mitted to the Sheriff to repone the appellant (defender) on such conditions with regard to expenses as should seem just. Their Lordships observed strongly on the delay which had occurred in the case during the repeated prorogations granted on consent of agents, and expressed an opinion that it was the duty of the Sheriff to prevent this. The procedure was a trap for litigants; for, when the defender's agent ceased to act after the long delays which had occurred, advantage was taken of this opportunity to get decree by default.

Counsel for Suspender — Rhind. Agent—William Officer, S.S.C.

Counsel for Respondent — Campbell Smith. Agent—William Spink, S.S.C.

Tuesday, January 16.

FIRST DIVISION.

THE CALEDONIAN RAILWAY COMPANY *v.* GREENOCK AND WEMYSS BAY RAILWAY COMPANY.

(Case for the Railway Commissioners.)

Process—Case for Opinion of the Court—Railways Regulation Act 1873—*Remit to Amend.*

A Case having been sent by the Railway Commissioners under the Regulation of Railways Act 1873, for the opinion of the Court, they, in the absence in the statute of provision to remit for amendment if so required, following the precedent of a Case sent for opinion from the Court of Chancery (*Sir F. S. Arthur, Bart., and H. D. Seymour*, Nov. 5 1867, not reported), pronounced an interlocutor intimating what additional information was desired, and superseding consideration of the Case, "to enable the parties or either of them to apply to the Railway Commissioners to amend the Case in such manner as to remove the difficulty."

Counsel for Caledonian Railway—Lord Advocate (Watson)—Johnstone. Agents—Hope, Mackay & Mann, W.S.

Counsel for Greenock and Wemyss Bay Railway Company—Balfour—Asher. Agent—John Carment, S.S.C.

Tuesday, January 16.

SECOND DIVISION.

SPECIAL CASE—YOUNG AND KIRKPATRICK (YOUNG'S TRUSTEES).

Succession—Trust—Fee and Liferent—Vesting.

A testator by trust disposition and settlement directed his trustees to pay an annuity to his wife, and the whole residue of income to his son, with power to the son to test upon the fee of the estate. If the son predeceased his mother, the whole income of the estate was to be paid to her during her life. On the death of the wife the trustees were to convey the whole estate to the son, if then alive, and if dead to his issue, if he left any. Failing issue of the son, the estate was to be conveyed to such persons as the son might direct by any writing under his hand, and failing such direction to certain persons named in the trust deed.—*Held* that vesting did not take place till the death of the widow.

This was a Special Case for Mrs Young, widow of the deceased George Kirkpatrick Young of Glendoune, and John George Kirkpatrick Young, his only son, of the first part, and the same persons and others, as trustees under the trust-disposition and settlement and codicil after mentioned, of the second part. It was set forth in the Case that the late George Kirkpatrick Young died on 6th April 1874, leaving a trust-disposition and settlement and codicil thereto, dated respectively 20th May 1868 and 28th December 1871, both registered in Books of Council and Session on 24th June 1874. He was survived by his wife and an only son, John George Kirkpatrick, who was of full age—the first parties to the case. By the deed and codicil Mr Young conveyed his whole estates, real and personal, to the second parties as trustees, for the following purposes:—1st, Payment of debts; 2d, payment of an annuity of £400 in all to the widow, and to allow her the liferent use of the mansion-house of Glendoune, and shootings, &c.; 3d, payment of certain legacies; 4th, the trustees were directed, from the residue of the income of the estates, to pay to the truster's son, the said John George Kirkpatrick Young, such portion thereof as they might consider proper, and the truster expressed his wish that, by disposing of his railway and other stocks, and house in West George Street, Glasgow, the trustees might be enabled to pay off a debt of £5000 over the estate, and to build a farm-steading at Cairnhouse, and make a new road from Cairnhouse. The trust-deed proceeded —"After said debt is paid off and these improvements effected, the whole residue of income from my estate during the lifetime of my said wife shall be paid over to our said son, but with the rights and powers to him, as from and after my decease, of testing on the fee, as in article sixth hereof. *Fifth,* In the event of my said son predeceasing his mother, without leaving a widow or children, I direct in that event the free income arising from my whole estates, heritable and moveable, to be paid over to her during her life. *Sixth,* On the decease of my said wife, survived by our said son, I direct and appoint my trustees to convey over absolutely to him, in common form, the fee of the residue and reversion of my whole estates, heritable and moveable; and failing my said son, by his predeceasing his mother, but leaving issue, then to such issue, in such shares and proportions, and subject to such conditions and restrictions of liferent or provisions for his widow, or otherwise, as my said son may by any writing under his hand have directed, and failing such writing, then my trustees shall convey my estate of Glendoune and other lands in Ayrshire to the eldest son on attaining majority, or, if there be no son, to the eldest daughter on attaining majority, and the remainder of my estates to the other children equally, on their respectively attaining majority, with full power to apply the whole or any part of the income in their upbringing, education, and maintenance during their nonage; and failing issue of my said son, then to the persons he may have by any writing under his hand directed to

succeed to my said estates, subject and postponed always to the liferent of my said wife should she be then surviving, as provided for in article fifth. *Seventh*, In the event of my said son dying before receiving a conveyance to the residue of my estate, without leaving issue, or exercising the power granted to him of testing as aforesaid, then, and on both of these events occurring, I appoint my said trustees, on the death of my said wife, to dispone and convey my estate of Glendoune and lands in Ayrshire, free of debt, to George Gillespie Young, my grandnephew, in liferent allenarly, and the heir of his body whom he shall appoint, failing which appointment his heir-at-law, being issue of his body, in fee," with further conditional limitations in favour of other grandnephews. The remainder of the estates, heritable and moveable, other than Glendoune and lands in Ayrshire, were directed to be sold and converted into cash, and the proceeds divided in shares among such of the parties therein named as might be alive at the decease of the truster's widow, "the same (failing all the prior destinations) vesting in them only on survivance." On the death of Mr Young the second parties entered on the management and administration of his estate. The personal estate amounted to above £4000. The heritable estate consisted of house property in Glasgow, yielding a gross rental of about £1387 a-year, and of the estate of Glendoune, yielding a rent of about £700 a-year. The debts and legacies had been paid, and the house in West George Street, Glasgow, had been sold. The heritable debt of £5000 referred to in the settlement was paid off during the truster's life. It was stated at the bar that the trustees were in course of carrying out the improvements above mentioned. The only burden affecting the estate was the annuity of £400 a-year to the truster's widow. The first parties called upon the second parties to denude of the trust and convey and make over the whole of the trust-estate to the said John George Kirkpatrick Young, under burden of the annuity in favour of his mother, the truster's widow, who had consented to discharge her whole interest in the trust-funds (that is, the annuity and contingent liferent) on the said annuity being properly secured.

The following questions were submitted for the opinion and judgment of the Court:—"Is the said John George Kirkpatrick Young fully vested with right to the trust-estate, subject to the provisions in favour of his mother? and are the second parties entitled and bound, on the requisition of the said parties, to convey and make over the said estate to the said John George Kirkpatrick Young on the truster's widow discharging her interests under the settlement? Or, are the second parties bound to continue to hold the said estate until the death of the truster's widow?"

Argued for first parties—(1) The substantial object of the trust is to secure the widow in her annuity and contingent liferent, and her death is to be followed by a conveyance without substitutions; (2) the annuity does not suspend vesting; (3) even prior to death of annuitant, the residuary liferenter has an absolute power of disposal by will, except in the case of his having children. Where an absolute right is given on survivance, the mere institution of grandchildren does not suggest any intention to protect their succession from the parent. [COURT—You wish to substitute a discharge by the widow for the condition of survivance mentioned in the deed.] We maintain the right has vested.—*Pretty* v. *Newbigging*, 16 D. 667. In *Pursell* v. *Newbigging* (15 D. 489, and 2 Macq. App. 273) there was a substitution of heirs of the body, but fee was found to be vested.

Argued for second parties—The settlement discloses an intention to suspend vesting. Provision is made for the case of the son surviving the testator and predeceasing widow. In *Pretty* v. *Newbigging* there was no destination beyond issue who took under a marriage-contract. Here we have a *mortis causa* settlement; and it is not clear that an arrangement such as is proposed would carry out the 6th purpose of the trust. There is no case where an incumbrance has been allowed to accelerate vesting—*Sloan* v. *Finlayson*, 20th May 1876, 3 Rettie, 678.

At advising—

LORD JUSTICE-CLERK—This Special Case is practically an application by the first parties to have the estate of Glendoune conveyed over by the second parties before the point of time fixed for that conveyance by the settlement. It is an appeal to the discretion of the Court, and in such a case, upon the statement of the parties interested and the trustees, we must see that all interests are fairly represented, and that there are no ulterior interests, although of course our judgment would not bind interests which are not represented. Now, on the terms of this settlement I am clearly of opinion that the right to this estate does not vest in Mr Young before his mother's death—[*reads the last clause of 4th purpose*]. This refers to a power of testing which to my mind is inconsistent with the notion of a fee being vested. Limited powers are given, and these are to take effect in certain specified events—[*reads 5th purpose*]. It has not appeared whether or not that event will happen. It is a provision which the widow may clearly renounce, and so in itself it would be no obstacle to our satisfying the wishes of the first parties to the Case. But it has a natural bearing on the question whether or not the fee has vested in the son. Then the deed proceeds—[*reads first part of 6th purpose*]. No doubt, where a conveyance is taken to A B and his issue, this is not a destination which prevents the vesting of a fee in A B. Such a rule, however, does not exclude the consideration of the settlement as affording evidence of an intention to suspend vesting. And here, I think, the issue take an ulterior interest subject to the father's power of appointment—[*reads to end of 6th purpose*]. This power of testing obviously cannot defeat the interest of the children—[*reads 7th purpose*]. A totally different question from that raised here might have to be tried with the persons called under these conditional limitations. Upon that question I say nothing.

LORD ORMIDALE—The trust-disposition and settlement of the late Mr Young, on the construction of which is the question submitted by the parties in this case for the opinion and judgment of the Court rests, is so special and peculiar as to prevent it, I think, being ruled by any of the precedents which were referred to at the debate.

This is certainly not the simple case of an estate or fund being destined to a party and his

heirs or issue subject to the burden of a liferent or annuity, which, although it might have the effect of postponing the full beneficial enjoyment of the fee till the death of the liferenter or annuitant, or at anyrate till the limited interest of the liferenter or annuitant had been otherwise satisfied or provided for, could not postpone the period of vesting.

I am unable to avoid the conclusion that in the present case, according to any admissible construction of the testator's settlement, the vesting of the residue of his estate was not intended and cannot be held to occur sooner than the death of his widow, that being expressly and unequivocally, as it appears to me, the condition upon which the vesting of the fee in the testator's son is made to depend. Accordingly, the nature and extent of the son's interest in the estate prior to the widow's death, as defined in the settlement, is such, taken in connection with the ulterior destinations, as to show unmistakeably, I think, that the testator did not intend that the fee should be then vested in the son. It is, on the contrary, expressly stated that he should not, prior to the death of his mother, have the power of dealing directly or immediately with the fee of the estate to any extent whatever, but merely a power of testing on it to the effect of apportioning the shares which his issue, if he should leave any, were to take in the event of his dying before his mother. The testator further, with great care and precision, provides for the contingencies of his son predeceasing his mother without leaving issue or without apportioning their shares of the estate; but, on the assumption that the fee had not vested or was intended to vest *a morte testatoris*, all that was useless and unmeaning. Nay, so anxious does the testator appear to have been to preclude the vesting of the fee of his estate in his son prior to the death of his mother, that he expressly provides in the 7th purpose of his settlement, for the contingency of his dying "before receiving a conveyance to the residue of my estate or exercising the power granted to him of testing, as aforesaid," by destining the estates to other parties in a manner and subject to conditions quite inconsistent, as it appears to me, with the idea that there could have been vesting in his son subject merely to the burden of his widow's liferent.

In these circumstances, which are special and peculiar, I am unable to see that there was, or that the testator intended that there should be, any vesting of the fee of the residue of his estate till after the death of his widow. And as the party or parties in whom it may then vest are left uncertain, depending as this does upon various contingent conditions, I am equally unable to see how the period of vesting can in existing circumstances be anticipated or accelerated in the manner and with the concurrence suggested in the case. Were the authority of precedent necessary in support of this view, I think it is to be found in the case of *Wright* v. *Ogilvie* (9th July 1840, 2 D. 1358), where in circumstances in many respects similar to those of the present case it was held that the fee of a fund liferented by the testator's widow did not vest till after her death. But what I desire to rest my judgment upon is what I must hold to be the clearly manifested intention of the testator, that there should be no vesting or right of disposing of the fee of the residue of his estate in any one till after the death of his widow.

The result is, that in my opinion the first question submitted in the Special Case for the opinion and judgment of the Court must be answered in the negative, and the second in the affirmative.

Lord Gifford—This is a very narrow case, and I confess my leanings were, and indeed are, in favour of answering the first question put in the affirmative, if it were possible to do so, and so allowing the trust-estate to be wound up on the joint discharge of Mrs Young and her son as the only parties really interested therein.

But there is great difficulty in reaching this result, and I have come ultimately to agree with both your Lordships that the first question must be answered in the negative, and the second in the affirmative.

The question of law upon which the whole case turns, is whether the fee of the trust-estate is or is not now absolutely vested in Mr Young, subject only to the provisions in favour of his mother? If the whole fee is at present and during Mrs Young's life fully vested in Mr Young, then Mrs Young's provisions, which are all of the nature of liferents or annuities, would not prevent the winding up of the estate, Mrs Young consenting or renouncing her rights. The question whether the fee has so vested in Mr Young or not depends on this farther question—Whether upon a sound construction of the deed there is any contingent or uncertain event upon which Mr Young's right to the fee is made to depend? for an uncertain condition which may or may not be purified before the term of payment will suspend vesting. Now, I rather think that there is such an uncertain or contingent condition provided and contained in the late Mr Young's trust-deed. I refer to the case specially provided for, of Mr Young, the only child of the granter, dying before the widow and leaving issue, in which case the fee of the trust-estate is to belong to such issue, and Mr Young, the truster's son, is not to have an absolute right of disposal or even an absolute right of testing on the estate, but only a power of apportionment thereof among his children. I think that the existence of this contingency is sufficient to suspend the vesting.

No doubt it has sometimes been held that in a destination-over where the issue of a legatee are substituted failing the legatee himself before the term of payment, this does not suspend the vesting in the legatee, it being merely the expression by the testator of what the law itself would do under the condition *si sine liberis;* but in the present case the provision to grandchildren is so special, and accompanied by only a limited power of apportionment, that I can hardly hold this destination-over to be mere surplusage or an expression of what the law itself would do, but I think it infers a conditional provision that if the son dies before his mother and leaves issue, then no right of fee shall vest in the son, but his issue will take in their own right in the proportions which their father may fix. I therefore concur with your Lordships, though I cannot say I do so without difficulty or hesitation.

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

Counsel for First Parties—M'Laren. Agent—John Carment, S.S.C.

Counsel for Second Parties—Moncreiff. Agent—John Carment, S.S.C.

Tuesday, January 23.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

FRANC NICHOLS STEUART *v.* SIR ARCHIBALD DOUGLAS STEWART.

Entail—General Disponee—Statute 1 *Geo. IV. c.* 47, *sec.* 47; 4 *Geo. IV. c.* 49, *sec.* 25—*Real and Personal.*

An heir of entail borrowed money for the making and maintenance of certain roads, and granted bonds for the money under the Acts 1 Geo. IV. c. 47, and 4 Geo. IV. c. 49, binding "his heirs, not only of line and provision, but also of tailzie, and his executors and successors." On his death the bonds were paid by his testamentary trustees out of his moveable funds.—*Held* that the bonds were *sua natura* moveable, and had been rightly so paid, and were thereby extinguished, and that therefore they could not be reared up by a subsequent heir of entail to affect the entailed estates and relieve his executry.

This was an action of relief brought by the pursuer, as executor and general disponee of Sir William Drummond Steuart of Grandtully, Strathbraan, &c., against Sir Archibald Douglas Stewart, who succeeded Sir William as heir of entail in his entailed estates, for payment of the sums contained in two bonds for £1100 each, granted by Sir William to Miss Barbara Hay and Miss Jane Hay. In these bonds, which were granted in 1840, Sir William bound his heirs, executors, and successors, but expressly declaring that his heirs of entail are to relieve all others, his heirs, executors, and successors. It was alleged that these bonds were granted by Sir William for sums which were actually advanced, in the first instance, by him for making a road called the Strathbraan turnpike road, that runs through part of his entailed estates, under the powers conferred on heirs of entail by a local Road Act of 1820 and the General Turnpike Act of 1823 (the Acts relied on by the pursuers in the case of *Breadalbane's Trustees* v. *Breadalbane*, July 7, 1846, 8 Dunlop 1062) to charge heirs of entail with the sums borrowed for making and maintaining the roads constructed under those Acts. It appeared, however, that the sums expended on the making of the road were borrowed by Sir John Steuart, the heir of entail who preceded Sir William in the estates, along with various other proprietors of adjoining estates. For these sums he and the other subscribers granted bonds to various creditors, and amongst others to the Misses Hay, binding the whole parties jointly and severally, their general representatives and their heirs of entail, but giving no indication of an intention that their heirs of entail should be primarily liable. They also executed a bond of relief apportioning the amount of liability amongst the various parties. Sir John died in 1838, leaving a trust-disposition and settlement, in which he made no special provision for the payment of his share of these bonds. His trustees, on a requisition from the trustees of the Marquis of Breadalbane, who had been one of the co-obligants in the bonds, that the bonds should be paid up in order that the Marquis's estate might be wound up, paid his share, including the bond to the Misses Hay, out of his moveable funds. Sir William having succeeded his brother in the entailed estates, granted these bonds anew, as narrated above; and in this action his executor sought to enforce the relief which Sir William had provided for his general representatives against the heirs of entail.

The pursuer pleaded—"(3) The amount of £4273, 2s. 11d., or at all events the amount in the bond libelled, was chargeable and charged by Sir John Archibald Stewart against the entailed estates and heirs of entail, and there was nothing in the arrangements by which that amount was separated from the sums undertaken by other proprietors which had the effect of relieving said entailed estates or heirs of entail. (5) The deceased Sir William Drummond Steuart having advanced funds to the amount of the bond in question, for making and maintaining said road, was entitled to borrow the like sum and to bind the estate and heirs of entail for the same."

The defender pleaded—"(1) The said Sir William Drummond Steuart not having been a subscriber for the formation of the said Strathbraan turnpike road, which was made before his succession to the entailed estate, the pursuer has no claim as his executor under the Acts of Parliament recited in the summons for relief of the sums contained in the bond and assignation libelled against the defender as heir of tailzie. (2) The subscription of the said Sir John Archibald Drummond Stewart for the formation of the said Strathbraan turnpike road having been paid, and the bonds granted by him to the persons who advanced the money to meet said subscription, including the Misses Hay, having been paid off by his trustees and executor as liable therefor both at common law and under the directions contained in his trust-disposition of 4th September 1837, no claim lies against the defender or any of the heirs of tailzie in respect of any of the said bonds. (3) Sir John Archibald Drummond Stewart never having imposed the liability of relieving his executry estate from the amount of the said subscription upon heirs of tailzie, no claim can in any event be now made against them in respect of any part thereof."

The Lord Ordinary assoilzied the defender, and added the following note:—

"*Note.*—By bond, dated 15th December 1840, the late William Steuart bound himself and his heirs of entail to pay £2200 to the Misses Hay. The bond proceeds on the recital of the Acts after mentioned, that Sir William had contributed £4723, 2s. 11d. towards the making of the Strathbraan Road; that he was desirous of keeping up the debt against the entailed estate; and that in order to assist him in paying this sum the Misses Hay had agreed to advance, and had advanced, £2200.

"The pursuer, as Sir William's executor, had paid to the Misses Hay the debt due to them, and has brought the present action of relief against