not by a messenger on the pursuer's order. I think that does not make any difference as to the competency of appeal; the merits of the case are exhausted when the defender's pleas are repelled, and an interlocutor is pronounced which leads necessarily to payment of the money sued for.

LORD KINNEAR—I am quite clearly of opinion that this appeal is competent. First, because the defender, against whom the judgment was given, has appealed, and the pursuer has appeared, and does not maintain that the appeal is not competent. But if the question is to be decided as a litigated point, I agree with your Lordships that the interlocutor appealed against disposes of the whole merits of the cause. I entirely agree with Lord M'Laren that section 53 of the Court of Session Act 1868 does not, directly or by reasonable implication, repeal the 24th section of the Sheriff Court Act of 1853. I am unable to see how an interlocutor which repels all the pleas-in-law for the defender does not dispose of the whole merits of the cause. The Sheriff-Substitute repelled the whole defences. The defender then appealed to the Sheriff, who repelled the first four pleas-in-law for the defender in respect that these were not insisted in, and then went on to repel the fifth plea-in-law, so that there was no defence remaining. Nothing remained to be done except an executorial proceeding for the purpose of carrying into effect the judgment of the Sheriff already given on the merits.

The case was sent to the Summar Roll.

Counsel for the Appellant — Munro. Agent—Robert Broatch, L.A.

Counsel for the Respondent—Balfour. Agent—J. W. Chesser, S.S.C.

Thursday, December 21.

SECOND DIVISION.

CATHCART'S TRUSTEES *v.* ALLARDICE.

Marriage-Contract—Provision for Widow—Gift of "Liferent Use" of House—Right of Occupancy—Incidence of Rates.

In the antenuptial contract of marriage a husband, *inter alia*, assigned and disponed to his wife in absolute property the whole household furniture in or about his house at the time of his death, "and also the liferent use of any one house he may die possessed of."

By his trust-disposition and settlement the husband conveyed his whole means and estate to trustees, to be applied, *inter alia*, in implementing the provisions in the marriage-contract.

The husband died possessed of one house which he had burdened to over two-thirds of its value. The house was let at the time of his death.

Held (*dub.* Lord Young) that the gift was not one of proper liferent, but only of a right of occupancy, and that the widow was liable only for rates payable in respect of occupancy, and that she was entitled to the rent of the house without deduction of the interest payable on the bonds.

Clark v. *Clark*, January 19, 1871, 9 Macph. 435; and *Bayne's Trustees* v. *Bayne*, November 3, 1894, 22 R. 36, *followed.*

By antenuptial contract of marriage between James Weir Cathcart and Miss Constance Margaret Valentine Hagart, dated 27th and 28th November 1885, Mr Cathcart, *inter alia*, gave, assigned, and disponed to his said wife as her absolute property, if she should survive him, the whole household furniture which should be in or about his house at the time of his death, "and also the liferent use of any one house he may die possessed of." This was Mr Cathcart's second marriage. No children were born of the marriage.

Mr Cathcart died on 29th July 1890, leaving a trust-disposition and settlement by which he, after conveying to trustees generally his whole heritable and moveable means and estate, *inter alia* directed them to apply said means and estate, "In the first place, in payment of all my just and lawful debts, sickbed and funeral charges, and the expense of executing this trust, which debts, charges, and expenses my trustees may pay without requiring legal constitution: In the second place, in implement, so far as the same have not been implemented, of the provisions contained in my antenuptial contract of marriage with my wife, the said Constance Margaret Valentine Hagart or Cathcart."

At the date of his marriage and at the date of his death Mr Cathcart was owner of a house No. 29 Palmerston Place, Edinburgh. Mr Cathcart had no other heritable property. The children of Mrs Cathcart's first marriage were, in terms of his settlement, fiars in the property and residuary legatees.

For some time after their marriage Mr and Mrs Cathcart occupied this house, but prior to Mr Cathcart's death they had gone to live elsewhere, and the house was let by Mr Cathcart to a rent-paying tenant. The house was burdened with bonds amounting to £2750.

On 20th April 1895 Mrs Cathcart married Mr Allardice.

In 1897 Mr Cathcart's testamentary trustees, with the approval of Mrs Allardice and all parties interested in Mr Cathcart's estate, sold the house at the price of £3600. It was part of the bargain that the purchaser should take over the bonds along with the property. The testamentary trustees accordingly received the purchase price of the house under deduction of the sum of £2750, the net balance received being £850.

Certain questions thereafter arose with regard to the rights of Mrs Allardice in relation to the house and the price that was obtained for it; and for their settlement a

special case was presented to the Court by (1) Mr and Mrs Cathcart's marriage-contract trustees; (2) Mr Cathcart's testamentary trustees; (3) Mrs Allardice, with consent of her husband; and (4) Mr Cathcart's children by his first wife.

The questions of law were—"(1) Was the third party liable in payment (*a*) of the interest upon the bonds, and (*b*) of the whole other annual outgoings connected with the ownership as opposed to the occupancy of the property? (2) Upon the sale of the house, were the second parties bound to set apart for the liferent use of the widow (*a*) the whole price received, or (*b*) only the balance after deducting the amount of the bonds?"

Argued for first and third parties—The right conferred by the marriage-contract on the third party was a right to use No. 29 Palmerston Place during her lifetime in such manner as she might deem most beneficial, either by personal occupation thereof or by lease to tenants for a rent. The right of use did not subject her to payment of any annual burdens affecting the property except such as were incident to occupancy, and did not make her liable to bear the payment of interest on the bonds over the house. The extent and measure of right depended on the measure of the grant, and there was here no conveyance of liferent estate on which the third party could take infeftment. It was a gift of the use of the house, not of the house itself, in liferent, and the widow was only liable in payment of rates payable in respect of occupancy—*Clark* v. *Clark*, January 19, 1871, 9 Macph. 435; *Bayne's Trustees* v. *Bayne*, November 3, 1894, 22 R. 26. The third party was in the same position as if she had been granted absolute warrandice—*Strong* v. *Strong*, January 29, 1851, 13 D. 548. Upon the sale of the house in 1897 the third party was entitled to have the gross price received therefor, and not the net price after deducting the amount of the bonds, set apart as a special fund, the interest of which was due to her as a *surrogatum* for the use of the house. Alternatively, in the event of the right of use conferred upon the third party being decided to be a "liferent" in the ordinary legal sense, implying liability for all annual burdens affecting the property, the testamentary trustees, in terms of the directions in the truster's settlement to pay his debts, were bound to pay the amount of the bonds from the residue of his moveable estate, and thus free the liferented subjects thereof.

Argued for the second and fourth parties—The right conferred on the third party was not a mere right of occupancy, but was one of liferent in the proper legal sense of the word. The cases of *Clark* and *Bayne* were totally distinct from the present. There was no question in these cases of liferent. In *Clark* it was the testator's intention that his wife should be the occupant of a particular furnished house; and in *Bayne* the house was to be "made over" to the widow as a residence for the testator's family. In the present case the "liferent use" of the house was given, and the widow was entitled to let it as a subject of profit; and the legal obligation incumbent on a liferenter being the payment of all annual burdens affecting the property when the liferent becomes operative, the third party while entitled to receive the rents of the house as let, was liable in payment of these burdens, including the interest on the bonds. Although the fiars in the property and the residuary legatees in the truster's moveable estate were the same—namely, the truster's children—the testamentary trustees were not entitled either to pay off the bonds out of the residue of the moveable estate, or to burden the same with said bonds to the effect of freeing the third party from payment of the annual interest thereof, there being no express direction in the truster's settlement to do so—*Macleod's Trustees*, June 28, 1871, 9 Macph. 905. The case of *Strong* did not apply, as in that case there was a clause of warrandice. The usual general direction (which was all that the trust-disposition and settlement contained) to pay the truster's debts was not to be construed as an express direction to that effect, and in the absence of express direction, or at least of clear implication, the testamentary trustees were bound to follow the ordinary rule of law that a liferented heritable subject under a *mortis causa* deed must be taken *cum suo onere* as regards the obligations both of liferenter and fiar. Similarly, on the sale of the house the testamentary trustees were bound to set apart the net price thereof, or the price after deducting the amount of said bonds, as a *surrogatum* for the heritage for the liferent use of the third party.

At advising—

LORD JUSTICE-CLERK—The testator in this case left to his wife, *inter alia*, "the liferent use of any one house" he might die possessed of. He left a house in Palmerston Place in Edinburgh, which his trustees have sold. There were certain burdens on the house in the form of bonds, and the question now is, whether the trustees have to account to the widow for the whole annual proceeds of the price obtained for the house, or whether she was liable to be charged with the interest of the sums borrowed on the house and the ownership outgoings, and whether on the house being sold the trustees must pay the whole annual return from the price obtained to the widow, or whether she is only entitled to the proceeds of the balance after paying the bonds.

It appears to me that the intention of the testator was to make a provision to his widow of a house to live in during her life free of charge, and that there is nothing to indicate that in giving her the use of the house he intended her to be burdened with payment of interest on bonds and owner's charges, which would just be in effect charging her a rent for the occupation. I should read the clause as meaning that if Mr Cathcart left a house his intention was to give to his widow the right to occupy it—a free gift of the occupation of the house,

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.