only to or through some banker, and the same shall be payable only to or through some banker."

That certainly does not mean that the banker who obtains payment is to be in right of the cheque, but rather in right of his customer. This is just what occurred here. A cheque was presented by Paul or by a servant of Paul's, and the Royal Bank cashed it at once. This only showed that the Royal Bank felt safe in trusting to Paul to satisfy them if the Clydesdale did not produce funds to meet the draft. But their having advanced money to Paul does not alter their position in regard to the Clydesdale Bank; for when they go to the Clydesdale Bank, they go as the agent of Paul, having themselves no right except as the hand of Paul. The Clydesdale Bank, on the other hand, on the cheque being presented, pay the money in the belief of course that it is the genuine draft of Dixon Brothers. It turns out that it is not so, and the question is, Who is to bear the loss? It appears to me that when the Clydesdale Bank pay money on the draft of a customer, they are bound to satisfy themselves that the signature is genuine. The Royal Bank, which brings the cheque, has no knowledge of the signature of Dixon Brothers, but the Clydesdale necessarily has of their own customers, whose signature they every day examine. It seems to me, therefore, as in a question between the two banks, that the Clydesdale is answerable, and that the Royal Bank having taken no benefit from the transaction, and having acted merely as the agent of Paul, incurred no responsibility. Paul, of course, is not at present before us. I am therefore for adhering to the interlocutor of the Lord Ordinary.

Lord Ardmillan—I think the Lord Ordinary put the case very tersely in his interlocutor. The Royal Bank received a cheque from a party who was their customer, but drawn by a party who was not their customer, and they were under no obligation to assure themselves of the genuineness of the signature of Dixon Brothers. They were only the medium whereby the money was obtained.

Lord Mure—I concur. I think the case is ruled by the doctrine in the case of the *Caledonian Insurance Co.*, 21 D. 1197, and 23 D. (H. L.) 3.

Lord Deas declined as a Director of the Royal Bank.

The Court adhered.

Counsel for Pursuers—Readman. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for Defenders — Fraser. Agents—Dundas & Wilson, W.S.

Tuesday, March 14.

SECOND DIVISION.

[Lord Curriehill.

MACKIE *v.* GLADSTONE AND OTHERS (MACKIE'S TRUSTEES).

Trust-Disposition — Residue — Vesting — Suspensive Condition.

A truster directed his trustees to pay over the residue of his estate equally between two sons "when the younger of them shall attain twenty-five years of age," with a clause of survivorship in case of the death of either "before the succession opens to him." — *Held* that on the death of the younger before he had attained twenty-five, the elder brother was entitled to immediate payment of the whole residue, on the ground that the suspensive condition had been purified.

This was an action at the instance of John Gladstone Mackie of Auchencairn, Kirkcudbrightshire, against the trustees and executors under the will of his father (the deceased Ivie Mackie), and also against the beneficiaries under that will, who did not, however, lodge defences. The summons concluded for declarator that the trustees should, under burden of certain provisions in his father's trust-disposition and settlement—(1) denude of and make over to the pursuer, as the surviving residuary legatee, the whole residue and remainder of the heritable and moveable, real and personal, estates of the deceased Ivie Mackie, at present standing in their names; or otherwise (2) that the trustees should denude of and make over to the pursuer, as surviving residuary legatee, the one-half or share of the whole residue and remainder of the said estates which Stuart Mackie, now deceased, would, under the said trust-disposition and settlement, have been entitled to receive on his attaining twenty-five years of age; and to denude of and make over to the pursuer, on his attaining twenty-five years of age, the other half or share of the whole residue; or otherwise (3) that the trustees should denude of and make over to the pursuer, as surviving residuary legatee, on his attaining twenty-five years of age, the said whole residue.

The late Ivie Mackie, the pursuer's father, died 23d February 1873, leaving a trust-disposition and settlement dated 11th May 1871, and recorded 6th March 1873. The defenders were under this deed appointed trustees and executors, and after the truster's death they paid the legacies and made the investments directed by the deed. The residue of the estate standing in the name of the trustees consisted of—*First*, The estates of Auchencairn, Rascarrel, and Netherlaw, which were burdened with an annuity of £2500 to the deceased's widow, and subject to her liferent right to Auchencairn House and others; and *second*, of personal property amounting to about £95,000, in addition to the share of the trust in a business carried on in Manchester under the firm of Findlater & Mackie. The annual income of the residue amounted, after the deduction of the annuity to the widow and expenses, to about £11,000.

Under the deed the residuary legatees were the pursuer, born 20th July 1854, and his brother Stuart Mackie, born 2d April 1856, and drowned 18th August 1875. Stuart died unmarried, and the succession to the residue had not opened to him.

The leading provisions in the clause referring to the residue in the trust-deed were as follows—"*Seventh*, I direct and appoint my trustees, after payment of my debts, deathbed and funeral expenses, and after payment and delivery of the foresaid provisions, to pay, assign, and dispone . . . to my sons, John Gladstone Mackie and Stuart Mackie, equally between them, share

and share alike, when the younger of them shall attain twenty-five years of age, the whole residue and remainder of my heritable and moveable, real and personal estates, my shares and interests in trading concerns or businesses . . . and in the event of the death before the succession opens to him of either of my said two sons, without leaving lawful issue, the share of the deceaser shall accresce and belong and be paid, assigned, and disponed to the survivor. . . . And in the event of the death of either of the said two sons without leaving lawful issue, the share of the deceaser shall pertain and belong to the survivor; and in the event of either of my said two sons dying before the succession opens to him, and leaving lawful issue, I direct and appoint my trustees to hold the one-half of the residue of my estates and property provided for my said son so dying for behoof of his lawful issue, and the same shall be paid, assigned, and disponed to them equally, on such issue attaining twenty-one years of age in the case of males, and in the case of females on attaining twenty-one years of age or being married."

The pursuer pleaded—"(1) On a sound construction of Mr Mackie's trust-settlement, the pursuer is entitled to payment and conveyance of the residue of the trust-estate in terms of the leading conclusions of the action, or otherwise, in terms of one of the alternative conclusions. (2) The said Stuart Mackie having died without attaining the age of twenty-five, and it being now impossible to make payment and conveyance of the residuary estate on his attaining that age, the pursuer is entitled to take the estate discharged of the said suspensive condition; or, at all events, he is entitled to immediate payment of the moiety to which he has right as in place of his deceased brother under the said clause of survivorship. (3) Alternatively, the direction to convey on the younger of the two sons attaining twenty-five years of age, should, in the event which has happened, be construed as a direction to pay and convey on the survivor of them attaining that age. (4) In case it shall be found and declared in terms of the preceding plea, the pursuer should be found entitled to payment and conveyance of said residue (or so much thereof as is not immediately distributable) upon his attaining the age of twenty-five."

The defenders pleaded—(1) "Upon a sound construction of the trust-disposition and settlement of the late Ivie Mackie, no right to the residue of the trust-estate, or to any part thereof, having vested in the pursuer, he is not entitled to decree in terms of the first or alternative conclusions of the summons. (2) Assuming that the right to the residue has vested, such vesting having been *a morte testatoris*, the pursuer is not entitled to decree in terms of any of the conclusions of the summons. (3) In any view, the trustees under the said trust-disposition and settlement, being bound in terms thereof to retain the residue and remainder of the trust-estate until the time when the said Stuart Mackie would have attained the age of twenty-five years, the defenders ought to be assoilzied from the conclusions of the summons."

The Lord Ordinary (CURRIEHILL) pronounced the following interlocutor:—

"*Edinburgh*, 18*th January* 1876.—The Lord Ordinary, &c.—Finds that according to the sound construction of the trust-disposition and settlement of the deceased Ivie Mackie of Auchencairn libelled, the right to the fee of the whole residue and remainder of the heritable and moveable, real and personal estates of the said deceased Ivie Mackie is now vested in the pursuer, as the surviving residuary legatee of the said Ivie Mackie, but under burden of annuity of £2500 in favour of Mrs Agnes Gladstone or Mackie, the widow of the truster, and her liferent right to Auchencairn House and others, all as specified in the said trust-disposition and settlement, and that the pursuer is entitled to immediate payment or conveyance thereof under the foresaid burden: Therefore finds, decerns, and declares against the defenders for whom defences have been lodged in terms of the first conclusion of the summons: Finds, decerns, and declares, in absence, against the defenders, for whom defences have not been lodged, in terms of said conclusion: Assoilzies the whole defenders from the whole other conclusions of the summons, and decerns: Finds that the expenses incurred by the defenders in this action form a proper charge against the trust-estate, and decerns.

"*Note.*—The late Ivie Mackie died on 23d February 1873, leaving a trust-disposition and settlement of his whole estate in favour of the defenders Thomas Gladstone, James H. W. Davidson, and W. H. Lidderdale, and another, as trustees, dated 11th May 1871. He was survived by his wife, now his widow, Mrs Agnes Gladstone or Mackie, and by four sons and three daughters. The sons were Ivie Mackie, James Todd Mackie, John Gladstone Mackie, and Stuart Mackie, who was the youngest of the family. The daughters, all of whom were married at the date of the settlement, are Mrs Elizabeth Mackie or Fildes, Mrs Jessie M'Blain Mackie or Fildes, and Mrs Jane Gladstone Mackie or Warner. By the settlement the truster bequeathed an annuity of £2500 to his widow, as well as the liferent of his mansion-house of Auchencairn, and the gardens and offices thereof; and he made special provisions in favour of his sons Ivie Mackie and James Todd Mackie, and in favour of each of his daughters, all of which he directed to be invested as soon as conveniently could be done after his death. It is necessary to notice the nature and terms of these special provisions, as they appear to me to be of importance in construing the clause in the settlement disposing of the residue in favour of the two youngest sons of the truster John Gladstone Mackie and Stuart Mackie, to ascertain the true meaning of which the present action has been raised.

"The provision in favour of Ivie Mackie, the eldest son, was that a sum of £10,000 should be invested, and the interest applied for his behoof at the discretion of the trustees, but that he 'is to have no further interest in my means and estate, and on his death the said sum is to be divided amongst his brother James Todd Mackie and his sisters, and the children of any of them who may have died, such children being only entitled to the share that would have accrued to their parent if alive.'

"The provision for the daughters is that £30,000 shall be invested for each of them, the interest to be paid to them for alimentary purposes only, exclusive of their debts and deeds,

and of the diligence of their creditors, and of the *jus mariti* of their husbands, or the diligence of their creditors. The principal sum so invested for each of his daughters Elizabeth and Jane is on her death to be divided equally among her lawful issue—on such issue, if males, attaining majority, or if females, on attaining that age or being married; and in the event of either of said two daughters dying without leaving issue, said principal sum is to be divided equally among her sisters and her brother James Todd Mackie, or the survivor, and the issue of any of them who may have died, *per stirpes;* and the principal sum invested for Jessie (Mrs Fildes) is at her death to be divided in the following manner, viz.:—If she leaves only her existing child Stuart Gladstone Fildes, £15,000 is to be paid to him at majority, and the remaining £15,000 is to be divided among her sisters and James Todd Mackie, and the lawful issue of any of them who may have died, *per stirpes.* If she leaves more children, then the whole £30,000 is to be divided among them, payable to males at majority or marriage; and if she leaves no issue, the whole £30,000 is to be divided between James Todd Mackie and her sisters, or the survivors, and the issue of any who may have died, *per stirpes.*

"The provision in favour of James Todd Mackie (the second son) is that £35,000 shall be invested, and the interest paid to him during his life for alimentary purposes only, excluding his debts and deeds and the diligence of his creditors, and at his death the principal is to be divided as follows, viz., £10,000 is to be invested for his daughter Constance Florence Mackie, out of the interest of which she is to be supported and educated, and the capital is to be paid to her at majority or marriage; and the remaining £25,000 is to be divided and paid equally among his other children—if males, at majority, and if females, at majority or marriage. If Constance shall die before majority or marriage, or without lawful issue, the £10,000 is to fall and accresce equally to the other lawful issue of James Todd Mackie, and to be paid to them in the same way; but if he leaves no lawful issue, then the whole £35,000 is to devolve on his sisters, or the lawful issue of any who may have died, *per stirpes.*

"Then follows a general declaration applicable to all the foregoing special provisions, viz.—'That in the event of the said James Todd Mackie or of his sisters succeeding to any part of my means and estate in virtue of these presents, other than the above special provisions in his and their own favour, in consequence of the death of any of them, and of my said son Ivie Mackie, the sum or sums to which he or she shall so succeed shall from time to time be vested for his or her behoof, in the same manner, and subject precisely to the same restrictions, declarations, and conditions as the special provision in his or her favour, and at his or her death be treated and regulated in the same manner.'

"These provisions in favour of the truster's two sons Ivie Mackie and James Todd Mackie, and of his three daughters and their respective issue, are manifestly the only portions of his estate in which the truster intended them to have any interest; and it will be observed that neither of these sons, and none of the daughters, is under any circumstances to have any right of fee, or anything more than a mere alimentary payment of the interest of their special or accrescing provisions during their respective lives. This is a consideration of material consequence in construing the residuary clause, in which the residue is provided to the two youngest sons of the truster, viz., the pursuer John Gladstone Mackie and Stuart Mackie, the latter of whom is now dead.

"The residue is dealt with in the *seventh* purpose of the trust, which is as follows:—'I direct and appoint my trustees, after payment of my debts, deathbed and funeral expenses, and after payment and delivery of the foresaid provisions, to pay, assign, and dispone, but under the burdens always of the foresaid annuity of £2500 in favour of my said wife, and her liferent to Auchencairn houses, lodges, offices, garden, fields, and premises attached, to my sons John Gladstone Mackie and Stuart Mackie, equally between them, share and share alike, when the younger of them shall attain twenty-five years of age, the whole residue and remainder of my heritable and moveable, real and personal estates:' . . . . 'And in the event of the death before the succession opens to him of either of my said two sons without leaving lawful issue, the share of the deceaser shall accresce and belong, and be paid, assigned, and disponed to the survivor.' It is then declared that on the younger of the said sons attaining twenty-five years, if John Gladstone Mackie, the elder, should then wish to purchase the estates of Auchencairn, &c., subject to his mother's liferent, the trustees should be bound to sell the same to him at a price to be fixed by arbitration; and if the elder son should not incline to make the purchase, then Stuart Mackie, the younger son, should be entitled to a similar privilege; and in either case the price obtained for the same should form a part of the residue and remainder of the estate for equal division among the said two sons; and the prices of any real or personal estates in England or Ireland, and of the trading concerns in which the truster was engaged, if such sales should have taken place, should also form part of the residuary estate, and be divided equally as aforesaid among the said two sons. And the clause then proceeds:—'And in the event of the death of either of the said two sons without leaving lawful issue, the share of the deceaser shall pertain and belong to the survivor; and in the event of either of my said two sons dying before the succession opens to him, and leaving lawful issue, I direct and appoint my trustees to hold the one-half of the residue of my estates and property provided for my said son so dying, for behoof of his lawful issue, and the same shall be paid, assigned, and disponed to them equally on such issue attaining twenty-one years of age in the case of males, and in the cases of females, on attaining twenty-one years of age or being married.' Power is given to the trustees at their discretion 'to pay and dispose of any part of the share provided to each of my said two sons, John Gladstone Mackie and Stuart Mackie, and the rents, interest, and dividends thereof, for their maintenance and education, and also for placing him or them in any profession, business, or employment, or otherwise for his or their benefit and advancement in the world.' The whole provisions in favour of his wife and children are declared by the truster to be in full of terce, *jus relictæ*, and legitim.

"The investments were all duly made of the

sums specially provided to the truster's elder sons Ivie Mackie and James Todd Mackie, and to his daughters. Mrs Agnes Gladstone or Mackie, the widow, still survives, but Stuart Mackie, the truster's youngest child, and one of his two residuary legatees, recently died by drowning, in minority, unmarried, and without issue. The pursuer John Gladstone Mackie, who is upwards of twenty-one years of age, is thus the sole surviving residuary legatee. He will not attain the age of twenty-five until 20th July 1879, and his brother Stuart, had he survived, would not have attained that age until 2d April 1881. In these circumstances the present action has been raised by the said John Gladstone Mackie, in the leading conclusion of which he asks to have it found and declared that his father's trustees are bound immediately to make over to him, as sole surviving residuary legatee, the whole residue and remainder of his father's trust-estate, under burden of his mother's liferent and annuity. By a second or alternative conclusion he asks for declarator that the trustees are bound immediately to make over to him the one-half or share of the whole residue which Stuart Mackie would have been entitled to receive on his attaining twenty-five years of age; and to make over to him, on his attaining twenty-five years of age the other half or share of the residue. And by a third alternative conclusion he seeks to have it declared that the trustees are bound to convey to him the residue, under burden as aforesaid, on his attaining twenty-five years of age. The parties called as defenders are the trustees, the widow of the truster, and all his surviving sons and daughters, the husbands of his daughters, and his grandchildren. Defences have been lodged for the trustees and for some members of the family, objecting to any decree whatever being pronounced in terms of any of the conclusions of the summons, and alternatively objecting to decree being pronounced in terms of the first conclusion, or otherwise to any decree at all being pronounced in favour of the pursuer until the time when Stuart Mackie, had he survived, would have attained the age of twenty-five.

"The defenders maintain as their leading defence that no right to the residue vested in either of the residuary legatees at the death of the truster, and that no right was to vest in either until the youngest attained majority, or, at all events, until the time when the youngest would have attained majority had he survived. And they maintain, alternatively, that if vesting should be held not to be postponed till that date, it took place *a morte testatoris*, in which case one-half of the residue will now belong to Stuart Mackie's next-of-kin.

"The pursuer, on the other hand, does not maintain that any vesting took place at the death of the testator, but that it was suspended during the joint lives of himself and his brother until the youngest should attain the age of twenty-five, but that on the decease of either vesting was then to take immediate effect,—the interest of the survivor being by that event ascertained to extend either to half of the residue in the event of the predecessor having left issue, or to the whole in the event of his dying without issue. I am inclined to hold that this is the sound view of the case, and that by the death of Stuart Mackie without issue the right to the whole residue is now fixed to belong absolutely and indefeasibly to the pursuer as the sole survivor.

"The settlement is a peculiar one. From what I have already said, it is plain that the truster's intentions as regards his family will, in the event which has happened, be materially violated, unless his settlement can be so read as to have effectually disposed of the residue of his estate in favour of the survivor of his two younger sons, to the exclusion of all the other sons and daughters and their issue. If by the death of both or either without issue before 1881, when Stuart Mackie, the youngest son, was expected to have attained majority, the whole or any part of the residue shall be held to have been undisposed of, the result will be that it will go as intestate succession in fee to his sons Ivie and James Todd, and his daughters, all of whom he has carefully excluded from more than a bare alimentary interest in the sums specially provided to them and their respective issue. If, therefore, the residuary clause can be fairly read so as to prevent such a result, it will be the duty of the Court so to construe it. 'There is always a leaning on the part of the Court to favour a last survivor, although the event contemplated may not have arrived, and to hold in favour of such sole survivor that vesting will take place; for there is no longer any interest to protect by delaying the vesting.'—(See the opinion of Lord Benholme in *Maitland's Trustees* v. *M'Diarmid*, 15th March 1861, 23 D. 740.)

"In the present case it is plain that the truster did not contemplate that both of his sons should die before the time when the younger would have attained the age of twenty-five. He has, however, provided for the case of one of them so dying, for he has expressly declared that if one of these sons shall die 'before the succession opens to him,' *i.e.* (as I think), before the youngest attains the age of twenty-five, the half of the residue provided for him shall, if he dies without issue, 'accresce and belong, and be paid, assigned, and disponed to the survivor;' and if he dies leaving issue, the trustees are to hold his half of the residue for behoof of his lawful issue, to whom at marriage or majority the same shall be paid, assigned, and disponed in equal shares. But the truster has not specially provided for the case of both sons dying before the period mentioned; and, in particular, he has not said that where one son has died leaving issue the share of the other son dying afterwards without issue shall go to the issue of the predeceasing son, and there is no provision made by way of destination over, or otherwise, for the case of both sons dying without issue. It is, I think, clear that the truster contemplated and intended that the whole residue should go to his two sons equally, or one-half to the survivor, and the other to the children of the predeceasing son, or that the whole should go to the survivor if one should die without issue.

"If the direction to divide the residue among the sons or to pay it to the survivor 'when the youngest attains majority,' is a condition suspending vesting, it is now an impossible condition, and must be held *pro non scripto*. The youngest has died in minority, and without issue; his share has, by the express terms of the deed, accresced, and now pertains and belongs, and must be paid and assigned, to the survivor.

No division of the estate can now take place because there is only one residuary legatee in life. No interest beyond that of the survivor now remains to be protected, and as the suspensive condition has been removed, the vesting of the whole residue must be held to have taken place in the pursuer as surviving residuary legatee at the moment of his brother's death.

"Indeed, the express direction that the predeceaser's share is, if he die without issue, to accresce, pertain, and belong, and be paid to the survivor, without any time being fixed for payment, seems to me to imply that it was in the view of the truster that the whole residue might vest and be paid to the survivor before the time specified in the gift. This view derives some support from the direction that if either son dies 'before the succession opens to him,' but leaving issue, the trustees are to hold his half or share for behoof of his children, to be paid to them on attaining the age of twenty-one, *i.e.*, it is to vest in these children as a class on the death of their parent, and would be at once payable to them but for the express postponement of payment till majority. But as no such postponement is attached to the gift to the survivor when the predeceaser dies without issue, immediate payment of the predeceaser's half must, I think, have been intended. And if that be the true reading of the gift of the predeceaser's half to the survivor, it appears to me that it would be absurd to hold that the survivor's own half is not to be held as vested, but is to be suspended until it shall be seen whether he shall live till the day when the predeceaser would have attained the age of twenty-five—the result of which might be that this large portion of the residue, of the value of nearly £6000 per annum, would in that case fall into intestacy should he die without issue, and go in absolute fee to the truster's other children, whom he has so carefully restricted to special alimentary provisions.

"On the whole matter, I am of opinion that the right to the whole residue has vested in the pursuer as surviving residuary legatee. As to the time when payment is to be made, I have already said that as regards Stuart Mackie's share, which has now accresced to the pursuer, he is entitled to immediate payment. As to the pursuer's own half, it was with some plausibility contended for the defenders that the trustees are not bound to denude thereof until 2d April 1881, when Stuart Mackie would have attained the age of twenty-five, or at all events until the pursuer himself shall attain that age. But I do not see any good ground for so postponing payment. The reason for postponing the payment or actual division of the residue no longer exists. It plainly was that the truster's two sons might, before an actual sale and division of the estate took place, have so far matured their views for life as to enable one or other of them to say whether he desired to purchase the estate of Auchencairn and the other landed estates of his father.

"The two sons, one of whom would then be twenty-seven, and the other twenty-five years of age, were then to say in their order, the elder having the first chance, whether they elected to purchase these estates at a price to be fixed by arbitration. But that reason no longer operates. The whole estates, heritable and moveable, are now vested in the pursuer as sole surviving residuary legatee, as his own property, without any purchase, and there is no interest to be secured or benefited by withholding payment or conveyance of the residue. But further, the period of denuding appointed by the trust-deed can never arrive, because Stuart Mackie can never attain the age of twenty-five, and there is no such expression, or even clear implication, of the truster's intention to delay payment in the event which has occurred as to render further postponement necessary. The pursuer will therefore obtain decree in terms of the first or leading conclusion of the summons. The parties were agreed that the pursuer should not, if successful, ask expenses, and that the defenders' expenses should form a charge against the trust-estate."

The defenders reclaimed.

At advising—

Lord Justice-Clerk—This is a case which, from the amount of the interests at stake, assumes much importance. I am of opinion that the Lord Ordinary has arrived at a correct judgment, and I think effect must be given to the first conclusion of the summons.

The seventh purpose of the trust-deed of Mr Mackie is quite independent of the other purposes of the deed, and it provides that the property and residue should devolve on the two sons of the testator, John Gladstone Mackie and Stuart Mackie.

The first question then comes to be, Whether there is here a gift at all? Now, the provision is for distribution of the residue "when the younger of them shall attain twenty-five." That, it appears to me, is in itself a gift, but a gift with a term of payment qualified by a specific condition. But the younger son has predeceased, and the condition has not only failed of fulfilment, but never can be fulfilled. This, then, brings us to the second question, Is there any condition whatsoever remaining? I am of opinion that the words of the bequest originally contained a suspensive condition, which, by the death of Stuart Mackie, became inoperative. The only difficulty in the case is suggested by the question, Whether the meaning and intention of the testator was not that neither of his sons should have the residue paid over to him until the expiry of the period at which the younger would have attained twenty-five years of age? This might have been a more difficult matter had it been a provision as to a class of persons, but that is not so. The gift remains, and it remains without any qualification.

But there is also here a clause of survivorship, and it may be urged that the right of the survivor only under this clause can be said to accresce. [*His Lordship read the clause.*] The sound conclusion from that, I think, is that the limitation is only to apply where *both* live, but not where only one does so.

Accordingly, on the whole matter, I have founded my opinion on the view that this was a suspensive condition, which was purified by the death of the younger brother.

Lord Ormidale—I am of the same opinion. The first question is, Whether this residue vested *a morte testatoris*, or at some other period? If the vesting was *a morte testatoris*, then much of the

argument becomes unavailable; but against such a view we have the survivorship clause, which in the view of such a vesting could not have been of any use. If the vesting did not take place till the younger son was twenty-five, the whole might fall into intestacy; that scarcely can have been intended.

The next question is, Whether by the death of Stuart Mackie the whole residue has vested in his brother, not only the half belonging to the younger, but also his own portion of the residue? There is, I think, quite enough in the clause to leave no option on that matter, and taking the testator's own words, I think the residue has all vested, and the trustees have no choice save to pay it over to the pursuer, the surviving brother.

LORD GIFFORD—I concur generally in what your Lordships have said.

The only thing that can prevent vesting in such a case as this is the insertion of a condition, but the moment that condition has been purified, as it has been here, the deed has a simple operation. This trust-deed goes no further; beyond the two sons there is, as regards residue, no ulterior person in view, not even the other children, who, in the other portion of the deed, are carefully substituted for one another.

The Court adhered.

Counsel for Pursuer (Respondent)—Gloag—Blair. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for Defenders (Reclaimers)—Dean of Faculty (Watson)—M'Laren. Agents—Hunter, Blair, & Cowan, W.S.

Wednesday, March 15.

FIRST DIVISION.

[Sheriff of Edinburghshire.

AITKEN *v.* KIRK.

Agent and Client—Account—Notary-Public.

A notary-public when employed as conveyancer is entitled to charge *ad valorem* fees, calculated upon a reasonable scale as between agent and client.

This was an action under the Debts Recovery Act 1867, at the instance of Thomas Aitken, accountant and notary-public, Edinburgh, against Jane Kirk, merchant there, for payment of £34, 17s. 3d., being the amount of an account for legal expenses incurred by the defender. The defence of non-employment which was pleaded not having been insisted in, the Sheriff remitted the account to the Auditor of the Court of Session to tax and report. A portion of it, amounting to £26, 1s. 3d., was made up of charges in connection with the completion of the purchase of a villa by the defender, and with the negotiation of a loan upon it.

The Auditor reported as follows:—

"In consequence of a remit by the Sheriff of Edinburgh, the Auditor of the Court of Session has examined the account sued for in presence of the pursuer and the agent for the defender, and certifies that, on the assumption that the pursuer is entitled to charge for the conveyancing business included in the account the fees for such business in the table of fees of the societies of W.S. and S.S.C., the same is correctly charged at the sum of Thirty-four pounds seventeen shillings and threepence (£34, 17s. 3d.) sterling, but reserving for the determination of the Sheriff the question of the right of the pursuer so to charge. Reference is made to the subjoined note.

"*Note.*—The pursuer is designed in the summons "accountant and notary-public," and it is admitted that he holds, and at the date of employment for the defender in the conveyancing business held, the certificate of the Inland Revenue as a "notary-public." None of the business charged in the account is of a notarial character, but it is maintained by the pursuer that, holding a certificate as a notary, he is entitled to perform business of every description except Court business, and to charge therefor in accordance with the table of fees in force for the time regulating the charges for members of the societies of W.S. and S.S.C. The Auditor does not consider it within his province to dispose of this question, which is one of very considerable importance, and he has therefore reserved it for the decision of the Sheriff. The Auditor believes that many persons, even without the qualification of a certificate as notary, act as conveyancers, and charge the conveyancing fees under the table of the societies of W.S. and S.S.C. He is not prepared to hold that persons so acting are entitled to charge the conveyancing fees, and it appears to him questionable how far a notary-public (even though certificated by the Inland Revenue) is entitled to more than a *quantum meruit* for any business transacted by him other than business of a proper notarial character. If the pursuer's contention be well-founded, the expenses attending the professional education, apprenticeship, and entrance of the members of the societies of W.S. and S.S.C., and other chartered or incorporated bodies of legal practitioners, appear to the Auditor to be very much money thrown away, in so far as the matter of professional emolument is concerned.

"The portion of the account covered by the reservation is the branch headed 'Title in Mrs Kirk's favour to Warrick Villa, and loan thereon,' and the amount is £26, 1s. 3d. It is proper to note that the defender in settling with the seller of the property has been allowed deduction from the price of £8, 13s. 6d., being one-half of the items of £9, 9s., £7, 10s., and 8s., and that the sums of £7, 10s. and 8s. are outlays. For the business detailed in the other branches of the account, the charges made and sustained do not amount to more than a *quantum meruit.*"

The Sheriff thereupon pronounced the following interlocutor:—

"The Sheriff having considered the Auditor's report, and heard parties' procurators, Finds that the pursuer is not entitled to charge for the conveyancing business in the account sued for under the table of fees allowed to Writers to the Signet and Solicitors before the Supreme Courts of Scotland; and with regard to the sum which he ought to receive for the said business, remits again to the Auditor of the Court of Session to tax that part of the account in question, on the footing that the pursuer is only entitled to charge *quantum meruit*, and report.