But looking to the nature of the weather which this vessel encountered, I think that the *onus* was shifted from the shipmaster to the shipper.

In the ordinary case, when the shipowner has bound himself to deliver the goods carried by him in the like good order in which they were shipped, if he fails to do so, it falls upon the shipmaster to account for any damage which the cargo may have sustained; but if the log-book shows that in the course of the voyage the vessel encountered weather of exceptional severity, then I think that the shipmaster sufficiently discharges the *onus* which lies upon him by showing that the damage has arisen from a cause beyond his control. This shifts the *onus*, and I think that in the present case the shipmaster has sufficiently discharged the *onus* by showing the excessive length of the voyage, and by proving the exceptional severity of the weather which this vessel encountered on her voyage to Dumfries.

In regard to the matter of dunnage, I think it falls upon the owner of the cargo to prove that the dunnage supplied was insufficient. In this matter I also differ from the Lord Ordinary. I think that he has taken a wrong view as to the question of *onus*, and at the same time that he has not allowed sufficiently for the extreme severity of the weather. It appears that this voyage lasted nearly eight weeks instead of from ten to fourteen days, which is the usual passage. It was suggested in the course of the discussion that the crew were idling away their time in port when they ought to have been prosecuting the voyage. But such a suggestion cannot be entertained when it is kept in mind that the shipmaster was owner of the vessel and that every day he delayed or was kept in port was the loss of so much freight to him. The presumption under such circumstances must be in favour of his going on as quickly as the weather would permit of. The captain brings this out quite clearly, I think, in his evidence, and he is fully corroborated on this point by several of his sailors. If further evidence was necessary in this matter, we have it in the reports both of the lighthouse men and of the Meteorological Society, which I consider in such a question as the present to be good evidence. There can be no doubt, I think, that the seams of the vessel opened in course of the voyage owing to the very severe weather which the vessel encountered, and that the cargo was in this way damaged by the sea water which so passed in. But it is maintained by the defender that sea water is one of those perils of the sea which are excepted in the bill of lading, and for any damage arising from which he is not to be held responsible, unless it can be proved that the vessel was not properly dunnaged. Now, there seems to be no fixed rule about dunnage, it being entirely a question of circumstances, and having regard to the length of the voyage, the character of the cargo, and the probable nature of the weather to be encountered. The Court in a question of this kind must rely upon the evidence of men of skill, who in forming their opinions will take these different matters into consideration. I do not intend to go into the evidence upon the question of the amount of dunnage used for this vessel. All I desire to say is, that in my opinion it has not been made out that this vessel was not sufficiently dunnaged. In the course of the voyage there can be no doubt that during the severity of the gales, both the cargo and the dunnage would be more or less shifted, and this would quite account for the seeming conflict of evidence between the witnesses who saw the cargo shipped, and those who assisted at its unloading. I am therefore of opinion, on the whole case, that while finding that the freight is due, we should also find that there has been a failure on the part of the pursuers to prove that the amount of dunnage supplied was insufficient, and that the shipowner and shipmaster should accordingly be assoilzied.

The Lord President and Lord Mure concurred.

The Court pronounced the following interlocutor:—

"Adhere to the interlocutor reclaimed against, so far as it finds the pursuer entitled to £43, 6s. 3d., with interest as concluded for in the action at his instance: *quoad ultra*, recal the interlocutor; and in the action at the instance of John Dobbie, sustain the defences, assoilzie the defenders, and decern."

Counsel for Dobbie — Baxter. Agent — A. & G. V. Mann, S.S.C.

Counsel for Williams — Trayner — Salvesen. Agent—Thomas M'Naught, S.S.C.

Friday, June 27.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

CHEYNE AND ANOTHER (BAXTER'S TRUSTEES) *v.* CHEYNE AND OTHERS.

Succession — Trust-Disposition and Settlement — Husband and Wife—Renunciation of Terce and Jus relictæ *—Effect of Wife's Signature to Husband's Universal Settlement.*

A husband by his trust-disposition and settlement directed his trustees, *inter alia*, to pay his wife if she should survive him, a liferent of his whole estate, "and after the death of the survivor of me and my said wife, and with her consent and full approbation, in token of which she has subscribed this deed," he appointed his trustees to pay a number of legacies. Many of these legacies were to persons who were among the next-of-kin of his wife. The residue was to be employed in charitable purposes. The settlement was signed by both husband and wife. The wife only survived her husband a few weeks, and after her death her executor maintained that her legal rights in her husband's estate had not been discharged. *Held* that the settlement being universal, the wife, by her consent to the giving of the legacies, which implied a different disposal of the residue, and by her signature of the deed, had accepted the provisions of the deed in her favour, and could not after the husband's death have claimed her legal rights, and that the claim of her executor fell to be repelled.

Opinion (*per* Lord Justice-Clerk) that a settlement executed by the wife ten years before that of the husband, and to come into effect in the event of his survivance, the terms of which showed that it was intended that the husband should settle his funds in manner agreed on between the spouses—though it could not be looked at as a testament, could be read as affording evidence that the provisions of the husband's deed carried out an arrangement between the spouses.

John Boyd Baxter, LL.D., Dundee, died on the 4th August 1882, survived by his wife, but without issue. He left a trust-disposition and settlement dated in 1881, and conveying his whole estate, heritable and moveable, to trustees, the purposes of which trust were as follows:—first, for payment of his debts; second, for payment out of the residue of his estate after his wife's death of a further contribution to the funds of University College, Dundee, to which he had already undertaken to give a sum of £10,000 (this sum he actually handed over to the college between the date of his settlement and his death); third, for payment of "the free annual proceeds or income of my estate and whole effects, heritable and moveable, before conveyed to my dear wife Margaret Edward or Baxter, if she shall survive me, during the whole period of her life, to be used and enjoyed by her as she shall think proper;" by this purpose he also gave his wife a liferent of his household furniture and whole plenishings connected with his establishment; fourth, "I direct and empower my said trustees, after the death of the longest liver of me and my said wife, to realise and convert into money all my estate and effects, or such part or parts thereof as they think proper, and that in such manner, and at such time or times, and at such prices as they think fit, and after the death of the survivor of me and my said wife, and with her consent and full approval (in token of which she has subscribed this deed), I direct and appoint my said trustees, as soon as they conveniently can, or at such time or times as they consider proper, with full power to postpone the payment of any of the legacies underwritten if my trustees think it expedient to do so, to pay to the institutions, societies, and persons after mentioned, or to hold in trust for behoof of such females as are after specified, whose husbands' rights are excluded, the following sums or legacies which I hereby legate and bequeath to them respectively." Then followed a list of the legacies, amongst which were legacies to the amount of £16,000, among various nephews and nieces of his wife, who were among her next-of-kin. The fifth purpose provided for the division among certain legatees, after his wife's death, of his household furniture, and bequeathed certain books and other articles. Sixth, regarding the residue of his estate and effects, he directed and appointed his trustees to apply and appropriate the same when realised "to and for such useful and charitable or benevolent institutions, and such uses and purposes, religious or sacred, as they shall think proper, not forgetting to aid respectable deserving females to whom a little help might bring comparative comfort, and not forgetting also that if the College in Dundee should require somewhat more assistance, and they should be able to give it," he most willingly gave them full power to bestow it, and declared that they should be the sole judges of the propriety of giving such further assistance, the personal and other stated legacies before bequeathed being to be paid and provided for in the first place, and the other purposes of his settlement thereafter carried out and fulfilled. The settlement thus concluded—"In witness whereof, I and my said wife have subscribed these presents." The will was holograph of Dr Baxter, and was signed by Mrs Baxter as well as by him.

There had been no antenuptial contract of marriage between Dr and Mrs Baxter. They had made a mutual settlement in each other's favour in 1828.

Dr Baxter was, as already stated, survived by his widow, but the shock of his death seriously affected her, both physically and mentally, and it was admitted by all parties in this action that she was not in a condition to attend to matters of a business nature from the time of her husband's death till her own, which occurred a few weeks after her husband's, viz., on 15th October 1882.

Dr Baxter's estate consisted of bonds over heritable property in Scotland to the amount of £12,500, and of moveable funds to the amount, as at the date of his death, of £58,620 or thereby. There was found in Mrs Baxter's repositories at the time of her death a deed dated in 1871, by which she conveyed and assigned to her husband, "in case he shall survive me," her whole estate, heritable and moveable, and appointing him, "in case he shall surviye me," to be "my sole executor and universal intromitter with my whole means, estate, and effects of every kind, and that for his own use and behoof, with full power to him to do everything competent to him as my executor, it being understood between us, in case of his surviving me, that he will execute a deed of settlement or trust-deed, to take effect at his death, in the terms and for the purposes settled and known to us both, with such necessary alterations as he may consider called for on account of any change of circumstances that may take place. With this duty he is solely and confidently entrusted, and in the disharge of it no one shall interfere."

The trustees were in course of paying the legacies directed by the fourth and fifth purposes of the will when a claim was made upon them by Allan Edward, a nephew and one of the next-of-kin of Mrs Baxter, who had obtained himself decerned her executor-dative *qua* one of her next-of-kin, for *jus relictæ*, to which he alleged that Mrs Baxter was entitled in respect that she had survived her husband and had not renounced her legal rights as his widow. He also maintained that she was entitled, as terce, to one-third of the free rental of her husband's heritage from the date of his death to the date of her death.

This action of multiplepoinding was raised by Dr Baxter's trustees to determine the question which thus arose, and an action which Mr Edward, as Mrs Baxter's executor, had raised against Dr Baxter's trustees for declarator that she was entitled to legal rights, and for count and reckoning therefor, was meanwhile sisted. The position taken up by Dr Baxter's trustees is explained in their claim and pleas-in-law in this multiplepoinding. They claimed (1) to be ranked and preferred to a sum of £8000 consisting

of legacies to certain of Mrs Baxter's nieces for whom the trustees were directed to hold the same in trust, and to the whole residue after the legacies should be paid, to be held for the residuary (6th) purpose of the settlement. They lodged also an alternative claim which need not be here related.

They pleaded — "(1) The trust-disposition and settlement of Dr Boyd Baxter having been executed by him in terms and by virtue of an agreement and understanding come to between him and Mrs Baxter prior to the execution of Mrs Baxter's last will and testament, of date 11th July 1871, Mrs Baxter's representatives are barred from making any claim against Dr Baxter's estate in reprobate of his said trust-disposition and settlement, and of said agreement, and are therefore not entitled to claim Mrs Baxter's terce and *jus relictæ* as in her right. (2) Mrs Baxter's right of terce and *jus relictæ* being excluded by the terms of her husband's trust-disposition and settlement, and of her consent thereto, and approval thereof; and *separatim*, revocation of her consent thereto, and approval thereof, being only competent to her personally, the claimants are entitled to be ranked and preferred in terms of the first alternative of their claim. (3) The trust-disposition and settlement of the said Dr John Boyd Baxter, consented and approved of by his wife, the said Mrs Margaret Edward or Baxter, as aforesaid, being truly a mutual settlement between them, whereby Mrs Baxter obtained for herself the liferent of her husband's whole estate, and also valuable provisions in favour of certain of her next-of-kin, and therefore not revocable by Mrs Baxter alone, or at least by Mrs Baxter after the death of her husband, the said Dr John Boyd Baxter; and *separatim*, being not now revocable by her representatives, the claimants are entitled to be ranked and preferred in terms of the first alternative of their claim. (4) Mrs Baxter's claim of terce and *jus relictæ* being only competent to her in the event of her revoking her consent and approval of her husband's said trust-disposition and settlement during the lifetime and in the knowledge of her said husband, and this not having been done, the claimants are entitled to be ranked and preferred in terms of the first alternative of their claim."

Allan Edward, as Mrs Baxter's executor, claimed half the free moveable estate of Dr Baxter and one-third of the rent of his heritage between his death in August and his wife's death in October, 1882. Claims were also lodged by Kenrick Alexander Edward and Alfred Edward, children of a brother of Mrs Baxter, and by James Kenrick Edward and three of his sisters, children of another deceased brother of Mrs Baxter, and among his next-of-kin. These claimants also claimed on the footing of receiving payment of the shares which would fall to them of Mrs Baxter's legal rights.

The Lord Ordinary (KINNEAR) pronounced this interlocutor:—"Repels the claim for Allan Edward as Mrs Baxter's executor, and the claims for Kenrick Alexander Edward and Albert Edward, and for James Kenrick Edward and the Misses Edward, so far as claiming *jus relictæ* and terce out of the said John Boyd Baxter's estate, and decerns, &c.

"*Opinion.*—The question is, whether the lat Mrs Baxter, the testator's widow, by consenting to the provisions of his trust-disposition and settlement, had renounced her claim to *jus relictæ*, so as to exclude the claim now brought forward by her next-of-kin as representing her?

"It is not disputed that the deed implies in law, although it does not in terms express, the testator's intention to exclude the legal rights of the widow according to the doctrine stated by Erskine, iii. 3, 30, and established by the authority of many decisions; and the only question is, whether Mrs Baxter had assented to that intention on the part of her husband, and consented to the provision in her favour, so as to preclude her from rejecting the deed upon her husband's death?

"I am of opinion that she did consent; and that the claim of her next-of-kin is therefore excluded. She signs the deed as a consenting party, and that would probably in itself have been sufficient to intimate her acceptance of its provisions. But it is said that her consent is confined to the dispositions contained in the fourth direction to the trustees; and that she cannot be held to have known or consented to any of the other provisions of the deed. I think this contention untenable. There are indications throughout the deed that the testator is speaking on his wife's behalf as well as his own; but without adverting to these, and upon the construction of the clause in question alone, I am of opinion that it imports an acceptance by the wife of the entire settlement, and not merely her approval of particular legacies.

"It is necessary to observe the general scheme of the deed. By the first purpose the trustees are directed to pay the testator's debts; by the second they are authorised, if they think proper, to make a further contribution out of the residue of the estate, after his 'wife's death,' to a college to which he had already undertaken to give a certain sum. By the third purpose he gives his wife the liferent of his whole estate, heritable and moveable; and there can be no question that if Mrs Baxter accepted that provision she thereby renounced her *jus relictæ*. Then follows the clause which is to be construed, and by which the testator, in the fourth place, directs his trustees, 'after the death of the longest liver of me and my said wife, to realise and convert into money all my estate and effects, or such part thereof as they think proper, . . . and after the death of the survivor of me and my wife, and with her consent and full approval, in token of which she has subscribed this deed,' he appoints his trustees to make payment of a number of legacies, including legacies to various near relatives of his wife, of whom several were among her next-of-kin. By the fifth purpose he makes certain bequests of furniture; and by the sixth he disposes of the residue.

"By the fourth direction to the trustees, therefore, the testator expresses a clear intention to dispose of his entire estate at his wife's death, if she should survive him; and his wife's consent to the specified legacies, which are given upon that footing to her friends and relations, can have no meaning, if it does not import her consent to these legacies as the full amount that is to be bequeathed out of the entire estate to persons whom she desires to favour. That necessarily implies her consent to a different disposal of the

residue. But it also implies her acceptance of the liferent provision to herself. For the introductory words of the clause very clearly express the assumption on which the bequests proceed—viz., that the capital of the entire estate shall be available at the death of the widow for the subsequent purposes of the will; and that could only be brought about by the operation of the previous direction, that the testator's wife, if she survived him, should receive the income of the whole estate during her survivance, but should have no part of the capital. I am of opinion, therefore, that the bequests in question must be held to have been given on the understanding that the widow should be content to accept the liferent provided for her, and to claim no part of the capital. She had, therefore, no further right to elect, after her husband's death, between the testamentary provisions and her legal rights. She could neither defeat the legacies to which she had consented by rejecting the deed and claiming *jus relictæ*, nor could she defeat the testator's intention by taking away one-half of the moveable estate, and leaving the other half burdened with legacies which had been given with her consent, upon the understanding that the whole estate would be available for the purposes of the will.

"If this view be correct, the other questions which were argued do not require to be considered. But I shall add that I can give no weight to the argument which was founded upon the terms of Mrs Baxter's will. The will provides only for the event of her husband surviving her; and it is impossible therefore to hold that it expresses any intention with regard to the claim for *jus relictæ*, which could only arise in the event of her surviving him."

The claimant Allan Edward reclaimed, and argued—The question raised here was, whether the consent which Mrs Baxter gave to a portion of her husband's deed of settlement amounted in law to a renunciation of her legal right, so as to exclude the present claim brought by her next-of-kin. The Lord Ordinary in deciding that it did, had decided that the legal rights of a widow might be discharged by implication. But in order to import renunciation there must be an express clause by the husband that the provisions made by him were to be accepted by the wife in full of her legal claims—*Johnstone* v. *Coldstream*, June 30, 1813, 5 D. 1297—or an express renunciation by her. The case fell to be ruled by *Leighton* v. *Russell*, December 1, 1852, 15 D. 126. Lord Fullerton observed there that the consent of a wife to her husband's testament was a very different thing from the case of a marriage-contract, where each party is giving and receiving something, the taking of which is incompatible with retaining that to which the taker previously had right, and which was a contract where there might be a perfectly fair implication that something was surrendered on the one side for something on the other. There could be no such implication with regard to the present deed of settlement.

The real raisers replied—It was true there was no express consent, except as regards the legacies in the fourth purpose, but there was enough consent on her part to import by implication a renunciation by her of her legal rights. The wife consented to legacies being given to her own relatives, and meant them to be paid out of the whole estate, and not out of the dead's part. It was absurd to argue that she could have taken her common law provisions and thrown the burden of these legacies on the dead's part. But further, her signature to the deed imported her consent to all that was in the body of it, unless anything was to be found in it to the contrary. Her will of 1871, too, showed that she had previously contemplated and arranged with Dr Baxter the legacies in the fourth purpose. She had never withdrawn her consent, and no right to do so now could have transmitted to her next-of-kin—Ersk. Inst. i. 632.

At advising—

Lord Justice-Clerk—In this case I have come to be of opinion, and that very clearly, with the Lord Ordinary—that is to say, there is no doubt that in the circumstances of this case the claim for *jus relictæ* cannot be sustained. I am disposed to take rather a stricter view of the effect of the settlement of Dr Baxter, with the consent of his wife, than was argued from the bar. The state of the question is this. We have to deal with a settlement executed by Dr Baxter, with the consent of his wife, who subscribes as consenting thereto. The effect of that settlement is to give his wife, in the event of her surviving, the liferent of the whole of his estate, which was very large; and in the second place to provide for certain legacies to a number of persons who were to a large extent connections and relatives of his wife's. The residue of his estate is bequeathed for charitable purposes. That is the substance of the settlement. The wife signs the settlement in token of her assent to these provisions—The testing clause bears, "In witness whereof, I and my said wife have subscribed these presents before these witnesses," and so on.

In the first place, I am of opinion that a subscription by the wife to the settlement of the husband is a universal attestation, as far as she is concerned, of the provisions of the deed. I see no reason whatever for making any exception in favour of the wife. Whether the consent has been alluded to or not in the body of the deed, unless something very special has been found there to limit the effect of the assent, it binds both. I should hold that in the general case to be the effect of subscribing this deed. It is said that this is a donation, because if the wife had taken her legal rights, her *jus relictæ* would have amounted to a half of this large personal estate; otherwise, being a person advanced in years, she would only have a liferent of the whole estate for, probably, a very few years. I do not think that that would have been at all an important matter in the question we are here considering. Whether it was a donation or not, can hardly, I think, be the question raised by the representative of the wife. She chose to make it if it was a donation. She signed the deed. She survived her husband, and she died without challenging anything she had done. I should have thought it exceedingly doubtful whether any plea of donation could be maintained by her representatives, but I am satisfied on the whole complexion of this transaction between husband and wife that it had nothing of the nature of donation in it. The real fact is that the husband gives his wife for her life the income of the whole of his large estate, and he bestows a large portion of the residue of the estate itself in gifts to her family,

from which I should have inferred—and I have no doubt the inference is the true one—that this had been done by arrangement with her, not only with her consent, but with her strong approbation, being substantially what she would have done with her own share, coming to her through her *jus relictæ*, if that had been the state of it, and being available for distribution among her own relations. And I am very much fortified in that view by a document that the Lord Ordinary seems to think not important, but which seems, in that view of the case, to be of considerable importance. It is the will executed on the 11th July 1871. I quite admit that it is of no force or effect as a settlement, or a will, or a testament. In this deed Mrs Baxter appointed her husband, in the event of his survivance, "my sole executor and universal intromittor with my whole moveable means, estate, and effects of every kind, and that for his own use and behoof, with full power to him to do everything competent to him as my executor, it being understood between us, in case of his surviving me, that he will execute a deed of settlement or trust-deed, to take effect at his death, in the terms and for the purposes settled and known to us both, with such necessary alterations as he may consider called for on account of any change of circumstances that may take place. With this duty he is solely and confidently entrusted, and in the discharge of it no one shall interfere." Now, that shews beyond all doubt that it was understood between her and her husband that in case of his surviving he was to execute a deed of settlement or trust-deed, to take effect at his death, in the direction and for the purposes settled and known to them both. That deed, of course, is not available in a testamentary sense, but when the question is whether this is or is not a fair settlement as between husband and wife of the estate of the husband, I think it indicates quite clearly what I do not doubt is the fact, that all these provisions had been arranged before the deed was executed between the spouses.

For these reasons, I think the Lord Ordinary did right in repelling the plea founded on donation.

Lord Craighill—The next-of-kin of the late Mrs Baxter here claim from the testamentary trustees of her husband, who are in the possession and administration of his estate, the share which represents her common law rights as the surviving spouse. Is such a claim open to them? That depends on the effect of her husband's settlement, to which she became a party. The Lord Ordinary has found that this claim is thereby excluded, and I concur in his judgment. The scheme of Mr Baxter's settlement was to give a liferent of his estate to his wife should she survive him, and to dispose of the entirety, of which she was the liferentrix, for the other purposes specified in the deed. Not one of the many bequests left in the will was to be paid so long as she should live, and even the realising of the estate for the purposes to which the fee of it was destined was not till then to be begun. These things are plain on the face of the deed. Now, if Mrs Baxter had said in form of words that she had accepted the liferent provided for her, that confessedly would have settled the controversy, for the passage from Erskine which has been cited by the Lord Ordinary, and the decisions following upon it, have long been taken to be the law upon this subject. But though we have not here this express acceptance, we have that by which the same result is accomplished. In the first place, all the legacies to which her consent was given are to be paid only at her death, that is to say, at the close of her liferent, and consequently, as there was and could be no other reason for this postponement than the fact that in consequence of her acceptance of a liferent the capital could not be sooner applied in payment of the bequests, this imported by clear implication that the liferent had been or was to be taken and enjoyed as the truster intended.

But this is not all. For, in the second place, there is an express consent by Mrs Baxter, as I read the deed, not to some, but in reality to all the legacies, as well those in the fifth and sixth purposes as those in the fourth purpose of the deed. This view of course is resisted by the reclaimers, and was not very warmly maintained in argument by the respondents. The former, indeed, even contend that only a portion of the legacies contained in the fourth purpose of the deed are legacies to which Mrs Baxter was a consenting party. But my reading goes the full length which I have explained. There is a fourth, a fifth, and a sixth head of the deed. But this division does not necessarily imply in the latter severance from the consent and approbation with which undoubtedly the legacies in the former were bequeathed. All appear to me to fall under the direction and appointment as well as the consent and approbation to be found at the outset of the fourth head of the settlement. Take this as a test—the fourth head begins by directing and empowering "my said trustees, after the death of the longest liver of me and my said wife, to realise and convert into money all my estate or effects, or part or parts thereof, as they think proper," and therewith fulfil the purposes to which the fee of the estate was to be applied. Now, there is in the sixth purpose no specification of the time when the realisation of the residue, which is the subject-matter of the bequests in that part of the deed, is to be accomplished. For that period we must go back to the fourth head of the deed, and for this reason it appears to me that we must read the bequests in the sixth head as being in truth a continuation of those previously bestowed.

This view, however, is not necessary for a decision in favour of the respondents, because, in the third place, the consent to the legacies specified in the fourth head of the trust-deed seems to me to be enough to involve her acceptance of the liferent as satisfaction of all she could claim. Legacies, both numerous and large, are left to her near relatives, and the idea that, consenting to these, she was yet to be at liberty to take her common law provisions and throw the burden of such bequests upon the dead's part is something which cannot reasonably be entertained.

Moreover, in the fourth place, Mrs Baxter's signature at the deed, apart from the express consent and approbation which are given at the outset of the fourth purpose, implies approval of the general tenor of the settlement. Two other meanings might, no doubt, have been given to her subscription—one that it was adhibited only for some limited purpose; another that it was intended to express approbation of every provision which the

deed contained. The effect of either would have been plain, for it would have been expressly provided for; but I think that the mere signature, which is mentioned along with that by her husband in the testing clause, made Mrs Baxter a party to the deed, and must be taken to imply that, there being nothing to the contrary, she approved of all the testamentary arrangements contained in the deed. There is, therefore, no room for the claim urged by her next-of-kin, for they cannot repudiate the consent or acceptance evidenced under her own hand; and that claim has, therefore, as I think, been rightly repelled by the Lord Ordinary.

Lord Rutherfurd Clark—I am of opinion that the judgment of the Lord Ordinary is right. It is plain that if Mrs Baxter was a consenter to her husband's settlement, she must be taken as having accepted the provisions thereby granted to her in lieu of her legal rights. If such consent be not expressed, it is, I think, very clearly implied. Legacies to a very considerable amount are given with her consent and approval to her own relations. These may, I think, be regarded as in substance left by herself or by her husband at her request, or in accordance with her wish. But, as it appears to me, she meant that they were to be paid out of the whole estate, and not out of dead's part. She was thus by necessary implication a consenting party to the disposal of the whole estate in terms of her husband's settlement, and by consequence must be held to have accepted the conventional provisions in lieu of the legal.

Whether she could have withdrawn her consent and claimed her legal provisions it is not necessary to inquire. Such a right was personal to herself, and did not transmit to her next-of-kin.

Lord Young was absent.

The Court adhered, and remitted to the Lord Ordinary for further procedure.

Counsel for Reclaimers — D.-F. Macdonald, Q.C.—Pearson. Agent—A. P. Purves, W.S.

Counsel for Respondents — Mackintosh — H. Johnston. Agents—Mackenzie & Kermack, W.S.

Saturday, May 17.

OUTER HOUSE.

[Lord Kinnear.

COCHRAN, PETITIONER.

Entail—Petition to Uplift Consigned Money—Interest of Pupil Heir—Curator ad litem.

This petition was by an heir of entail in possession to uplift money consigned in bank by a railway company as the price of certain parts of the entailed estate taken by the railway company. The two next heirs entitled to succeed to the entailed estate were in pupillarity, and it was necessary that a *curator ad litem* should be appointed to each of them. At the bar the name of a gentleman suitable for the office was suggested by the petitioner.

The Lord Ordinary said it had been the practice to appoint as *curator ad litem* in such cases the person suggested by the petitioner, but that although this system had worked quite well, it would be better that it should not be continued, as the interests of the petitioner and the pupil to whom the *curator ad litem* is appointed are in such cases antagonistic. He then appointed two other gentlemen on behalf of the next heirs respectively.

Counsel for Petitioner—Wallace. Agent—David Turnbull, W.S.

Friday, June 13.

FIRST DIVISION

[Lord M'Laren, Ordinary.

BRODIE AND ANOTHER *v.* MANN.

Road—Estate Road—Public Right-of-Way—Prescription.

Two public roads running parallel to each other were connected by a road originally made as a farm occupation road. In 1883 two members of the public raised an action against the proprietor of the estate through which this road passed, for declarator that there was a public right-of-way over the road for all purposes. *Held* (1) that the evidence showed that the public had been excluded from the use of the road since 1846, and that there was no proof of the assertion of any right upon their part since that year; but (2) that it had been proved on behalf of the public that for forty years prior to the commencement of 1847 the road had been a public road, and decree of declarator *granted* accordingly.

Observed (1) that the original character of the road as a mere farm occupation road placed a greater *onus* of proof on the party seeking to establish a public right-of-way; (2) that it was not here admissible (as in *Rodgers* v. *Harvie*, 7 Shaw 287) to presume from the use proved during a period less than the full forty years that there had been similar use during the earlier portion of these years, because (1) the presumption would require to be applied to a longer period than had been sanctioned by that case, and (2) there was evidence extending over the whole period, on the import of which the case must be decided.

Prescription—Negative Prescription—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. c.* 94, *sec.* 34).

The Conveyancing (Scotland) Act 1874 has not altered the rule of the common law, that the right of the public to a right-of-way, once established, can only be extinguished by exclusive possession on the part of the proprietor for forty years.

In August 1883 Andrew Brodie and Malcolm Neil, weavers, both residing in Kilbarchan, in the county of Renfrew, raised this action of declarator against Thomas Mann of Glentyan in the parish of Kilbarchan, concluding that the road or way near to the village of Kilbarchan leading from the Bruntshields public road past the farm of Wardhouse on the defender's property of Glentyan, and joining the Lawmarnock public road, was a public right-of-way or road, and that the pursuers as inhabitants of Kilbarchan, and members of the community, and