by which the law surrounded him, and placed himself as regards this matter at the mercy of his landlord. To that effect the landlord has pleaded this clause. On this record the plea for the landlord is that "all claims," not some claims, but "all claims of damages are excluded by the lease."

The Lord Ordinary's reading of the clause is severe on the tenant's claim. The landlord's own reading and pleading of the clause is precisely to the same effect. The Lord Ordinary has read it just as the landlord reads it, and just as the landlord has pleaded it.

On the whole case I feel that I have no alternative but to reject this claim of damages. The contract of lease, and this clause in the contract of lease, is clear in its import, and in its effect is conclusive, and in the face of the lease, with that clause in it, this action cannot be sustained.

Lord Mure—I have little to add. I agree with Lord Ardmillan in the opinion that this is the most stringent and strictly-worded clause which has ever come before the Court, but my opinion is that it does not necessarily bar the tenant in all cases. When the case was before us with regard to the mode of proof, I thought that if the averments in the 6th article of the condescendence were proved, the clause in the lease would not have protected the landlord. If he were to take no steps to keep them in check, to abstain from shooting or from employing keepers, and to inundate the district with more rabbits than would permit the crops to grow, I think that would be treatment such as would entitle the tenant to compensation. The law holds, in the absence of a protecting clause of the description found here, and without the necessity of proving that the increase arose from designing acts on the part of the landlord, that wherever there is a material increase the tenant is entitled to claim damages. Where a clause of this kind has been inserted, that has been done for the purpose of avoiding such a claim if in some year there has been an increase. It is well known that rabbits will breed more or less according to the seasonableness of the year, and that one set of trappers may do better than another. It is to meet the sudden rise in one year over another. For instance, in 1871 they increased more than in other years, but we see from the evidence of the keepers and ground overseer that the rabbits were kept down under the instructions of the landlord. It is proved by the gamekeeper Fair, who is a witness for the pursuer, that the rabbits were trapped and kept down both in summer and winter, and it is further proved that that is never done in summer unless with that intention. Fair was keeper from 1870 to 1873, and it appears that at first there was an increase in the number of the rabbits, but I agree with your Lordship that that increase was not such as that the landlord was not protected from its effect by the terms of this clause.

The following interlocutor was pronounced:—

"The Lords having heard counsel on the reclaiming-note for William Cadzow against Lord Shand's interlocutor of 24th November 1875, Recal the said interlocutor: Find that, having regard to the clauses of the leases libelled, excluding all claims of damages by the tenant for injury done by game or rabbits, the pursuer has not proved such an increase in the amount of game and rabbits on the farms during the years libelled as to entitle him to any decree in terms of the conclusions of the action: Therefore assoilzie the defender from the conclusions of the action, and decern: Find the defender entitled to expenses, and remit to the Auditor to tax the account thereof and report."

Counsel for Pursuer (Reclaimer)—Fraser—Balfour—Mackintosh. Agents—J. & R. D. Ross, W.S.

Counsel for Defender (Respondent)—Adam—Mackay. Agent—Hector F. M'Lean, W.S.

Saturday, May 20.

SECOND DIVISION.

[Lord Craighill, Ordinary.

COWAN *v.* SLOANE AND OTHERS.

Succession—Period of Vesting—Liferent—Postponement.

A testator provided that the residue of his estate should upon the death of his wife, or upon the death of the longest liver of two annuitants, "whichever of these events shall last happen, but not earlier, be divided equally, share and share alike, among the children of my said two sisters, and if any child or children shall have died, either before the date of these presents or before the said period of division, then their issue shall equally among them succeed to their parent's share." It was further declared that "in the case of females, whether children or the issue of children, the provision in their favour shall be exclusive of the *jus mariti*" of their husbands; and in the case both of males and females "their provision shall be either paid to themselves upon their own receipt, or secured for their behoof by my said trustees" in such way as they shall think fit.—*Held* that the residue vested at the death of the longest liver of the wife and the two annuitants, and not *a morte testatoris*.

This was an action of multiplepoinding raised by John Cameron Craig, C.A., judicial factor on the trust-estate of John Craig, clothier in Edinburgh, who died on 20th July 1857, leaving a trust-disposition and settlement, of date 24th September 1855, the 5th clause of which was in the following terms:—"The free residue and remainder of my said subjects, means, and estate shall upon the death of my said spouse, or upon the death of the longest liver of the said two annuitants, whichever of these events shall last happen, but not earlier, be divided equally, share and share alike, among the children of my said two sisters, and if any child or children shall have died either before the date of these presents or before the said period of division, then their issue shall equally among them succeed to their parent's share. Declaring that in the case of females, whether children or the issue of children, the

provision in their favonr shall be exclusive of the *jus mariti* or right of administration of any husbands whom they may have married or may marry, and as well in that case as in that of any of the other beneficiaries of the fee, even males, their provision shall be either paid to themselves upon their own receipt, or secured for their behoof by my said trustees and their aforesaids in such way as they in their sole discretion may think most fit for the interest of the beneficiaries."

Mr and Mrs Sloane and certain other claimants maintained that the period of vesting of the residue under this clause was *a morte testatoris*, while the contention of the other parties was that the residue did not vest until the death of the liferentrix and the last of the annuitants, whichever event last occurred.

The Lord Ordinary on 18th November 1875 pronounced this interlocutor:—

"Finds that the residuary bequest did not become vested in all or any of the residuary legatees till the death of the last survivor of the annuitants on 12th October 1873; and further, that as the testator's widow had predeceased that event, the same then became vested: Appoints the cause to be enrolled that this finding may be applied to the claims of parties: . . . . . Finds the claimants Mr and Mrs Sloane, the claimants Miss Jane Buchanan and others, and the claimants John Craig M'Intyre and another, whose contention as to the period of vesting has been overruled, liable to the other claimants as a class in the expenses of discussing the question now decided; modifies these expenses to the sum of nine guineas, and decerns.

"*Note.*—Parties desired that the question as to the period of vesting should be taken up and decided in the first instance, and this course has accordingly been followed.

"The clause of the truster's settlement upon which the decision of this question depends is that in which the fifth purpose of the deed is set forth. The meaning of this clause appears to the Lord Ordinary to be plain. That meaning is not controlled, as the Lord Ordinary thinks, by any words, expressions, or provisions to be found elsewhere in the deed, and consequently he has without difficulty adopted the conclusion to which effect has been given by the foregoing interlocutor. . . . .

"The clause in question directs that 'the free residue and remainder of my said subjects, means, and estate shall upon the death of my said spouse, or upon the death of the longest liver of the said two annuitants, whichever of these events shall last happen, but not earlier, be divided equally, share and share alike, among the children of my said sisters; and if any child or children shall have died either before the date of these presents or before the said period of division, then their issue shall equally among them succeed to their parent's share.' Thus, sisters' children alive at the appointed period of division, and the issue, if any, of such children as predeceased that period, form the component parts of the class of residuary legatees. There are no other members of that class nominated by the truster; and certainly there is nothing which suggests that issue of predeceasing children are to be excluded that other parties deriving right from the parents of such issue may be introduced. And yet such would be the effect of so reading the clause as to hold that there was vesting *a morte testatoris*. Every sister's child would by that interpretation become at the death of the testator a residuary legatee, and as a consequence, though she might die before the period of division, leaving issue, such issue could take nothing under the conditional institution provided in the clause of bequest. A reading which leads to such a result cannot, the Lord Ordinary thinks, be the true reading, because it operates as a defeasance of a provision plainly expressed, and forming an integral part of the scheme of the truster's settlement.

"The expenses of the discussion of the question now decided have been allowed to the claimants successful in the controversy. But these claimants on the present occasion must be regarded as a class, and accordingly the expenses which have been given have been awarded to them as such. Counsel for each of the several sets of claimants were instructed, but this was more than was required, and the extra cost thus incurred was not a burden which, in the opinion of the Lord Ordinary, ought to be cast upon those who have been unsuccessful in this part of the litigation."

Mr and Mrs Sloane and others reclaimed, and argued that the vesting took place *a morte testatoris*.

Authorities—*Foulis*, Feb. 3, 1857, 19 D. 362; *Wallace*, Jan. 28, 1807, M. Appx. *voce* Clause 6; *Majoribanks* v. *Brockie*, Feb. 18, 1836, 14 S. 521; *Maxwell* v. *Wylie*, May 25, 1837, 15 S. 1005; *Forbes* v. *Luckie*, Jan. 26, 1838, 16 S. 374.

At advising—

Lord Ormidale—The question for decision in this case relates to the vesting of the residue of the trust-estate of the deceased John Craig; and it depends upon the construction and effect of the fifth purpose of his trust-disposition and settlement, which in some respects is peculiarly expressed.

It was contended, on the one hand, that the residue vested *a morte testatoris*, and, on the other, that it did not vest till the period of division, that is, till the death of the liferentrix and the two annuitants.

The mere circumstance of there being a liferent and annuities, and consequent delay in paying or distributing the residue, could not have the effect of postponing the vesting. But it appears to me there are specialties in the present case sufficient to shew that it was not the will or intention of the testator that the residue of his estate should vest till the period of divison, that is, till the death of his widow and the longest liver of the two annuitants.

(1) It is expressly declared by the testator that payment or division of the residue should then take place, "and not sooner." In this respect there is a marked distinction between the present case and that of *Foulis* (3d February 1857, 19 D. 362), cited in argument for the reclaimers. In consequence of this distinguishing feature, it cannot, I think, be held that the widow and annuitants in the present case could, by executing a renunciation of their interests, accelerate the period of distribution, as was done in the case of *Foulis*.

(2) The next, and I think a very important

peculiarity in the present case, is that the testator not only provides that the issue of his sister's children dying before the period of division shall succeed to their parents' share,—a provision which, it might be argued, as it was at the debate, is nothing more than what the law would supply independently of express declaration,—but also that the issue of children dying before the date of "these presents," that is, before the date of the trust-disposition and settlement, should succeed to their parents' share. This is a peculiarity of the present case not to be found in any other, so far as I am aware; and it unmistakeably indicates, I think, so far at least as concerns the issue of children dying before the date of his deed of settlement, that the testator had not his own death in view as the period of vesting, and neither, of course, could he have proceeded on the footing of vesting taking place previous to his own death. The only intelligible explanation is, that the testator by the language he employs intended that there should be no vesting till the period of division. On any other footing the manifest object of the testator in providing that the issue of such of the children as might die before the date of his deed, or before the period of division, should come into the place of their parents, and be entitled to their parents' share, might be entirely defeated by the creditors or other assignees of such parents.

And (3) In support of the same view, there is also the peculiarity that in dividing and paying over the residue the testator declares that in the case of females, whether children or the issue of children, the provision in their favour shall be "exclusive of the *jus mariti* or right of administration of any husbands whom they may have married or may marry, and as well in that case as in that of any other of the beneficiaries of the fee, even males, their provision shall be either paid to themselves upon their own receipt, or secured for their behoof by my said trustees and their aforesaids, in such a way as they, in their sole discretion, think fit for the interest of the beneficiaries." I cannot think that an anxious provision such as this would have been made by the testator if he had intended that the residue of his estate should vest on his own death, or contemplated the possibility of its vesting prior to the period of division. It is plain, however, that supposing vesting to have taken place *a morte testatoris*, it might happen that the trustees would find when the period of division arrived that they had to pay it over and divide it, not amongst the children or the issue of the children of the testator's sisters, but to others to whom it had been transferred by them, strangers to the testator, and in regard to whom it can scarcely be supposed the anxious provision which has just been referred to was ever intended to apply.

Having regard to these considerations, I am of opinion the Lord Ordinary is right in holding that the residuary bequest in question did not vest till the death of the liferentrix and annuitants, that is, till the period of division. I am unable, in any other view, to see how what appears to me to be the manifest intention of the testator, which must in the present, as in all cases of its class, be the paramount and guiding rule of construction, could be given effect to.

In accordance with the opinion I have now expressed, I am for adhering to the Lord Ordinary's interlocutor.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming note for Mrs Margaret Finlayson or Finlay, now Sloane, and her husband, against Lord Craighill's interlocutor of 18th November 1875, Adhere to the said interlocutor, except as regards the finding for expenses; recal that finding, and allow the expenses incurred by the respondent, both in the Outer and Inner House, to be paid out of the fund *in medio;* and remit to the Auditor to tax the said expenses, and to the Lord Ordinary to proceed further with the cause, with power to decern for the expenses now found due when taxed and reported on by the Auditor, and decern."

Counsel for Reclaimers—Balfour—Jameson. Agents—Dalmahoy & Cowan, W.S.

Counsel for Respondents—Kinnear—Mackintosh. Agents—Frasers, Stodart, & Mackenzie, W.S., and D. J. Macbrair, S.S.C.

Counsel for Real Raiser—Asher. Agents—Dalmahoy & Cowan W.S.

Saturday, May 20.

SECOND DIVISION.

SPECIAL CASE—MACGREGOR AND OTHERS.

Succession—Property—Fee and Liferent—Heir of Provision—Sale—Constructive Conversion.

Certain house property being held in trust for Mrs A in liferent and her seven daughters in fee, the sole surviving trustee in 1782 executed a disposition, the dispositive clause of which was in these terms:—"I, by these presents, alienate and dispone to and in favour of the said" Mrs A "in liferent, and the said" seven daughters, "and their heirs and assignees whomsoever, equally in fee, and failing any of them by decease to the survivors," the said property. The procuratory of resignation was "in favour of and for new infeftment to be made and granted to the said" Mrs A "in liferent, and to the said seven daughters, and their heirs and assignees whomsoever, equally in fee, with this provision always, as it is hereby expressly provided and declared, that after the death of the said" Mrs A "the house above mentioned shall be rented by the said" seven daughters "and each of them, so long as any one of them shall remain unmarried, without paying any rent or acknowledgment for the said house to the sisters who shall happen to be married, and in the event of the marriage of the said whole sisters, or on the death of all who shall remain unmarried, then the house above mentioned shall be sold, and the price thereof be divided among the surviving married sisters and the child or children of the deceased sisters, equally, as the fee is provided in manner above written." This deed was