his daughter Margaret Muir Smith or Sellar: Find and declare, with reference to the second question, that such advance only became imputable to account of succession at the testator's death, and that no interest is due thereon: Find and declare, with reference to the third and fourth questions, that the fee of the shares of the one-half of the residue effeiring to the third parties vested in them respectively *a morte testatoris*: . . . Accordingly, answer the first and third questions in the affirmative, and the second question in the negative."

Counsel for First Parties—Ure—Constable. Agent—N. Briggs Constable, W.S.

Counsel for Second Parties—Dickson—Younger. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Third Parties—Graham Murray, Q.C.—Dundas. Agents—Bell & Bannerman, W.S.

Counsel for Fourth Parties—Dean of Faculty (Pearson, Q.C.)—Guthrie. Agents—Simpson & Marwick, W.S.

Saturday, March 10.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

WHITE *v.* STEELS.

Parent and Child — Tutor — Expenses—Liability of Tutor for Expenses in Action Raised on Behalf of Pupil.

Held that a father who sued an action unsuccessfully in the character of tutor to his pupil child was personally liable in expenses to the opposing party.

William White, 4 Steel Street, Glasgow, as tutor and administrator-in-law of his pupil son Robert Frew White, residing with him, brought an action of damages against Elizabeth Steel and others for injury caused to his son through the defective state of a railing at his house, of which the defenders were proprietors. A jury returned a verdict in favour of the defenders, and the Lord Ordinary (KINCAIRNEY), in applying the verdict and assoilzieing the defenders, found William White liable personally in the expenses of the action.

"*Opinion.*—The sole pursuer of this action is William White, as tutor and administrator-in-law of his pupil son, and he concludes for damages on account of injury suffered by his son through the fault of the defenders. The pupil is not a party to the action. A jury has returned a verdict for the defenders, who have moved for application of the verdict, and for decree for expenses against the pursuer personally. The pursuer contends that he is not liable for expenses personally, but only in his character of tutor and administrator-in-law of his son—in other words, that the defenders can only recover their expenses from the estate of the pupil, which means practically that they cannot recover them at all. The point is very important, and I was informed that it has not been decided.

"I have studied our authorities bearing on the question, and so far as I have been able to discover, they seem to stand as follows—It is, I think, settled that trustees litigating for their estate, whether a sequestrated estate or a trust-estate, will in general be liable in expenses to the opposing party succeeding in the litigation. It was decided, in a case which presented no specialty, that a liquidator of a joint-stock company was personally liable for the expenses of an action in which he was unsuccessful. That liquidator was appointed by the Court. *The Consolidated Copper Company of Canada* v. *Peddie*, December 22, 1877, 5 R. 393.

"On the other hand, it was decided in the case of *Fraser* v. *Pattie*, March 9, 1847, 9 D. 903, that a *curator ad litem* could not be made liable in expenses.

"The case of a guardian appointed by the Court, such as a *curator bonis* or judicial factor, has always been distinguished from the case of a trustee, and their appointment to these offices by the Court has been regarded as an important distinction. But that specialty occurred in the case of the *Consolidated Copper Company*. In *Forbes* v. *Morrison*, June 10, 1845, 7 D. 853, that distinction between a trustee and a *curator bonis* was taken, and it was held that a *curator bonis* who had been sisted in an action 'in room of' the pursuer, who had become insane, and who was unsuccessful, was not liable in the expenses of the action. A judgment finding 'the pursuer liable to the defender in the expenses of the action' had been pronounced, and the question of the liability of the *curator bonis* personally was tried in a suspension of a threatened charge. The Lord Ordinary (Cunninghame) suspended the letters. It appears from his note that he proceeded on the ground that tutors and curators were exempt from personal liability for expenses. His judgment was affirmed; but Lord Mackenzie observed that in certain cases a curator might be made personally liable, and that 'if the curator knew that there were no funds out of which expenses could be paid, that would be sufficient if it were clearly made out;' and Lord Fullerton said that there might be a great many cases in which such liability would be held to exist.

"In *Ferguson* v. *Murray*, December 20, 1853, 16 D. 260, Lord Anderson, as Lord Ordinary, decided that a party who, on the failure of trustees, had been appointed '*curator bonis* or judicial factor,' and had unsuccessfully defended an action of maills and duties, had not subjected himself to liability for expenses personally. But this interlocutor was recalled, and an interlocutor was pronounced which appears to signify that the party would be individually liable so far as the expenses could not be recovered out of the curatorial estate.

I so understand the interlocutor, but it is so expressed that I cannot be confident that my interpretation of it is correct.

"In *Drummond* v. *Carse*, January 27, 1881, 8 R. 449, and 18 S.L.R. 272, a party to certain actions was decerned as judicial factor to pay certain sums to his opponent, and he was found liable in expenses without that qualification being expressed. He paid the expenses out of the trust-estate, and thereby reduced it below the sum which had been decerned for. In a suspension of a charge for this sum, the Lord Ordinary (Curriehill) repelled the reasons of suspension, on the ground—as explained in his note—that the judicial factor was personally liable for the expenses, as a trustee would have been. The interlocutor, however, was recalled, and the Lord Justice-Clerk expressed the opinion that the position of a judicial factor was to be distinguished from that of a trustee on a sequestrated estate, and that the decisions as to such trustees were inapplicable to questions with judicial factors. Lord Young's opinion, however, proceeds on the assumption that the judicial factor was liable for the expenses personally, although he reserves his opinion on the point. The report seems to bear that the judgment was pronounced by these two judges.

"In an early case, *Chalmers* v. *Douglas*, 19th February 1790, M. 6083, a pursuer who succeeded in an action of damages against a married woman for defamation, defended by her with consent of her husband, was found entitled to expenses against the husband personally; but on appeal that finding was reversed, and it was declared that the husband was responsible for the conduct of the cause 'in so far as the same is malicious, vexatious, and calumnious,' and the cause was remitted for inquiry how much of the expenses had been occasioned by his conduct in the cause—*Baillie* v. *Chalmers*, 6th April 1791, 3 Paton's Appeals, 213.

"In the recent case of *Whitehead* v. *Blaik*, 20th July 1893, 20 R. 1045, the question whether a husband should be found liable in the expenses of a process brought by his wife was raised, but the motion to that effect was not granted, because it was held that the husband had not appeared in the cause.

"In *Fraser* v. *Cameron*, 8th March 1892, 19 R. 564, a judgment by the Sheriff in an action brought by a minor aged nineteen, with consent and concurrence of her father as her curator, finding the father personally liable in expenses, was approved of in the Second Division. Lord Young qualified his judgment by the remark that 'if a father consented to make an action formally competent there might be just grounds for not subjecting him to liability for expenses.'

"Lord Fraser has expressed the opinion that, in general, a tutor will not be found liable in expenses, and he quotes in a note, a passage from the Code (which he considers to be in accordance with the Scottish authorities), to the effect that tutors and curators might be found liable in expenses *si nomine pupillorum vel adultorum scientes calumniosas instituant actiones*, which he regards as implying that in the general case tutors and curators would not be so liable—Fraser on Domestic Relations, ii. 135; also Parent and Child, 276.

"The pursuer referred to the twelfth section of the Guardianship of Infants Act, 49 and 50 Vict. c. 27, and the first section of the Pupils Protection Act, 12 and 13 Vict. c. 51, as putting a father in the position of a tutor-at-law or tutor-dative. But I do not see that these statutes affect the question.

"In that state of the authorities I have found very great difficulty in deciding this question. But I have come, although with much hesitation, to think that my judgment should be for the defenders.

"William White is the only pursuer of this action. His son is but a boy, only seven years old, and there can be no doubt that the action was raised in the knowledge that the son had no estate. It is the very case supposed by Lord Mackenzie in *Forbes* v. *Morrison*. The pursuer had the whole control of the case. He is responsible for the record, and it cannot be suggested that the boy interfered at all. Further, I think it clear that nothing which the boy did affected the result of the action. There was really no ground for charging the boy with contributory negligence. One question—and what appeared to me the chief question—was whether the factor for the defenders had due notice of the dangerous state of the property. On that point the evidence of the pursuer, and that of the factor were in direct conflict. It was impossible to believe both. Each was supported by other witnesses. I do not say that the jury disbelieved the evidence of the pursuer, but they at least held that he had not proved his case. I am not prepared to censure the pursuer for bringing the case, nor to affirm that his record and evidence were consciously false. These were questions, I apprehend, for the jury. But neither is it a case for treating the pursuer with exceptional indulgence; and I think, on the whole, that it is in accordance with principle, and not against the balance of authority, to hold the pursuer liable. I am unable to hold that a party is entitled to bring an action into Court under the condition that he shall not be liable for the expenses. A tutor entering into any ordinary contract on behalf of his ward, is liable personally to see that it is fulfilled, and if it be permissible to represent an action as a contract of litiscontestation, or as analogous to a contract, there seems no good reason for relieving a tutor from the obligations which arise out of it. I am disposed to doubt whether Lord Fraser's statement of the law does not go slightly beyond the authorities which he quotes, and it occurs to me that the practice of the Court in reference to questions of expenses has been greatly modified since 1791, when the case of *Chalmers* v. *Douglas* was decided.

"If it be said that the result of holding a tutor or father liable in such cases might be to deprive a pupil of the benefit of a just action, I think the answer may be that in

such a case an action in name of the pupil alone might possibly be sustained, the defect in the instance being remedied by the appointment of a curator *ad litem*."

The pursuer reclaimed, and argued—He had acted merely by virtue of his office as his son's tutor and having no personal interest should not be found personally liable. Had he been successful he would under the Guardianship of Infants Act and the Pupils Protection Act have had to account for any money received to the Accountant of Court. Curators *bonis* were not liable in expenses unless the circumstances were exceptional—*Forbes* v. *Morrison*, June 10, 1845, 7 D. 835. A father as curator for a child who was a minor, was not liable personally for expenses so long as he acted merely in his representative capacity although he might be if he took a personal interest in the action—*Fraser* v. *Cameron*, March 8, 1892, 19 R. 564. It would be hard if he were to be held liable because he was a tutor and not a curator. The opinions of Lord Fraser in his work on Parent and Child, pp. 271, 273, were against a tutor being found liable. Tutors *ad litem* were not liable—Mackay, ii. 316, and cases there cited.

Argued for the respondents — (1) The cases of curators *ad litem* and tutors *ad litem* were not in point because they were officers of Court. Tutors were in no such favourable position but were to be classified with trustees in bankruptcy—*Scott* v. *Pattison*, December 21, 1826, 5 S. 158; *Gibson* v. *Pearson*, May 25, 1833, 11 S. 656; *Torbet*, *infra*; Bell's Comm. (5th ed.) ii. 379—and Liquidators—*Liquidator of the Consolidated Copper Company of Canada* v. *Peddie*, &c., December 22, 1877, 5 R. 393. Even curators *bonis* might be personally liable—*cp. Forbes* v. *Morrison*, *supra*, where it was suggested they would be if they litigated, knowing there were no funds belonging to the ward. That was the case here. (2) The father here had a personal interest, for if successful he would have been recouped in outlays for medical attendance &c. He was also the *verus dominus litis*—*Stevens* v. *Burden*, November 21, 1823, 2 S. 447. The same principle was also recognised in *Mathieson* v. *Thomson*, November 8, 1853, 16 D. 19. (3) The true *ratio* of awarding expenses was not to impose a penalty upon rash litigation, but to recoup the person who had been unwarrantably put to the expense of vindicating his rights. That was made clear by Lord Jeffrey in *Kirkpatrick* v. *Irvine*, January 18, 1848, 10 D. 367, and again in *Torbet* v. *Borthwick*, February 23, 1849, 11 D. 694.

At advising—

LORD PRESIDENT—In my opinion the Lord Ordinary's interlocutor should be adhered to. From the carefully balanced statement in his Lordship's opinion I gather and I assume that there has been nothing in the conduct of the cause to introduce any specialty into the question which we have to determine; and that is, whether a man who has sued an action of damages in his character of tutor to his pupil child, and has lost it, is liable personally to judicial expenses to which his successful opponent is found entitled.

I understand the *ratio* of the modern rule which makes costs in the general case follow the event is, that the rights of parties are to be taken to have been all along such as the ultimate decree declares them to be; and that, as Lord Jeffrey said in *Kirkpatrick* v. *Irvine*, 10 D. 367—"If any party is put to expenses in vindicating his rights he is entitled to recover it from the person by whom it is created." Now, the person who has caused the expense to the present defenders is William White; for it is he, and not the pupil or the pupil's estate, who has raised and followed forth this action. The fact that he has done so in the interests of another is not, in my opinion, a matter which affects his liability to third parties. A father who thinks that his child has been wronged may come into Court or he may not; neither his opponent nor anyone else can restrain him from doing so on the ground that the child has no money. If, as is the case here, he litigates and is found to be wrong, it makes no difference to his opponent that the costs have been incurred in an action in which the non-existent claim was ascribed to a child.

No decision can be pointed to in which the father of a pupil has been exempted from personal liability on the ground now stated, and I am therefore for deciding it on the principle thus stated by Lord M'Laren in the case of testamentary trustees—"The existence of trust funds is ever held to be immaterial, and the inconvenience to the trustee of having to pay the expenses is just as little considered, because expenses are not awarded as in the nature of penalty, but as compensation to the successful party for the cost to which he has been put in establishing a right which his opponent ought to have known to be well founded."—M'Laren on Wills, ii. 558.

LORD ADAM—I agree with your Lordships that the rule now applicable to the question of finding or not finding a person liable in expenses is that stated by Lord Jeffrey in the case of *Kirkpatrick* v. *Irvine*, and repeated by him in the subsequent case of *Torbet* v. *Borthwick*. It is that if a party is put to expense in vindicating his rights he is entitled to recover such expense from the person who made it necessary for him to incur it.

The difficulty arises when a person is suing or being sued in a representative capacity. It is quite settled by the case of *Torbet* v. *Borthwick* that a trustee in a sequestration is personally liable, and the practice on that matter is now recognised. A liquidator has been found by a recent case in the other Division to be in the same position in this respect.

The rule as to voluntary trustees is as stated in Lord M'Laren's book in the passage quoted by your Lordship. In all these cases of persons suing or being sued in their representative capacity they are found liable in expenses if unsuccessful.

On the other hand, it has been found that curators *ad litem* are not liable. The reason of this is obvious from the position they occupy. The case of curators *bonis*, &c., is not very settled, and I desire to reserve my opinion as to such officers of Court, whether and in what circumstances they are to be found liable. I think I may say that a curator for a minor merely giving his consent to an action would not be liable. So far the law is pretty clear. Here we have the case of the tutor to a pupil child, and I agree that if asked in what category we are to put this case, it must be answered, into that of voluntary trustees rather than into officers of Court.

Therefore, for the reasons stated, I think the interlocutor of the Lord Ordinary should be affirmed.

LORD M'LAREN concurred.

LORD KINNEAR—I think that William White, the pursuer in this case, is the person who has created the expense of which the other party is entitled to be relieved, and on that ground I am of opinion that the judgment should be affirmed.

The Court adhered.

Counsel for Pursuer and Reclaimer—Wilton. Agent—John Rhind, S.S.C.

Counsel for Defenders and Respondents—C. S. Dickson—A. S. D. Thomson. Agents—Morton, Smart, & Macdonald, W.S.

Saturday, March 10.

SECOND DIVISION.

JACOBSEN, SONS, & COMPANY *v.* UNDERWOOD & SON, LIMITED.

Sale—Offer and Acceptance—Stipulation for Reply by Certain Day—Whether Acceptance Posted on that Day Timeous—Delay in Delivery from Insufficient Address.

Upon 2nd March the defenders offered to buy from the pursuers a quantity of straw. The offer was stated to be "for reply by Monday 6th inst." The pursuers posted a letter accepting the offer on the evening of the 6th. Owing to the letter being insufficiently addressed it did not reach the defenders until the second instead of the first post on the 7th. The defenders repudiated the contract on the ground that the acceptance was too late.

Held (1) that the pursuers timeously accepted defenders' offer by posting their acceptance on the 6th; and (2) that the pursuers were not to blame for the delay in the delivery of the letter on the 7th, as it was addressed in the same manner as their previous letters to the defenders, who had never said that the address was insufficient.

Contract—Sale—Custom of Trade—Whether Consistent with Law.

The defenders alleged but failed to prove a custom of trade to the effect that when a date was fixed for reply to an offer the reply must be not only despatched but received by that date.

Opinion by Lord Stormonth Darling that the alleged custom of trade, even if proved, would have been ineffectual to affix to the contract the meaning which the defenders desired to put upon it in respect that it was inconsistent with law.

Opinion by Lord Young *e contra.*

Upon 2nd March 1893 Underwood & Son, Limited, hay and straw importers, Brentford, who also carried on business in Leith, offered verbally through their agent in Leith to purchase a quantity of straw from Jacobsen, Sons, & Company, merchants in Edinburgh and Bona, the straw to be shipped during the month of March. The terms of the offer were reduced to writing and confirmed by Jacobsen, Sons, & Company by a letter addressed to Underwood & Son the same day, in which it was stated that the offer was "for reply by Monday 6th inst." Upon 6th March Jacobsen, Sons, & Company wrote accepting the offer. This letter was posted in Edinburgh after six o'clock on the evening of the 6th. In ordinary course it would have been delivered to Underwood & Son by the first post on the 7th, but owing to the name of the street not being specified in the address it was not delivered until the second or midday post. Upon the same day Underwood & Son wrote to Jacobsen, Sons, & Company as follows—"As our offer for the straw was for reply on Monday, you will have to consult us again before confirming sale . . . in the meantime there is no purchase." Jacobson, Sons, & Company refused to accept this repudiation of the contract, and subsequently tendered delivery of the straw, which Underwood & Son refused to take. Jacobsen, Sons, & Company accordingly, after intimation to Underwood & Son, sold the straw in Glasgow through a neutral broker, and then brought an action against Underwood & Son for payment of the difference between the contract price and that actually realised for the straw.

The defenders in answer averred that by the terms of the pursuers' letter of 2nd March, and "according to the understanding and custom of trade and of business men, the defenders' offer was open for acceptance until the end of business hours on Monday 6th March and no longer."

They pleaded, *inter alia*—"(2) The pursuers having failed to accept the defenders' offer in terms thereof, there was no concluded contract, and the defenders ought to be assoilzied."

Proof was allowed. The defenders failed to prove their averment as to custom of trade.

It appeared that the pursuers' letter of acceptance was addressed "Underwood & Son, Argyll Lindsay, Esq., Leith," that