been public roads from Dunkeld on the lines marked on the plan, coming out at what is undoubtedly a public place at Kirkmichael. It seems to me that that is a question as to which, according to the decisions, there is no ground for not allowing it to be tried by jury. I am therefore of opinion that we should recal the interlocutor. Of course the issues must be with reference to a plan.

LORD KYLLACHY—I concur with what your Lordship has said. I quite agree that cases of this kind would be much better tried by a judge than by a jury; but I am afraid that except in special cases the practice is settled the other way. In the present case I do not think that there is anything in the circumstances which would justify me in differing from the view of the Lord Ordinary that, the alternative conclusion of the summons being withdrawn, there must be a trial by jury.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court pronounced this interlocutor —"Recal the . . . interlocutor reclaimed against: Assoilzie the defenders from the alternative conclusions of the action and decern: Appoint the pursuers to lodge issues within eight days, and find no expenses due to or by either party since 4th July last.

The issues as finally adjusted and approved were as follows—"(1) Whether for forty years and upward, or from time immemorial prior to 1904, there has been a public road or right-of-way for passage on foot and horseback, and also for driving cattle and sheep, or any and which of them, between Dunkeld and Kirkmichael, leading the said public road or right-of-way from the public highway between Dunkeld and Blairgowrie at or near the house known as Cally Lodge at the point marked A on the map No. 7 of process in a northerly direction past the houses of Hatton and Birkenburn to the Glack Sawmill; thence in a north-easterly direction across Cardney Hill to Grews or Santa Crux Well at the point marked B on the said map; thence in a north-easterly, northerly, and north-easterly direction past Easter Riemore, across Riemore Hill, on the west side of Loch Benachally, to the estate of Woodhill; thence through the Woodhill estate in a northerly direction past Dalnabrick, Pitcarmick, Dalvey, Stronamuck, Cragansualtach, and the Kirkmichael Free Church to Kirkmichael, where it joins the public highway from Blairgowrie to Kirkmichael and Pitlochrie at or near the point marked C on said map on or near the line coloured red on said map? (2) Whether for forty years and upwards, or from time immemorial prior to 1904, there has been a public road or right-of-way for passage on foot and horseback, and also for driving sheep and cattle, or any and which of them, between Dunkeld and Kirkmichael, leading the said public road from Cally Lodge aforesaid to Grews or Santa Crux Well aforesaid until it reaches Riemore, being the road or way described in the first issue; thence in a north-westerly and northerly direction up the bed of the Buckney Burn past Lochan Oisinneach Mhor to Lochan Oisinneach Bheag through the gate in the fence at the top of Lochan Oisinneach Bheag at the point marked D on said plan, and downwards towards Loch Esk; thence by alternative routes, the first in a north-easterly, easterly, and northerly direction towards Cragansualtach, at the point marked E on said map, and past the Free Church aforesaid; and the second by a ford over the Loch Esk Burn by Balnald plantation in a north-easterly direction to Balnakilly, and thereafter in an easterly direction, both to Kirkmichael, joining the public highway from Blairgowrie to Kirkmichael and Pitlochrie at or near the point marked C on said map on or near the lines coloured red on the said map?"

Counsel for Pursuers (Reclaimers)—Ure, K.C.—Hunter, K.C.—J. A. Macdonald. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for Defenders (Respondents)—Solicitor-General (Clyde, K.C.)—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, December 7.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow

KIRK'S TRUSTEES *v.* WALKER AND OTHERS.

Succession—Trust—Vesting—Repugnancy—Discretionary Power of Trustees to Withhold Payment—Conditional Institution of Issue of Beneficiary—"Dying," meaning Dying before Receiving Payment, and not Dying before Term when Legacy might have been Paid.

A testator who died in 1884 conveyed to trustees his whole estate, *inter alia*, "(*Second*) For payment at the first term of Whitsunday or Martinmas after my death . . . to my nephews" A and B, "equally between them, the sum of £1000, but declaring that it shall be in the power of my said trustees to withhold payment of this legacy in whole or part for such time as they may think proper, and to apply the income, or such part of the capital as they may think proper, for the benefit of the legatees, declaring that the trustees shall be entitled to exercise an absolute discretion as to the extent and manner in which this legacy, and the income thereof, shall be paid to or applied for the benefit of the legatees, and in the event of either of the said" A or B "dying, leaving lawful issue, my trustees shall be entitled to apply such deceaser's share of the legacy for behoof of such issue in

any way they may think proper, and failing such issue they shall be entitled to hold the share of such deceaser for behoof of the survivor of my said nephews in like manner and subject to the same conditions as are applicable to the original legacy" With regard to the residue of his estate, he directed his trustees "to divide the same among the legatees before named in proportion to the legacies hereinbefore bequeathed to them respectively. . . ."

A died in 1902 intestate, leaving a widow and issue, and without having claimed or received full payment of his half-share of the said legacy and its accompanying proportionate share of residue. Of the unpaid balance his widow claimed one-third as *jus relictæ*.

Held (1) that the unpaid balance of the half-share of the legacy had not vested in A, and so was not subject to his widow's claim of *jus relictæ*, and (2) that the share of residue followed, as regarded all its conditions and incidents, the share of legacy to which it was attached.

This was an action of multiplepoinding brought in the Sheriff Court of Lanarkshire at Glasgow by John Watt, agent of the Bank of Scotland in Trongate, Glasgow, and George Phillips, wholesale grocer, Trongate, Glasgow, the surviving testamentary trustees of the late William Kirk, tea merchant, Candleriggs, Glasgow, who died in the beginning of August 1884. Kirk by his trust-disposition and settlement, dated 15th April, and recorded in the Books of Council and Session 16th August 1884, conveyed his whole means and estate to the said John Watt, the said George Phillips, and John Connell, Sandyford Place, Glasgow (who predeceased the testator), and the acceptors and acceptor, survivors and survivor, as trustees in trust for certain purposes, *inter alia*—"(*Second*) For payment at the first term of Whitsunday or Martinmas after my death of the following legacies, all free of legacy duty, namely, to each of my trustees who shall accept office a legacy of £100 sterling; to my nephews Thomas Kirk and Ebenezer Kirk, sons of my late brother Thomas Kirk, equally between them, the sum of £1000, but declaring that it shall be in the power of my said trustees to withhold payment of this legacy in whole or part for such time as they may think proper, and to apply the income, or such part of the capital as they may think proper, for the benefit of the legatees, declaring that the trustees shall be entitled to exercise an absolute discretion as to the extent and manner to which this legacy, and the income thereof, shall be paid to or applied for the benefit of the legatees, and in the event of either of the said Thomas Kirk or Ebenezer Kirk dying leaving lawful issue my trustees shall be entitled to apply such deceaser's share of the legacy for behoof of such issue in any way they may think proper, and failing such issue they shall be entitled to hold the share of such deceaser for behoof of the survivor of my said nephews in like manner and subject to the same conditions as are applicable to the original legacy.

. . . .

—"*Lastly*, with regard to the residue of my means and estate, I direct my trustees to divide the same among the legatees before named in proportion to the legacies hereinbefore bequeathed to them respectively—that is to say, in the event of my estate being more than sufficient to provide for payment of all of the said legacies, then the said legacies shall all be proportionally increased; and on the other hand, in the event of the amount of the legacies being found to exceed the amount of my estate, then the same shall suffer proportionate diminution."

The testator's nephew, the said Thomas Kirk, died on 11th May 1902, intestate, leaving a widow—Mrs Margaret Warnock or Kirk, who subsequently married Alexander Walker, baker, East Crawford Street, Dennistoun, Glasgow—and also surviving issue — Agnes Kirk, Mrs Mary Kirk or Anderson, Thomas Kirk, and John Kirk. His share of said legacy of £1000, and the accompanying proportion of residue, amounted together to £951, 18s. 2d., and from this the trustees made regular payments to him during his life to account of the capital and revenue thereof. On his death the balance in the hands of the trustees amounted to the sum of £305, 6s. 1d. Two-thirds of this sum — *i.e.*, £203, 10s. 9d. — the trustees divided amongst the said issue, and they stated they were ready and willing to divide also the remaining one-third—*i.e.*, £101, 15s. 4d. This sum—which formed the fund *in medio*—was, however, also claimed by the widow, Mrs Margaret Warnock or Kirk or Walker.

The widow — the said Mrs Walker—claimed the whole fund *in medio*, on the ground that, as the widow of Thomas Kirk, she was entitled, "in terms of the law of Scotland in intestate succession, to succeed to one-third of the clear moveable estate left by her said husband, being the *jus relictæ* due to her from her deceased husband's moveable estate which she succeeded to on the said Thomas Kirk's death."

The said issue claimed that they were entitled equally among them to payment of the whole fund *in medio*, or that the fund should be held by the trustees for their behoof, in terms of the trust-disposition and settlement.

The Sheriff-Substitute (M. G. DAVIDSON), on 21st February 1905, repelled the claim for the said Mrs Walker, and sustained the claim for the said issue.

"*Note*.—The competing claims here are those of the widow and children of the late Mr Thomas Kirk, who was one of the beneficiaries of his uncle's will. In that settlement the testamentary trustees were empowered to retain in their own hands the legacy bequeathed to the said Thomas Kirk for an indefinite period; and there is a provision that in the case of his death the legacy may be paid to his issue. I have no doubt whatever that the money never vested in Thomas Kirk, and that he could

not have tested upon it. In these circumstances I disallow the claim of his widow, and prefer the other claimants to the fund *in medio*."

The claimant Mrs Margaret Walker appealed to the Sheriff (GUTHRIE), who adhered to his Substitute's interlocutor of 21st February 1905, with additional expenses to the successful claimants.

"*Note.*—This is a case which raises a question of nicety, and I am sorry not to have had the benefit of Sheriff Davidson's reasons for holding that the legacy did not vest in Thomas Kirk. I have considered many, though probably not all, of the cases bearing on the subject. It was contended that it fell within the class of cases among which *Chambers* v. *Chambers' Trustees*, 5 R. (H.L.) 151, is the leading case, and that so a conditional vesting should be held to have taken place. If that were so, it would still have to be determined how far Mrs Walker, taking *jure relictæ—i.e.*, as a creditor—is affected by the condition attached to her husband's rights. I think, however, that the condition under consideration was a suspensive condition, and that no vesting in Thomas Kirk could take place before payment to him. That part of the legacy, therefore, which was not paid at his death never vested. *Paterson's Trustees* v. *Paterson*, 1870, 8 Macph. 449, although a comparatively old case in the law of vesting, seems to be in point and not to be shaken by any later decision. The trustees have paid and are willing to pay to Thomas Kirk's issue, so that no question arises except as to the widow's claim."

The defender and claimant Mrs Margaret Walker appealed to the Court of Session, and argued—The Sheriff's judgment was wrong and should be recalled. (1) The half-share of the legacy of £1000 had vested in Thomas Kirk absolutely *a morte testatoris*. There was nothing in the clause (2nd clause), "but declaring" to "applied for the benefit of the legatees," to take away this gift, for the power to withhold payment had no such effect—*Macfarlane's Trustees* v. *Macfarlane*, December 10, 1903, 6 F. 201, 41 S.L.R. 164 (which, after the trustees had exercised their option, and "apportioned and set aside," came to be in a similar position to this case, where there was a direction to pay); *Wilkie's Trustees* v. *Wright's Trustees*, November 30, 1893, 21 R. 199, 31 S.L.R. 135; *Greenlees' Trustees* v. *Greenlees*, December 4, 1894, 22 R. 136, 32 S.L.R. 106, especially Lord M'Laren's opinion. The clause (3rd clause) beginning "and in the event" was a conditional institution (or at most a substitution); "dying" in that clause meant dying before the contemplated period of distribution, the first period of Whitsunday or Martinmas after the testator's death, *i.e.*, practically meant "predeceasing me;" "dying" had reference to the period of testator's death, and not to one legatee surviving another—*Wood* v. *Neill's Trustees*, November 6, 1896, 24 R. 105, 34 S.L.R. 107; *Hunter's Trustees* v. *Dunn*, January 27, 1904, 6 F. 318, 41 S.L.R. 251; *Greenlees' Trustees* (*supra*). The power of the trustees to give to the issue flew off as soon as Thomas survived the testator, after which the clause, "in the event," had no application. Even if it was a substitution it could be evacuated, and the contention of the other claimants that "dying" meant "dying before full payment" involved adding after "deceaser's share," the words "or portion of a share." It also involved reading "shall be entitled" as imperative, otherwise the fee would not be disposed of at all. (2) Assuming that "dying" did not mean "predeceasing me," but meant "dying before full payment," full payment of the legacy had been made, and what remained was not legacy but residue, for of legacy and residue which together amounted to £951, 18s. 2d. (£500 of this being legacy), what remained unpaid at Thomas' death was £305, 6s. 1d., and as legacies were paid before residue this balance must be considered residue. But there was no imposition at any rate on the residue of restrictive powers, and accordingly this unpaid balance was subject to *jus relictæ*.

Argued for the claimants, the surviving issue of Thomas Kirk—(1) There was no gift to the legatees except through the trustees, who had an absolute discretion either to pay or withhold, and the case was ruled by *Paterson's Trustees* v. *Paterson*, January 29, 1870, 8 Macph. 449, 7 S.L.R. 247 (*sub nomine Jamieson* v. *Paterson*). [The LORD JUSTICE-CLERK here pointed out that the distinction was that the present case started with a direction to pay.] If anything vested, it was not an absolute fee, but a conditional fee subject to the exercise of the trustees' discretion to withhold payment. The trustees, so far as they had not paid, had exercised their discretion not to pay, and therefore the sums remaining in the trustees' hands at the date of Thomas' death had not vested in him, and were not accordingly subject to *jus relictæ*—*White's Trustees* v. *White*, June 20, 1896, 23 R. 836, 33 S.L.R. 660; *Russell* v. *Bell's Trustees*, March 5, 1897, 24 R. 666, 34 S.L.R. 497. (2) No distinction could be drawn between the interest in the legacy and the interest in the residue. The latter followed the former.

LORD KYLLACHY—In the first place, I think it is fairly clear that the shares of residue follow, as regards all their conditions and incidents, the legacies to which they are attached. That being so, the question which we have to determine is whether this legacy to these two brothers Thomas and Ebenezer Kirk had vested in the deceased brother to the extent of one-half at the date of his death, so as to become subject to his widow's right of *jus relictæ*.

Now, I do not doubt that if the gift had been qualified only by the power to withhold payment during the legatee's life, the legatee would have possessed from the first, and would have retained at his death, a vested right of fee in such part of the capital as remained unpaid to him. In other words, the widow's case would have

been quite clear if the bequest had stopped at the end of what has been called the second clause—the clause which concludes with the words "for the benefit of the legatees."

But then it does not so stop. It proceeds to make an ulterior destination which further qualifies the right of fee, and does so by, in a certain event, carrying it to other people—the legatee's issue—and failing such issue to the survivor of the two brothers. The question thus comes really to be whether this ulterior destination applies only to the event of the legatee dying before the testator or before the first term of Whitsunday or Martinmas after the testator's death, or whether it also applies to the event of the legatee dying before payment, that is to say, full and complete payment of the legacy.

I am of opinion that the latter is the correct view. Reading the deed fairly, and giving full effect to all recognised principles of construction, I think the testator intended the destination over to apply in the event of the legatee's death while any portion of the legacy remained undisposed of in the hands of the trustees; and that being so, there was not, and could not be—as regards the sum now in dispute—any vested right in the legatee. I am therefore of opinion that the interlocutors of the Sheriffs should be affirmed.

Lord Stormonth Darling—I quite concur, and shall only add this—the appellant argued that the word "share," in what has been called the third clause of the destination, means the whole share as it existed at the date of the testator's death. I do not think that that is the true meaning of the clause. The trustees are to apply "such deceaser's share . . . in any way they may think proper." They could not apply what they had paid away, and I think the meaning is that they were to apply any balance that remained after what they had paid away to or for behoof of Thomas. I agree with your Lordship's construction of the deed, and that the judgment of the Sheriffs should be affirmed.

Lord Low—I am of the same opinion. I think that upon the death of Thomas Kirk his children became entitled to that portion of the legacy which was still in the hands of the trustees, free of any claim on the part of the widow. The solution of the question in the case lies where Mr Robertson put it. If what has been called the third clause was restricted in its application to the case of the legatee predeceasing the testator, or dying before the first term of Whitsunday or Martinmas after the testator's death, then it is plain that the fee vested in Thomas Kirk, he having survived both of these events. If, on the other hand, this clause is not restricted to that event, but applies to the event of Thomas Kirk's death at any time before the legacy had been fully paid to him, it is equally clear that any part of the legacy which had not been paid, was not *in bonis* of him at his death, and could not be made subject to a claim of *jus relictæ*. I am clearly of opinion that the clause in question was intended to cover the latter case. The testator had given power to his trustees either to pay the whole of the capital, or to pay part of it to Thomas Kirk, or to limit his enjoyment to the income. Having given that power, it was most natural that the testator should go on to provide what was to happen if any part of the capital was left in the hands of the trustees at the death of the legatee. In my judgment he did so by the third clause, and provided that in the event of Thomas Kirk's death the whole or any part of the capital which had not been paid to him should belong to his children, not as taking through or in succession to him, but in their own right.

I am therefore of opinion that the Sheriff's judgment should be affirmed.

Lord Justice-Clerk—I am of the same opinion and have nothing to add.

The Court dismissed the appeal and affirmed the judgment appealed against.

Counsel for the Claimant Mrs Walker (Appellant) — M'Lennan, K.C. — J. A. T. Robertson. Agents — Dalgleish & Dobbie, W.S.

Counsel for the Claimants, the issue of Thomas Kirk (Respondents) — Macdiarmid. Agents — Bonar, Hunter, & Johnstone, W.S.

Friday, December 8.

SECOND DIVISION.

[Lord Low, Ordinary.

SCOTT'S TRUSTEES *v.* MACMILLAN.

Trust—Succession—Donation mortis causa—Subsequent General Trust-Disposition Revoking all Previously Executed Testamentary Writings.

A trust-disposition and settlement by which the testatrix conveyed to trustees her "whole means, estate, and effects, heritable and moveable, real and personal," contained the following clause:—"And I revoke and recall all testamentary writings of whatsoever kind, formal or informal, previously executed or authorised by me." The testatrix had at an earlier date made a *mortis causa* donation by means of a deposit-receipt.

Held that *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823, 17 S.L.R. 597, was a case in point, and, following it, that the general trust-disposition and settlement with its clause of revocation was not sufficient by itself to revoke the prior *mortis causa* donation

Donation mortis causa—Deposit-Receipt—Delivery.

Circumstances in which *held—approving* judgment of Lord Ordinary (Low)—that a *mortis causa* donation had been made by a deposit-receipt found in the donor's repositories after her death.