities taken in name of themselves or other persons, as trustees for behoof of the said Lady Massy in liferent, for her liferent use allenarly, and her issue in fee. Find no expenses due to either party, and decern."

Counsel for the First Parties—Solicitor-General and Marshall. Agents—Russell & Nicolson, C.S.
Counsel for the Second Parties—Watson and Muirhead. Agent—Alexander Stevenson, W.S.

Friday, November 15.

SECOND DIVISION.

LIQUIDATORS OF WESTERN BANK *v.* BAIRD'S TRUSTEES.

Bank—Relevancy—Negligence—Debt.

In an action for debt due to a Joint-Stock Banking Company, at the instance of the Liquidator of the Company against a former director, founded on gross negligence on the part of the defender individually, or along with his co-directors, and, upon consideration of the sums concluded for, classed under three branches of—(1) sums advanced to customers on open account; (2) sums advanced by way of discount on bills of exchange; (3) sums expended on payment of premiums on policies of insurance, opened by the Bank on the lives of certain of their debtors—*held* (1) that certain statements to the effect that the defender, along with his co-directors, grossly neglected to superintend and control the manager in granting credits on open accounts, where the loss was ascertained and the debtors were insolvent before the defender retired from the directorate, were relevant to go to proof; (2) that the liquidator, by adopting the balances in certain open accounts, and by continuing to trade with the customers in these accounts by renewing the bills and selling the policies, had lost his recourse against the defender.

The pursuers in this suit are the Western Bank, registered under the Joint-Stock Banking Companies Act 1857, and the Liquidator of said Bank, appointed by the partners of the Bank in terms of said Act. The late W. Baird of Elie was the original defender, and his testamentary trustees were, on his death, sisted as defenders. The summons concludes for payment to the pursuers of the sum of £299,736, 7s. 6d., or such other sum as shall be found in the course of the process to be the amount of loss and damage due to the pursuers as at the 23d June 1852, with interest until payment.

Mr William Baird, the original defender, became a shareholder of the Bank in December 1837, when he acquired from the Bank forty shares of its stock. In October 1845 he held seven hundred shares. He disposed of these between June 1849 and November 1852. On 12th June 1839 Mr Baird