even if there were no precedent indicating how such a clause should be read. But I consider that this view is confirmed by the decision pronounced in the case of *Bayne's Trustees* v. *Bayne*, 22 R. 26, following upon the case of *Clark* v. *Clark*, 9 Macph. 430. I am therefore in favour of answering the first question in the negative, the first alternative of the second question in the affirmative, and the second alternative in the negative.

LORD YOUNG—I think the question is attended with considerable difficulty. I am not without doubt, but as I understand that Lord Moncreiff concurs in the views which your Lordship has expressed, I do not dissent.

LORD MONCREIFF—The questions put to us depend upon the construction of the gift to the third party in her antenuptial contract of marriage by her first husband Mr James Cathcart, of "the liferent use of any one house he may die possessed of." The main question is, whether this gift implies a proper liferent with its accompanying burdens, or merely a right of occupancy. It is certainly not a proper conveyance in liferent, and I do not see how it could be converted into such right. No house is specially conveyed or described, and Mr Cathcart was not even bound to leave a house to satisfy the gift. I think the true meaning of the gift is, that if, to take the case which happened, Mr Cathcart died possessed of a house, his widow should be allowed the free use of it during her life as an occupant, and that she should not be burdened with more than an occupant's share of the annual burdens. The gift would be practically valueless if in the case which has occurred the house were burdened to nearly the full extent, and the interest on the bonds fell to be defrayed by the widow. I am aware that there is another view of the question. Mr Cathcart was not bound under the marriage-contract to leave a house for the occupation of his widow, and accordingly it is argued that if he chose to leave his house heavily burdened she must take it as she finds it *cum onere*. But having regard to previous decisions, and especially to the recent decision in this Division of *Bayne's Trustees* v. *Bayne*, 22 R. 26, following the case of *Clark*, 9 Macph. 435, I think we are bound to hold as a question of intention that a mere right of occupancy was bestowed on the widow, and that the intention of the deed was that if Mr Cathcart left a house his representatives should allow his widow the use of it during her life on the footing of her merely paying those burdens which attend a right of occupancy. Indeed, this is a stronger case, because in the case of *Bayne's Trustees* the trustees were directed not merely to give the widow the use of the house but "to make it over" to her.

The case of *Clark* more closely resembles this, because there the direction to the trustees was to give the truster's widow "the use of my house No. 36 Drummond Place, with the whole furniture and effects contained therein." That practically is what is done here, the only difference in expression being that Mr Cathcart first gives the furniture, &c., absolutely, and then the liferent use of any house of which he might die possessed.

My observations have been made with reference to the house, but they also apply to the price.

I therefore am prepared to answer the first question in the negative, and to answer the first alternative of the second question in the affirmative.

LORD TRAYNER was absent.

The Court answered the first question in the negative and the first alternative of the second question in the affirmative, and the second alternative of the second question in the negative.

Counsel for the First and Third Parties—W. Campbell, Q.C.—Craigie. Agents—David Turnbull & Smith, W.S.

Counsel for the Second and Fourth Parties—H. Johnston, Q.C.—M'Clure. Agents—Hagart & Burn Murdoch, W.S.

Thursday, December 21.

SECOND DIVISION.

MACKENZIE'S TRUSTEES *v.* MACKENZIE.

Succession—Legacy—Construction—Subject of Gift—Fee or Liferent—Bequest of Rent of Houses—Whether Bequest Void from Uncertainty.

An uneducated man died leaving a holograph will, by which he, *inter alia*, bequeathed "the rent of my houses to be equally divided to my nephew Colin in Strathglass, and my two sisters, and one-half share to my niece Jessie and her sisters in America, . . . my nephew Colin, Strathglass, to be trustee." The identity of these persons was established. No other reference to the testator's heritable property was made in the will, and there was no clause of residue. The testator died possessed of certain houses. His nephew Colin was his heir-at-law.

Held (1) (*dub.* Lord Young) that the bequest was not void from uncertainty; (2) that the subject of the bequest was limited to the rent of the houses—*diss.* Lord Young, who was of opinion that the bequest was one of the houses themselves; and (3)—*diss.* Lord Young, *dub.* Lord Moncreiff—that said rent was divisible equally, one-half to the testator's nephew Colin and the testator's two sisters, and the survivors or survivor of them, and the other half to his niece Jessie and her sisters in America, and the survivors or survivor of them.

George Mackenzie, sometime farmer at Meikle Ussie, and saddler in Inverness, died unmarried on 16th February 1896, possessed of heritage consisting of house property in Inverness let out at a yearly rent of £78, 18s., and of moveable estate amounting to £1280. He left a holograph will in the following terms:—

"44 *Prince's Place, May* 23/94.

"I leave & Bequeath my Farm & Stock to Donald my nephew but my nephew & his mother to have Twenty pounds a year of the Profit of the farm, and I leave & Bequeath one hundred pounds to my nephew Colin George in Australia one hundred pounds to my sister Diana & her two daughters & Colin her son Forty five pounds to my sister in Dgall" [Dingwall] "Forty five pounds to my niece Ann in Dgal" [Dingwall] "Forty five pounds to niece Williamina @ Bogchro Forty five pounds to my nephew John at Meikle Ussie. Forty five pounds to my niece Abigail in America the Rent of my houses to be equally divided to my nephew Colin in Strathglass & my two sisters & one-half share to my niece Jessie and her sisters in America twenty pounds to the Highland Orphanage—twenty pounds to Sustentation Fund. Fifteen pounds to China mission

"my nephew Colin Strathglass to be trustee. GEORGE MACKENZIE."

Under the will the testator's nephew, the Rev. Colin Campbell Mackenzie, Minister of the Free Church of Scotland, Strathglass, was confirmed executor on 13th June 1896.

Thereafter a question arose with reference to the meaning and effect of the following holograph words in the will:—"The rent of my houses to be equally divided to my nephew Colin in Strathglass and my two sisters and one half share to my niece Jessie and her sisters in America." All parties were agreed that "my nephew Colin in Strathglass" was the Rev. Colin Campbell Mackenzie, the testator's heir-at-law; that "my two sisters" were the deceased Mrs Macdonald and Mrs Mackay, two sisters of the testator, and that "my niece Jessie and her sisters in America" were Mrs MacGregor, residing in England, and Eliza MacLennan, and Katie MacLennan, both residing in America, the children of the testator's only other sister who had predeceased him."

For the settlement of the point a special case was presented by (1) the trustee under the will, (2) the Rev. Colin Campbell Mackenzie as an individual, (3) Mrs Macdonald's children and Mrs Mackay, (4) Mrs MacGregor and Misses Eliza and Katie MacLennan.

The questions at law were—"(1) Is the said bequest void for uncertainty? In the event of this question being answered in the negative (2) What was the subject of the bequest? and (3) How does it fall to be apportioned among the parties hereto?"

Argued for second party—The words were too vague and unintelligible to receive effect in respect both of the subject-matter of the bequest and also of the manner in which it was to be divided. The language of the bequest was unintelligible. The bequest was therefore void from uncertainty, and the words must be held to be *pro non scripto—Anderson* v. *Smoke*, Jan. 27, 1898. 25 R. 493. Where the bequest was a charitable one a point might be stretched by the Court in order to prevent it lapsing by means of uncertainty—*Bruce* v. *Presbytery of Deer*, March 22, 1867, 5 Macph. (H.L.) 20. But the present was not a case of a charitable bequest. If it was held that the bequest was valid, then it was merely a bequest of the rents and not of the fee. Where a perpetual right to the rent was given, that might include the fee, but here the bequest was not a perpetual right to the rent. A bequest of the fee of heritable property founded on implication was unheard of in the law of Scotland—M'Laren on Wills and Succession, i. 345.

Argued for the fourth parties — The bequest was not void from uncertainty. By the clause the testator intended a bipartite division of the subject of the bequest—one part to be equally divided between his nephew Colin and his two sisters, and the other part to be equally divided among his niece Jessie and her two sisters. The subject of the bequest was the fee of the heritable property in Inverness. There was no special appropriation of the fee, and the terms of the will showed that the testator intended to dispose of his whole estate. There was an indefinite gift of the rents, and no words which restricted the bequest to a liferent. Unless it was held that the fee was conveyed, great confusion would arise in distributing the rents among the various parties. The bequest was plainly one of the fee of the houses—Williams on Executors, 1058; *Humphrey* v. *Humphrey*, 1851, 1 Simon's Ch. Rep. (N.S.) 536; *Watkins* v. *Weston*, 1862, 32 Beavan 238, 32 L.J., Ch. 396.

Argued for third parties — They also maintained that the bequest was not ineffectual because of uncertainty. By the bequest the testator intended the subject of the bequest to be divided in the proportion of two-sevenths to each of his nephew Colin and his two sisters, and one-seventh equally among his niece Jessie and her two sisters. On the subject of liferent or fee they adopted the argument of the fourth parties.

LORD JUSTICE-CLERK — The testator's will in this case is a somewhat crude production. It is holograph of the testator, and in endeavouring to get at his intention the words he uses are not to be looked at in the same critical way as regards the meaning of phrases as in the case of a formally expressed deed. It is plain that he intended the rents of his houses to be applied for the benefit of certain relatives, but how and in what proportions is the question. The words are, "The rents of my houses to be equally divided to my nephew Colin in Strathglass and my two sisters, and one half share to my niece Jessie and her sisters in America." These words are certainly not clear, but I think the natural and fair meaning of them

is that there is to be an equal division between two sets of beneficiaries, the nephew and the two sisters a half, and the other half to the niece and her two sisters—that is to say, that one half of the rents is to be paid to the nephew and sisters, and as each dies to the survivors or survivor, and the other half to the other group in the same way. Any other reading seems to me to be strained and unnatural, but this reading is, I think, a fair and reasonable reading, and therefore I am of opinion that the bequest is not void from uncertainty.

Another question is raised as to the subject of the bequest, it being maintained by some of the parties that although in words a bequest of rents it is really a bequest of the properties themselves. I cannot so read it. I hold it to be a bequest of annual proceeds, for the ingathering and payment of which the testator appointed a trustee. The expression "rents" seems to me to be quite unambiguous, and not to be capable of being read as meaning the actual properties themselves.

My opinion is that the first question should be answered in the negative, the second question by stating that the subject is the annual proceeds in rent of the deceased's house property, the third question by stating that one half of the rents is to be divided among the nephew and the testator's sisters, and among the survivors of them, and finally to go to the last survivor during her life, and the other half of the rents to be divided between the niece Jessie and her sisters, and among the survivors of them, and finally to go to the last survivor.

LORD YOUNG — One of the considerations on which the question whether or not this will is void from uncertainty falls to be decided is, What did the testator mean by rent? The rent of his houses, he writes, is "to be equally divided to my nephew Colin in Strathglass and my two sisters, and one half share to my niece Jessie and her sisters in America." I quite concur in the view that the word "rent" is not usually employed by anyone who has been reasonably well educated to describe the fee of heritable subjects. And I should think it not doubtful that if the liferent of houses were bequeathed to an individual it would mean that that individual was to get the rent of the property during his life, and not the property itself. But I do not remember ever having met with a case in which a liferent was bequeathed among six different individuals of great variety of ages. In such a case what life would constitute the measure of the liferent. And in the present case the testator does not use the word liferent at all—there is no suggestion of a liferent. It would be quite competent to bequeath the rent of houses for ten, or twelve, or thirty years to an individual or any number of individuals. But no period is fixed here. Is it the life of the longest liver of the six individuals referred to in this bequest? Then what does each get? How much has each to pay for legacy-duty? One of the parties might be an infant, and his liferent would necessarily be more valuable than the liferent of another who was an old woman. When one of the legatees dies is the liferent of the others to be increased? To confine the meaning of this bequest to rent alone would lead to a perfect muddle, and I am unwilling to attribute to the testator the intention of making such a bequest. I think the most reasonable, and indeed the most probable, construction of the will of this evidently uneducated testator is that he intended to give these legatees the same right in these houses as he himself had. All that he understood was that he drew so much rent from these properties. I think that his intention was to bequeath the houses themselves. Even if we hold that his intention was only to bequeath the rent in perpetuity, I understand that this must be held to be a gift of property.

Another reason against the view which your Lordship has expressed is that if your Lordship's view is adopted the testator will have given a liferent to the heir who takes the fee, and besides that implies leaving the testator intestate as regards the fee of these houses. Now, it is a well-known rule that if such a meaning can be given to a deed as to avoid partial intestacy, the presumption is in favour of that meaning being correct.

If, however, we cannot be certain as to the meaning of the clause, there is a great deal to be said for declaring it void from uncertainty. This could be decided on the ground that the testator has expressed himself in language from which we cannot judicially and with reasonable certainty determine what his intention was. I might have agreed to that course, but I cannot concur in a decision which will give rise to what I cannot describe otherwise than as a muddle.

LORD TRAYNER—The testator was possessed of some house property in Inverness, and by his will he left and bequeathed "the rent of my houses to be equally divided to my nephew Colin in Strathglass, and my two sisters, and one-half share to my niece Jessie and her sisters in America." With regard to that provision we are asked to determine (1) whether the bequest is void through uncertainty. If not (2) what is the subject of the bequest, and (3) how it falls to be apportioned.

The first question was scarcely argued. The bequest does not appear to me to be uncertain either as regards the subject of it or the persons in whose favour it is made. If there is any difficulty in the case (although I have not felt any) it is in connection with the third question. The second question, I think, is answered by the testator in words which could not be clearer or more precisely descriptive of the subject of the bequest. It is "the rents of my houses." It was argued for the third and fourth parties that that was a bequest of the houses themselves. But the words used by the testator will not bear that interpretation any more than the words "I bequeath a part" could be

interpreted as "I bequeath the whole," or "I bequeath the liferent" as "I bequeath the fee." The testator knew he had houses and that they yielded rents. He gave the rents, but he did not give more. He has not disposed of the houses themselves, and they fall therefore to the testator's heir-at-law. It was said that because the testator had not disposed of the houses by this will that he must or might be presumed to have left them to the persons who were to get the rents or profits of them. I see nothing to warrant such a presumption, or anything to indicate that the testator intended to bequeath more than he said he bequeathed.

As to the rights of the parties respectively in the subject of the bequest, the language of the testator may leave room for difference of opinion. But taking what I think is the simple and common-sense meaning of the testator's words, the bequest amounts to this—The rents of my houses are to be divided equally—one-half to Colin and my sisters, and one-half to Jessie and her sisters. That is dividing the rents equally, one-half to one set of beneficiaries and the other half to another set.

I would answer these questions accordingly.

LORD MONCREIFF—1. I answer the first question in the negative. The bequest cannot be said to be void from uncertainty, although opinions may differ as to its meaning.

2. The subject of the bequest is limited, I think, to the rent of the testator's houses, and does not extend to the fee. If the bequest had been one of the income of moveable estate there would have been ground for contending that it carried the capital. But here the subject is heritage, or rather the rents of heritage, and looking to the favour with which the law of Scotland regards the rights of the heir-at-law, I think that in the absence of any native authority to support the argument of the third and fourth parties we cannot hold that it was intended to convey the fee.

3. I have felt more difficulty about the third question, viz., how the bequest falls to be apportioned among the parties. The question is very much one of impression. My own impression is in favour of the contention of the third parties, viz., that the bequest should be divided in the proportion of two-sevenths to each of Colin and his two sisters, and one-seventh equally among the testator's niece Jessie and her two sisters. I think that one-half share means half a share. But the bequest admits of another construction, and as I understand your Lordships are agreed that Jessie and her sisters get half of the whole I do not formally dissent.

The Court pronounced this interlocutor—

"Answer the first question therein stated in the negative: Answer the second question therein stated by declaring that the subject of the bequest is the rent of the testator's houses: Answer the third question stated by declaring that the said rent is divisible equally (1) one-half thereof being payable to the testator's nephew Colin and the testator's two sisters and the survivors and survivor of them, and (2) the other half to the testator's niece Jessie and her sisters in America and the survivors and survivor of them: Find and declare accordingly, and decern."

Counsel for the First and Second Parties—Kennedy—Macphail. Agents—Kinmont & Maxwell, S.S.C.

Counsel for the Third Parties—Cullen. Agent—Andrew H. Glegg, W.S.

Counsel for the Fourth Parties—A. S. D Thomson. Agent—Alex. Ross, S.S.C.

Friday, December 22.

FIRST DIVISION.

(Without the Lord President.)

MUIR'S TRUSTEES *v.* MUIR.

(Sequel of *Muir* v. *Muir's Trustees*, 10th December 1887, 15 R. 170.)

Trust—Accumulation of Income—Authority to Make Advances—Incidence of Advances of Shares of Beneficiaries.

By his trust-deed and settlement a testator bequeathed the residue of his estate equally among his grandchildren, and directed his trustees to accumulate the income until the beneficiaries respectively attained the age of twenty-five (or being granddaughters were married), when the share of each was to be ascertained and set apart. While the beneficiaries were in minority the trustees obtained authority from the Court to make advances for their education and maintenance, and in terms of the interlocutor charged all the advances made to the general accumulation account. On an application for authority to make further advances—*held* (1) that the previous interlocutor did not decide the incidence of the advances made, and (2) that all the advances made and to be made for behoof of each grandchild should be charged to and deducted from his or her individual share.

By his trust-disposition and settlement the late Mr William Muir of Inistrynich, Argyllshire, *inter alia*, directed his trustees to hold and administer the residue of his estate "for behoof of and equally among the children of the said William Campbell Muir, and to accumulate the interest, dividends, and annual proceeds thereof until the said children respectively attain the age of twenty-five, or, in the case of daughters, until they attain that age or be married, whichever of these events shall first happen; and the shares of the accumulated principal and interest shall, in the case of sons, be paid to them on their respectively attaining to twenty-five years of age; and in the case of daughters, on