way in the wall, the gate being always kept locked, and the key obtained at Mrs Munnoch's by all parties entitled to have entrance. But while this was the state of matters at an earlier period, it is no less certain on the proof that from and after 1858, or at all events for ten or twelve years prior to 1872, this wall, except at the north side of it, was broken down and the gateway removed, so as to form no obstruction to access into the previously enclosed ground, whether by foot passengers or by carts having occasion to go to the premises, the entrance to which was on the one side or other of this piece of ground. Such lands and "premises" are "severally occupied." There are at least five or six such subjects—an "asphalter's yard," a "coal yard," a "wood yard," a "stable," besides other yards, &c., within what was once enclosed ground. A public lamp has been in recent times placed for the convenience of the public resorting to this place or street. Then it is clear beyond controversy that this ground in its now open condition forms a common access to those separately occupied premises. I hold these facts to be established by the proof, and it is for determination whether they are not sufficient to bring the ground within the statutory description of private street.

No thoroughfare or public passage from Elbe Street to Poplar Lane is proved to exist; but that is not required in the case of a private street as defined by the statute. The ground is used by carts, in so far as the occupiers of the several subjects require for the purposes of their possession to have carts to and from their premises. The ground as a continuation of the west end of Pattison Street is accessible from a public street, and it is a common access of the description set forth in the definition. The object contemplated by the statute appears to have been that such common accesses should be brought into such a state of repair as to allow them to be used by those of the public having occasion to resort to them with safety and convenience, And it cannot be doubted that this object will be fully served by the operations resolved on by the commissioners in reference to this ground.

It was strongly pressed on us that by these titles this ground could not be opened up as a street without the express consent of one or more of the co-proprietors. But consent to the effect stated may be inferred from their acts and deeds, or from their allowing the ground to fall into that condition and to be used in such a manner as, having regard to its proximity to the west portion of the private street, to bring the ground in its present state within the statutory definition.

On the whole, therefore, although the question is not unattended with difficulty, I hold that the definition of private street does apply to this common access to the several premises entering from the ground in question. And I do not think that the pursuers have any good ground to complain of the general terms of the notice given by the commissioners. It is in evidence that the several premises belonging to them entering from the ground in question have all along been described as situated in Pattison Street. Both in their own receipts to their tenants and in their rental books, as also in the public assessment receipts for the rates paid by them for these premises, they are so described. Notice of operations being intended to be done on the private street called Pattison Street, therefore, was due statutory notice, on the assumption always that the ground is to be regarded as part of a private street, and that the reasoning I have stated is sound. The result is, that in the state of the facts established by the proof, the Lord Ordinary's interlocutor is well founded.

The other Judges concurred. The Court affirmed the judgment of the Lord Ordinary.

Counsel for Pursuers—Adam and Marshall. Agents—Adam Kirk, & Robertson, W.S.

Counsel for Defender—Harper and Solicitor-General. Agent—J. C. Irons, S.S.C.

Wednesday, July 16.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

BREADALBANE TRUSTEES *v.* BREADALBANE AND OTHERS.

Trust Settlement — Construction — Application of Rents.

Circumstances in which *Held* (1) that trustees were bound to retain the rents of certain unentailed lands as a *surrogatum* for sums taken from the capital of the trust-estate and given as legitim to a beneficiary in lieu of the provisions in the trust-deed; (2) that certain annuities fell to be debited to the revenue of the trust-estate.

John, first Marquess of Breadalbane, died on 29th March 1834. He was survived by his widow, the Marchioness of Breadalbane, who died on 25th March 1845, and by three children, viz., John Viscount of Glenorchy, who became second Marquess of Breadalbane, and died 8th November 1862; Mary, Marchioness of Chandos, afterwards Duchess of Buckingham, who died 28th June 1862; and Lady Elizabeth Pringle, wife of Sir John Pringle of Newhall. On the 29th January 1823 the first Marquess of Breadalbane executed a trust-disposition and settlement of his lands and property, heritable and moveable, of every description, in favour of certain trustees. An addition of 24th October 1828 substituted other trustees for some of those nominated in the deed; and upon 11th November 1828 he executed another deed in the same terms as the former, giving effect to the changes made by the addition of 24th October in the nomination of trustees. The second disposition contained a clause declaring that it should be held as a duplicate copy of the first and of the addition, with full power to his trustees to make use of either deed as they should think fit. A codicil, dated 26th August 1829, is added to the trust-deed of 1828. His Lordship also left a holograph deed of legacies, dated 24th January 1829, with codicil, dated 30th June 1829. By a codicil of 26th August 1829 it is provided that the trustees, "instead of investing the free rents of my unentailed lands and estates in manner before-mentioned, shall annually pay over the whole free proceeds of the same to my two daughters, Lady Elizabeth Campbell, now Pringle, and Mary Marchioness of Chandos, equally between them while both shall be in life, and to the survivor, and shall continue to do the same as long as both or either of them are

alive." But always without prejudice to certain obligations and provisions granted in favour of Mary Countess of Breadalbane, or obligations contained in the contract of marriage between John Viscount of Glenorchy, and Eliza Baillie, his spouse.

By a deed of legacies and bequests, holograph of the said first Marquis of Breadalbane, dated 24th January 1829, he bequeathed various legacies to sundry individuals, and by an addition thereto, dated 30th June 1829, also holograph of the said first Marquess of Breadalbane, he directed his said trustees to divide the rents of his unentailed lands (after what Lady Breadalbane might be legally entitled to) equally between his two daughters, Lady Elizabeth Pringle and the Marchioness of Chandos, the survivor to receive the whole during her life, and at her death the rents to return with the lands to the heirs of entail of the Breadalbane property, as directed by his said trust-disposition.

The Marchioness of Chandos, afterwards Duchess of Buckingham, was married in 1819. Her marriage-contract contained provisions given by her father, the said first Marquess of Breadalbane, but no clause declaring these provisions to be in full of legitim.

Lady Elizabeth Pringle was married in 1831, and her claim of legitim was excluded in her marriage-contract in consideration of certain provisions by the said Marquess in her favour.

On the death of the said first Marquess of Breadalbane, his trustees entered on the possession of the trust-estate, including, *inter alia*, the unentailed estates and the rents thereof. Various questions having arisen in regard to the succession, the Duke and Duchess of Buckingham raised an action of multiplepoinding in name of the trustees, for the purpose of having the rights of the parties judicially ascertained.

Claims were lodged in this process for the Duke and Duchess of Buckingham, the Lady Elizabeth Pringle, the late (second) Marquis of Breadalbane, the Marchioness Dowager, and the trustees; and various questions raised were determined by the Court.

An interlocutor of 20th January 1836, pronounced by their Lordships of the Second Division, found, *inter alia*, 1st, That the Duchess of Buckingham was entitled to *legitim*, and that her claim extended over one-third part of the free moveable estate; that the second Marquess was not entitled to share in the *legitim* without collating his interest in the entailed estates; that the Dowager-Marchioness was entitled to a terce of the unentailed estates in which her husband died vested and seised, and to her *jus relictæ* extending over one-third part of the free moveable estate of her said husband; that the marriage-contract trustees of the Lady Elizabeth Pringle were entitled to the sums provided by the deceased Marquess in said contract of marriage; and that the Lady Elizabeth Pringle was entitled to "one-half of the free yearly proceeds of the unentailed lands of her said father, conveyed by him to his trustees, raisers of the process, in terms of his settlement . . . . and that without prejudice to any further claims on her part, either on the predecease of her sister, the Marchioness of Chandos; or in the event of its being found that the claims of the said Marchioness to the other half of the said rents could not be sustained," on the validity and effect of which claim counsel were appointed to be heard.

This interlocutor was in part appealed to the House of Lords, and so far as appealed against was affirmed on 16th August 1836. Parties having been thereafter heard on the claim of the Marchioness (then Duchess of Buckingham) to one-half of the rents of the unentailed estates, it was held that her Grace, having insisted on her claim for *legitim*, was barred from availing herself of that provision of the codicil in her favour, and the said claim was repelled.

Lady Elizabeth Pringle, on the Duchess of Buckingham's claim being repelled, claimed right to the whole rents, under the reservation in her Ladyship's favour in the interlocutor of 20th January 1836. This was opposed by the trustees, and on the 15th January 1841 the following interlocutor was pronounced:—"Find that the interest of Lady Elizabeth Pringle on the rents of the unentailed estates is not enlarged by the forfeiture which the Duchess of Buckingham has incurred, but that such forfeiture operates during the lifetime of the Duchess of Buckingham in favour of the trustees of the late Marquis of Breadalbane; and therefore find that the Lady Elizabeth Pringle, during the lifetime of the Duchess of Buckingham, is entitled to one-half, and no more, of the yearly proceeds of the unentailed estates, after satisfying the terce."

The second Marquess of Breadalbane left a trust-disposition and settlement, dated 26th November 1847, whereby he conveyed his whole estate to and in favour of the Earl of Dalhousie, Lord Jerviswoode, and others, as trustees for the purposes therein-mentioned. They accepted the trust, and acted for several years; but in November 1869 the survivors of the said trustees, being the Earl of Dalhousie and Lord Jerviswoode, resigned their office under the Act of 24 and 25 Vict., cap. 84, when George Auldjo Jamieson, C.A., was appointed judicial factor on the trust-estate, with the usual powers, and thereby acquired right to the whole claims competent to the said second Marquess against the trust-estate of the first Marquess.

The judicial factor claimed:—

1st. That the trustees of the first Marquess should make up and exhibit proper accounts of the income of the trust-estate from 15th May 1854 down to 8th November 1862, and that he should be ranked and preferred to the revenue of the trust-estate for the period between these dates, including the half of the rents of the unentailed lands from Whitsunday 1854 to the date of the Duchess of Buckingham's death in 1862.

2d. That in ascertaining the amount of the said income to which he is entitled, the annuities bequeathed and granted by the first Marquess should, for the period subsequent to Whitsunday 1854, be debited, not to the revenue, but to the capital of the trust-estate.

3d. That in ascertaining the said income there should be credited thereto the whole percentages paid by the liferenters of the unentailed lands in respect of permanent improvements, or other outlays made by the trustees thereupon as aforesaid.

Lord Mackenzie pronounced the following interlocutor:—

"*Edinburgh, 26th March* 1873.—The Lord Ordinary having heard counsel on the records closed in the competition, and with reference to the fund *in medio*—Finds that Mr George Auldjo Jamieson, as judicial factor on the estate of the second Marquess of Breadalbane, is not entitled to the one-half of the rents of the unentailed lands left by the truster,

the first Marquess of Breadalbane, for the period from Whitsunday 1854 to 8th November 1862; and to that extent repels the claim of the said judicial factor: Finds that the trustees of the first Marquess of Breadalbane are bound to retain the whole of the said rents for the period between Whitsunday 1854 and 28th June 1862, the date of the Duchess of Buckingham's death, as a *surrogatum* for the sums taken from the capital of the trust-estate, and paid as *legitim* to the Duchess of Buckingham, and to apply the same accordingly; and to that extent sustains the claim for the Earl of Breadalbane: Repels the second and third claims of the said judicial factor, and decerns: Appoints the cause to be put to the roll with a view to farther procedure, and reserves all questions of expenses.

"*Note.*—The Duchess of Buckingham having claimed and taken *legitim*, was found to have forfeited the provisions in her favour contained in the settlement of her father, the first Marquess of Breadalbane, and her claim to the rents of her father's unentailed lands, in terms of the codicils to his settlement, was repelled by interlocutor, dated 5th March 1840. That forfeiture was found by interlocutor, dated 15th January 1841, to operate during the life of the Duchess of Buckingham in favour of the trustees under the settlement of the first Marquess. By the two codicils of 30th June 1829 and 26th August 1829, the trustees are directed to pay to the Marquess' two daughters, Lady Elizabeth Pringle and the Duchess of Buckingham, equally between them, and to the survivor, the free rents of his unentailed lands. According to the true construction of these codicils and of the trust-disposition and settlement, it is, in the opinion of the Lord Ordinary, only upon the death of the survivor, Lady Elizabeth Pringle, that the rents of these unentailed lands will become payable to the heirs of entail of the Breadalbane estates called by that trust-deed. The second Marquess of Breadalbane, the first called of these heirs, who died on 8th November 1862, had no right to any part of these rents. One half of them was payable to Lady Elizabeth Pringle during the life of her sister, the Duchess of Buckingham, and, on the Duchess' death Lady Elizabeth Pringle acquired right for her life to the whole of these rents. During the Duchess' life the half of these rents provided to her fell to be retained by the trustees as a surrogate for the sums taken from the capital of the trust-estate, and paid to her as *legitim*, and the proceeds of that half must be invested and applied by the trustees in terms of the first Marquess' trust-settlement.

"The Lord Ordinary has on these grounds repelled the claim of the judicial factor on the estate of the second Marquess to the rents of the unentailed lands. But the judicial factor also claims to be ranked and preferred to the other revenue of the trust-estate from Whitsunday 1854 to 8th November 1862. If there had been any such free revenue his claim would not be disputed, but the trustees aver that there was no such free revenue, and that there was, on the contrary, a deficiency. In support of this statement they have lodged their accounts, with reports thereon by the late Mr Mansfield, C.A. Should the judicial factor, notwithstanding these reports, which distinctly state the annual deficiency from 1854 to 1864, insist in his objections in regard to this matter, a remit to an accountant will be necessary.

"2. The Lord Ordinary has been unable to find any provisions in the trust-settlement in virtue of which he can hold that the annuities granted or bequeathed by the first Marquess must, contrary to the ordinary rule, be debited, not to the revenue, but to the capital of the trust-estate.

"3. The sums expended on permanent improvements on the lands in the hands of the trustees were paid out of the trust-funds, under an arrangement with Lady Elizabeth Pringle, who had right to the rents, that she should pay 7½ per cent. per annum for 18¼ years on the sums so expended, four per cent. of which was to be accumulated for the purpose of replacing the capital advanced, and the remaining 3½ per cent. of which was to be dealt with as interest. This was an act of beneficial management, and within the powers conferred upon the trustees by the trust-settlement. Further, the Lord Ordinary is of opinion that the claim of the judicial factor that the whole 7½ per cent. per annum paid by the life-rentrix, under the above-mentioned arrangement, should be credited to income is altogether untenable, and that the judicial factor is not entitled to have a larger sum credited than that stated in the trust-accounts.

"4. The Lord Ordinary understands that parties hope to adjust the claim for £55, 12s. 6d. and £54, 3s. 2d."

The judicial factor reclaimed.

At advising—

Lord Benholme.—This is an action of multiplepoinding which was brought in the year that the first Marquess died, for the purpose of regulating his succession. The action has been the means of deciding various important questions in our law, and the interlocutor that we are now to review presents three questions for determination, and these are of some little importance.

The first Marquess died in 1834. He left a widow, a son (the second Marquess), and two daughters, one of whom became Duchess of Buckingham, and the other Lady Elizabeth Pringle. The Marquess left a large succession. Besides the entailed estates of Breadalbane, he left large unentailed property, and a large sum of lying money. But various events took place that interfered very much with the original scheme of the Marquess' settlement. I must mention to your Lordships two of the clauses of the settlement upon which the first of the points now before us turns. The fifth purpose of the trust was thus expressed;—"It is hereby expressly provided and declared that at the termination of the said twenty years, or as soon after as may be, the said trustees or trustee acting for the time shall be bound and obliged to settle and secure the whole lands, teinds, and other heritages conveyed by me to them, and also those purchased by them as aforesaid, in strict entail, and to vest the same by disposition, procuratory of resignation, or other legal deed, as shall be advised, to and in favour of the said John Viscount Glenorchy, my son," &c. That settlement was not allowed to take effect, because at a later period the Marquess executed a codicil, of date 26th August 1829, and that codicil is thus expressed:—"In virtue of the power hereinbefore reserved to alter and innovate these presents, I hereby direct that my said trustees, instead of investing the free rents of my unentailed lands and estates in manner before mentioned, *shall* annually pay over the whole free proceeds of the same to my two daughters, Lady Elizabeth Campbell and Mary

Marchioness of Chandos, equally between them while both shall be in life, and to the survivor, and shall continue to do the same as long as both or either of them shall be alive; but that always without prejudice to the obligations and provisions granted by me in favour of Mary Countess of Breadalbane, or to the obligations contained in the contract of marriage between John Viscount Glenorchy and Eliza Baillie, his spouse." Now, so far as relates to the unentailed property of the Marquess, this operated a complete alteration of the fifth purpose of the trust; for that fifth purpose directed that after the lapse of twenty years those unentailed lands, together with the produce of the accumulation, should be vested in the heir of entail. But by this codicil that was entirely defeated during the lives of the one or other of his two daughters. They were to enjoy the liferent of these lands during their lives, and during the life of the survivor, who was to take the whole upon the death of the predeceaser. Now these two clauses have given rise to several litigations, both in this Court and in the House of Lords; for the Duchess of Buckingham, who had not in her marriage settlement given up her right to *legitim*, chose to demand her *legitim*, and as her sister Lady Elizabeth had discharged her right to *legitim* by her marriage contract, the result was that the Duchess of Buckingham got the whole *legitim*—viz., one-third of the free proceeds of the moveable estate; and in this way she defeated the general intentions of her father, and consequently has been held to have forfeited her right to a liferent of the half of the unentailed property. With regard to that half which she had forfeited, it has been finally determined that that forfeiture operated not in favour either of the sister or of any other party, except the trustees of the Marquess, who had been deprived of a very large sum of money by the demand of *legitim* by the Duchess contrary to the intentions of her father, and she having thus deranged the settlement intended by her father, it was held that this half of the liferent of the unentailed lands went as a *surrogatum* to the trustees of the Marquess, and came in place of the large sum of money which the Duchess chose to take instead of the provision made to her by her father. Now the first point decided by the Lord Ordinary is, "that the trustees of the first Marquess of Breadalbane are bound to retain the whole of the said rents for the period between Whitsunday 1854 and 28th June 1862—the date of the Duchess of Buckingham's death—as a *surrogatum* for the sums taken from the capital of the trust-estate and paid as *legitim* to the Duchess of Buckingham, and to apply the same accordingly." It was contended by the judicial factor, who supports the interests of the second Marquess, that these rents belong to him; but the Lord Ordinary finds that the judicial factor "is not entitled to the one-half of the rents of the unentailed lands left by the truster, the first Marquess of Breadalbane, for the period from Whitsunday 1854 to 8th November 1862; and to that extent repels the claim of the said judicial factor." Now the result of repelling that claim was just to affirm, as the Lord Ordinary goes on to do in the subsequent clause, that instead of this forfeiture operating in favour of the estate of the second Marquess, and in that way in favour of the judicial factor, these forfeited rents were to go as a *surrogatum* for the large sum of money of which the estate of the first Marquess had been deprived by the choice of the Duchess of Buckingham. That is the first question in this case, and I confess that upon that question, important as it is, I have never been able to see that there is any reasonable doubt; because the codicil, which is later in date than the trust-deed with its fifth purpose, must prevail against that fifth purpose, as indicating a totally different destination of the unentailed lands from that which he had originally intended. And the result is, that during the lives of both or of either of these two daughters, the rents of the whole of the unentailed lands which belonged to the Marquess, including an estate which he had purchased, but had not taken possession of, must, during the lives of either of these ladies, be paid away from the destination that was originally intended, and the Duchess of Buckingham having died in 1862, from that date her sister became entitled to the whole rents. Now that is the first question in this case, and I have no doubt that the Lord Ordinary has decided that question rightly. It is just this, that the subsequent codicil must, so far as it goes, alter the destination which the Marquess had intended as to the unentailed rents, one-half of which is left to go to Lady Elizabeth during the life of her sister, and the whole after her sister's death, and the other half during the Duchess' lifetime whilst the forfeiture operated; these rents are to go as a *surrogatum*, and be applied to the general purposes of the trust, which were liable to be defeated by the claim of the Duchess to her *legitim*.

The second question which the Lord Ordinary has decided is set forth in the second claim for the judicial factor:—"The claimant claims that in ascertaining the amount of the said income to which he is entitled, the annuities bequeathed and granted by the first Marquess shall, for the period subsequent to Whitsunday 1854, be debited not to the revenue, but to the capital of the trust-estate." That seems to raise a pretty general question—viz., Whether heritable debts of the nature of annuities are liable to be paid out of the heritable or moveable succession of a testator? The general rule of law, as to the application of which to this case I cannot see any difficulty, is, that annuities being heritable, should be paid out of the rents of the heritable estate. I am not aware that there is any good exception to this rule, but it has been suggested that there are cases, and especially one, to which I shall refer, that seem to throw some doubt upon this general rule. That is a case decided by the House of Lords, reversing the judgment of the First Division of the Court here—the case of *Mackintosh* v. *Alexander Hay Miln* and others, decided on a special case. The question arose in this way: Mackintosh had executed a contract of marriage which imposed upon his entailed estate an annuity in favour of his widow. He had previously bound himself and his heirs and successors to relieve his entailed estate of La Mancha of all debts and obligations in these terms:—"I oblige myself and my heirs, executors, and representatives whomsoever, to free and relieve my lands of La Mancha of all my debts and obligations." Subsequent to the execution of this entail obligation he had created the burden upon the entailed estate in favour of his wife, who became his widow; and after his death the heir of entail got into controversy with the general representative of Mr Mackintosh, the general representative being of opinion that this burden must remain on the entailed estate, and consequently must burden the rents of the entailed

testate as in the hands of the heir of entail, whilst the heir of entail contended that, under the obligation that I have read the general representative was bound to relieve him of that burden. The contention did not go upon the general rule as to the payment of heritable debt in the shape of annuity—I think it went upon the special obligation which the testator here undertook, by which he bound and obliged his heirs, executors, and representatives, "to free and relieve my lands of La Mancha of all my debts and obligations." This argument was rendered the more conclusive, because the testator had provided the means of clearing off the entailed estate of this burden, for he had rendered it lawful for himself and his heirs of entail to clear it off by purchasing an annuity of an insurance office in the following words:—"Declaring that it shall be in the option and power of the said James Mackintosh and his heirs, executors, and successors, to secure the said annuity of £150, and yearly sum of £70 to the said Mary Ann Burn, by purchasing at his and their own expense from any respectable insurance company to be selected and approved of by her, an annuity payable to the said Mary Ann Burn in the terms before provided, and upon the purchase being effected and completed to her satisfaction, and the writs securing the same being delivered to her, she binds herself and the trustees after-named, but at the expense of the said James Mackintosh and his foresaids, to discharge and disburden the several subjects before-mentioned and described of the provisions secured to her." Here was a very special provision by which the testator had given the means of clearing off the burden, and indicated his intention that whether during his own lifetime the thing was done, for he had obliged himself as well as his heirs, that could be done by just purchasing an annuity, and the widow was to be bound to clear the burden off the entailed estate in consequence of obtaining as a *surrogatum* this obligation from the Insurance Co. In these circumstances I cannot help thinking that this was a tolerably clear point when it was duly considered, —that the general representatives, as coming in place of the testator himself, were liable to clear off this obligation, and they had the means of doing so provided by the testator himself, viz., by purchasing an annuity from an Insurance Co. to come in place of it. This was a very special case, and from the judgment of Lord Colonsay it is quite clear that the House of Lords considered it to be a specialty based upon the positive obligation to clear off this burden upon the entailed estate. I need not say that there is no such obligation here. There is a general obligation by the trustees to pay the debts and obligations, but there is no such special injunction upon them to clear off any burden upon an entailed estate, such as gives a character to that case. In these circumstances, I cannot help thinking that the Lord Ordinary's view of this question is perfectly correct. He says —"The Lord Ordinary has been unable to find any provisions in the trust-settlement in virtue of which he can hold that the annuities granted or bequeathed by the first marquess must, contrary to the ordinary rule, be debited, not to the revenue, but to the capital of the trust-estate."

The third point arises in this way, that the trustees advanced to Lady Elizabeth Pringle a considerable sum of money to be laid out in improving the unentailed lands, and the way in which that money was to be obtained was that her ladyship should pay 7½ per cent. for 18¼ years. It was calculated, and I believe upon perfectly just grounds, that allowing that 3½ per cent. was to answer for the interest of that money, the remaining 4 per cent. for 18¼ years would just be sufficient to clear off and repay the capital; because so many payments of 4 per cent., together with the interest which would be accumulating by the successive payments from year to year, would at the end of that period amount to the capital. That is a very reasonable arrangement, and it brings out in the clearest way that the payment of 4 per cent. was in respect of the capital alone, and that the whole interest to which the heir of entail was entitled was the 3½ per cent., which was the true interest of the money. The Lord Ordinary has, I think, decided this point also correctly. The judicial factor claims that the whole 7½ per cent. should go to the estate of the second marquess, that is to say, he claims that the second marquess' estate should not only draw the interest of the money but also the whole capital of that advance, for by demanding the whole 7½ per cent. he not only gets the interest during that time, but he has at the end of the period obtained payment of the capital too. Now on this point it is quite plain that the demand of the judicial factor is quite inconsistent with his position, and consequently I agree with the Lord Ordinary's observation, that "The sums expended on permanent improvements on the lands in the hands of the trustees were paid out of the trust funds, under an arrangement with Lady Elizabeth Pringle, who had right to the rents, that she should pay 7½ per cent. per annum for 18¼ years on the sums so expended, 4 per cent. of which was to be accumulated for the purpose of replacing the capital advanced, and the remaining 3½ per cent. of which was to be dealt with as interest. This was an act of beneficial management and within the powers conferred upon the trustees by the trust-settlement. Further, the Lord Ordinary is of opinion that the claim of the judicial factor that the whole 7½ per cent. per annum paid by the liferentrix under the above-mentioned arrangement should be credited to income is altogether untenable, and that the judicial factor is not entitled to have a larger sum credited than that stated in the trust accounts."

There is a fourth point which the Lord Ordinary has not taken up, but these three points, in my opinion, his Lordship has correctly decided.

Lord Cowan—I concur in the opinion of Lord Benholme on all the three questions which the Court have to decide. The first question is the more material, and, as to it, I would only add that in my view the codicil made provision as regards the rents of the unentailed lands in favour of the two ladies and the survivor, which must be held to come in place of the provision, or to the application of these rents for twenty years, declared by the 3d purpose of the deed. The deed is to be read and construed on the footing of its having contained the codicil provisions, and not that for which it is substituted.

Lord Justice-Clerk—I entirely concur in all that has fallen from Lord Benholme. There are three questions which were mainly argued, the first of them being whether the right to the interests bequeathed by the codicil of 1829 terminated at

the end of the 20 years. I am quite clear that it did not, but that it could only terminate at the death of Lady Elizabeth. In regard to the second question — whether the annuities should be capitalised and charged against capital or charged agains income — I am of opinion that it must follow the nature of the right itself, which is a right essentially chargeable upon revenue, and I see no element in this case to lead to an opposite conclusion. In regard to the question about the 7½ per cent., the argument seems to me to proceed on an entire fallacy. It was put in a double way. It was said, in the first place, that is interest, and therefore must be charged against the income, or there must be an allowance given. Now, it is not interest at all. It is a payment by instalments of interest and capital, and the demand to have that allowance made as if it were the income of the estate is out of the question. The other argument was that the trustees had no power to make advances at 3½ per cent. But it was an advantageous arrangement for the estate, and I think the trustees had ample power. Therefore, without any farther observation, I can only express my concurrence in what Lord Benholme has stated. We adhere to the Lord Ordinary's interlocutor.

Counsel for Reclaimer—Solicitor-General, Balfour and G. Campion. Agents—J. J. & A. Forman, W.S.

Counsel for Trustees of first Marquess of Breadalbane (Pursuers)—Kinnear. Agents—Davidson & Syme, W.S.

Counsel for Earl of Breadalbane—Watson, Adam, and Macdonald. Agents—Adam, Kirk & Robertson, W.S.

HIGH COURT OF JUSTICIARY.

Saturday, July 16.

A. *v.* B.

Suspension—Criminal Diet.

Sentence of imprisonment sought to be suspended, on the ground that although diet had been continued no competent interlocutor continuing the same had been pronounced—*held*, in the circumstances, that the process had been sufficiently regular, and complaint dismissed.

The facts of the case were these:—The complainer had been charged by the Procurator-Fiscal of Kilsyth with assault, and cited to compear on 19th May 1873; but on 17th May he received a written intimation to the effect that he need not compear on the 17th, owing to the absence of a witness, but must compear on the 22d. On the 22d, accordingly, he answered to the diet, and after evidence led was convicted and imprisoned, with the alternative of a fine. The complainer went to prison for a short time, then paid the fine under protest, and brought the present suspension on two grounds—(1) That on the 19th no interlocutor continuing the diet had been pronounced, and accordingly that the same, being peremptory, *fell*, and could not be resumed; and (2) that although an interlocutor appeared on the record bearing to be dated 19th May, yet the said interlocutor had not been written of the date it professed to bear, but was written on the 22d, and was therefore vitiated *in essentialibus*.

The Lord Justice-Clerk—I do not say what rule we might apply to the case where the date was wanting in an interlocutor of the High Court of Justiciary or the Circuit Court. Here the record is sufficiently clear. The date is not essential. But there is sufficient evidence on record to show the date.

The objection resolves into one against the citation, or it may be to jurisdiction. The accused came voluntarily to the Court and stood his trial and received sentence. If he had been acquitted he could not have been tried again. I am not inclined to allow a proof that the proceeding is not regular.

Lord Cowan—I am for repelling the objection. The date is not really essential, and we know that the party had received a letter from the Fiscal stating when his case was to come on. The accused makes his appearance, tholes an Assize, and I don't think we can interfere.

Lord Neaves—I concur. I don't mean to impugn the doctrine that criminal diets are peremptory any more than to approve of erasures, but this is an objection of "no process," and if the party had been acquitted I think it would have been a good acquittal. No process is the first of all pleas, and the panel should have looked to it.

The Court refused the suspension, but gave no expenses to either party.

Counsel for Complainer—Brand. Agent—Wm. Duncan, S.S.C.

Counsel for Respondent—Duncan and H. Moncreiff. Agent—J. Moncreiff, W.S.

Saturday, July 16.

GALT *v.* RITCHIE.

Suspension—30 *and* 31 *Vict. c.* 141, §§ 9 and 13—*Penalty—Allocation of Penalty.*

Objection to sentence of Justice of Peace Court, on the ground that the whole penalty inflicted was given to the complainer—*sustained.*

This was a suspension of a sentence pronounced by the Justices of the Peace at Irvine, on 2d April 1873, under the following circumstances:—On 21st January 1871, Ritchie, a dresser of stone, lodged a complaint against Galt, under the Master and Servant Act 1867, for having refused to fulfil his contract of service and absented himself from his work, and concluding for £10 damages. No proceedings were taken until 2d April 1873, when at a Court held at Irvine, Galt was found guilty of the contravention charged and fined £5, with 25s. of expenses, the whole of the fine being given to Ritchie.

The objections stated against the sentence were that in the complaint the various alternatives of punishment allowed by the Master and Servant Act were not set forth, and that the penalty was not properly allocated. In conformity with the Act only a part of the fine should have been given to the informer.

Authorities cited—*Lamont*, 22 D. 718; *Thomson*, 5 Irv. p. 45; *Baird*, 5 Irv. 200; *Lamont*, 4 Irv. 896.