which it has been already carried. I cannot say I agree with him altogether in thinking that it would be a logical extension of the doctrine to carry it that length. I prefer his second view, that whether it is logical or not it is an extension to which he will not give effect. I cannot say for myself, in the cases where it has been held that interests have vested subject to defeasance, I can find any principle of law which is capable of being drawn out to a logical conclusion unless it be the principle that you are to construe a will so as to give effect to the presumed intention of the testator when there is nothing in the will which will tend to rebut that presumption. The only doctrine, so far as I understand it, that has received effect in a description of vesting subject to defeasance is this, that when a gift is made in such terms that it would take effect absolutely at the death of the testator but for the single contingency of the possible birth of issue of a particular person, that is a possibility which interferes so little, for practical purposes, with the primary legatee treating the legacy as his own subject to his being divested by the single event, that it must be presumed that the testator intended that he should so treat it. In the leading case it is pointed out that it is for the benefit of the object of the testator's bounty that he should be able to deal with his expectant interests as if they were vested in him subject to being divested upon the happening of the subsequent event, rather than that he should be prevented from dealing with them at all on the ground that they are kept in suspense. It must be presumed that the testator intended to give that benefit in a case in which the contingency which should exclude the primary legatee is so simple as that of the birth of children to one particular person.

Accordingly it has been held that where a fund is given in liferent to a daughter or a granddaughter and to her issue, if any, and failing this issue to a person or class of persons at the testator's death, without any further destination which could possibly exclude such a legatee, the legacy is vested in him subject to defeasance rather than that his interest is held in suspense until the death of the liferentrix whether she has issue or not. But then the condition upon which that doctrine has been applied has always been that there is no other contingency but that very simple one, and that it is the possibility of issue without any further destination on their failure that raises the presumption. But because a particular intention may be inferred from certain circumstances, it does not follow that it must be inferred from other and different circumstances.

I must say I agree entirely with the Lord Ordinary in holding that the doctrine is excluded when you find that the gift to be construed is subject first to the contingency of the liferentrix leaving issue, and failing such issue to a further destination as regards one-half to a particular individual and then to her issue, and as regards the other half to a second individual and her issue before it can take effect in favour of the persons to whom it is ultimately destined. There is first of all a gift to the possible children of Barbara Johnston. If they fail, then there is a division of the estate between two people particularly described. If either of them dies leaving issue, then it is to her children, but if both fail without leaving issue then only to the next-of-kin. I agree therefore with the Lord Ordinary that the doctrine of vesting subject to defeasance is inapplicable.

On the whole matter, I think the fair meaning of this codicil is that the testator intended to direct his trustees to pay to the persons whom they shall find to answer the description of "nearest in kin" at the death of Barbara Johnston without issue, and in the event of her two aunts having predeceased her without issue, and no sooner.

LORD DUNDAS—I agree with your Lordship upon all points, and have nothing to add.

LORD MACKENZIE—I am of the same opinion.

The Court adhered.

Counsel for the Reclaimers—M'Clure, K.C.—Mackintosh. Agents—Mackenzie & Kermack, W.S.

Counsel for the Respondents—A. R. Brown. Agents—T. & R. B. Ranken, W.S.

Wednesday, March 15.

FIRST DIVISION.

[Lord Dewar, Ordinary.

JACK *v.* BLACK.

(Reported on the Merits, January 28, 1911, *supra*, p. 331.)

Expenses—Tender—Expenses Subsequent to Tender—Expenses Incurred in the Natural Progress of the Cause—Delay in Accepting Tender.

Where a tender is lodged, the pursuer, if he means to accept it, must do so within a reasonable time. Where that time has been exceeded the defender is entitled to the expenses incurred by him in the natural progress of the cause between the date when the tender ought to have been accepted and its acceptance—the question as to what is a reasonable time being matter for the consideration of the Auditor.

In this case, which was an action of damages for wrongous use of diligence in obtaining a warrant to carry back a tenant's furniture to premises vacated by him, the Lord Ordinary (DEWAR) on 2nd November 1910 approved of an issue for the trial of the cause.

On 10th February 1911 his Lordship fixed the trial for 30th May. On the same day the defender lodged a tender of £75 with expenses to its date. The tender was accepted by the pursuer on 2nd March 1911.

Thereafter, on 4th March 1911, the Lord Ordinary (DEWAR), in respect of the minute of tender and acceptance, decerned against the defender for the said sum of £75, and found the defender liable in expenses.

The defender reclaimed, and argued that he was entitled to expenses between the date of lodging the tender and its acceptance. When, as here, a pursuer unduly delayed accepting a tender, the defender was entitled to assume that it was not going to be accepted. He was not bound to wait till the eve of the trial before preparing for it. The reclaimer had incurred expense in obtaining precognitions. These expenses were necessary in the proper conduct of the case, and he was therefore entitled to them—*Shaw* v. *Edinburgh and Glasgow Railway Company*, November 28, 1863, 2 Macph. 142; *M'Laughlin* v. *Glasgow Tramway and Omnibus Company Limited*, June 30, 1897, 24 R. 992; *Wilson* v. *Rapp*, 1909, 2 S.L.T. 295; *Jacobs* v. *Provincial Motor Cab Company Limited*, 1910 S.C. 756, 47 S.L.R. 634. Reference was also made to article 3 of the General Regulations as to the Taxation of Judicial Accounts (*v.* P.H. Book, G 34).

Argued for respondent—The Court would not readily entertain a reclaiming note on the mere question of expenses, especially where, as here, the sum in dispute was trifling—*Caldwell* v. *Dykes*, May 25, 1906, 8 F. 839, 43 S.L.R. 606. The pursuer was entitled to consult counsel before accepting the tender, and owing to the intervention of the February week (when the Court did not sit) counsel were not available. No undue delay had therefore taken place.

LORD PRESIDENT—In this case the pursuer sued the defender for damages in respect of wrongous diligence. The Lord Ordinary allowed an issue. A reclaiming note was taken to this Division, who refused the reclaiming note and remitted to the Lord Ordinary to proceed. On 10th February the Lord Ordinary fixed the date of the trial, as he was bound to do under the recent Act of Sederunt, for 30th May. That very same day a minute of tender was lodged for the defender, tendering in proper form a certain sum "with the taxed expenses to date hereof." Now that tender was not accepted until 2nd March, that is to say, nearly three weeks afterwards. The tender being accepted, the Lord Ordinary on 4th March, in respect of the minute of tender, decerned against the defender for payment to the pursuer of the sum of £75 sterling and found the defender liable in expenses. Against that a reclaiming note has been taken.

Now we never encourage reclaiming notes on the matter of expenses alone, but I think that that means that we do not encourage reclaiming notes on the matter of expenses where there has been a decision on the merits and where a party acquiescing on the merits reclaims merely on the question of expenses. I do not look upon this as a case of that sort, because this case really raises a general question as to what is the proper interlocutor to pronounce in respect of a tender, there being no contest in one sense on the merits at all.

I am of opinion that the matter is well settled. When one of the parties, the defender, puts in a tender in proper form, he is bound to give a reasonable time to the pursuer whether he shall or shall not accept it. But as soon as that reasonable time has passed the defender is perfectly well entitled to go on with his preparations for the trial, and I have only a slight alteration to make on the words which I used in the case of *Jacobs* (Session Cases 1910, p. 756), where I said—"The pursuer gets what is offered by the tender and his expenses to its date" (and in practice that includes a fee for consulting his counsel as to whether he should or should not accept it), "but that, on the other hand, the defender is entitled to the expenses incurred by him in the natural progress of the cause in the period between the making of the tender and its acceptance." I alter these words now "making of the tender," because I think the true date is the date at which it is reasonable to expect that the tender should either be accepted or refused. I think in a case such as the present the best course would be for the Judge to pronounce an interlocutor in general terms, leaving it to the Auditor to decide, which he can easily do, what is the reasonable date at which a particular tender ought or ought not to be accepted, because quite obviously it is not a matter in which you can lay down a general rule as to a period. The matter depends very much upon how soon the trial is to be, and in one of the cases cited to us it was held that a pursuer ought only to have had two days to consider the matter. That was a case where the trial was so imminent that there was a necessity for despatch, so to speak, on both sides. But although I think that it should generally be left to the Auditor, yet in this particular case as we have the whole facts before us we can determine the question ourselves, being in as good a position as the Auditor would be. It seems to me that the date of the trial having been fixed at a somewhat remote date, viz., the 30th of May, it was necessary for the defender to give a reasonable time to the pursuer to consider as to acceptance of the tender. It was made upon 10th February, which was a Friday, and the next day, the 11th, was a Saturday, on which the Court rose for the February week. I do not think that that week can be kept out of consideration altogether, but, on the other hand, it cannot be treated as a Court week, and therefore upon the whole matter I think the pursuer was entitled to a couple of days of the next week, and accordingly to give him until the evening of Wednesday, 22nd February, is giving him ample time to have considered sufficiently as to whether he would accept the tender or not. I think that by that time he ought to have accepted it if he was going to accept it.

Therefore I think the defender ought to have such expenses as he can show were incurred by him in preparing for the trial from 22nd February.

Mr M'Lennan argued that in this matter we ought to follow the rule laid down in the regulations, that a person in whose case a proof is allowed is entitled to the expenses of preparation for the proof even although these expenses were incurred before the date of the allowance of proof, if in fact an allowance of proof is ever made. I do not think that that applies to the present case, for a simple reason. A man who comes into Court is entitled to have the courage of his opinions, and if he says "I think proof ought to be allowed," and risks the matter and goes on to make his preparations, he will get his expenses if he is right. But that is not the case here. The case here is that a tender was made, and it was dubious whether it would be accepted or not. I do not think that the party making the tender is entitled to go on and make preparations as if the tender was certain to be refused.

I propose that we recal the Lord Ordinary's interlocutor and find the pursuer entitled to the expenses up to the date of the tender, and to find the defender entitled to the expenses, if any, incurred subsequent to Wednesday, 22nd February 1911.

LORD JOHNSTON—I concur.

LORD MACKENZIE—I also concur.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"The Lords having considered the reclaiming note for the defender against the interlocutor of Lord Dewar, dated 4th March 1911, and heard counsel for the parties, recal the finding therein as to expenses, and in lieu thereof find the defender liable in expenses to the date of tender, viz., 10th February 1911: Find the defender entitled to expenses (if any) incurred by him subsequent to 22nd February 1911, and remit the accounts of said expenses to the Auditor to tax and to report to the Lord Ordinary, to whom remit the cause with power to decern for the taxed amounts thereof: *Quoad ultra* adhere to the said interlocutor, and decern."

Counsel for Pursuer (Respondent)—Paton. Agents—Gill & Pringle, W.S.

Counsel for Defender (Reclaimer) — M'Lennan, K.C. — Mercer. Agents — Cumming & Duff, S.S.C.

HIGH COURT OF JUSTICIARY.

Wednesday, March 15.

(Before the Lord Justice-Clerk, Lord Ardwall, Lord Dundas, and Lord Salvesen.)

M'INTYRE *v* HENDERSON.

Justiciary Cases—Probation of Offenders Act 1907 (7 *Edw. VII, cap.* 17), *sec.* 6, *sub-sec.* 5—*Process—Bond of Probation—Jurisdiction—Judge Entitled to Convict and Sentence on Breach of Bond.*

Where under section 1 (2) of the Probation of Offenders Act 1907 an accused has been discharged conditionally on his entering into a recognisance to appear for conviction and sentence when called upon, in the event of a breach of the probation bond a magistrate other than the magistrate who originally tried the accused and put him on probation can competently convict and sentence for the original offence.

The Probation of Offenders Act 1907 (7 Edw. VII, cap. 17) enacts, section 1 (1)—"Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order . . . (ii) discharging the offender conditionally on his entering into a recognisance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order." Section 6 (5)—"A court before which a person is bound by his recognisance to appear for conviction and sentence, on being satisfied that he has failed to observe any condition of his recognisance, may forthwith, without further proof of his guilt, convict and sentence him for the original offence. . . ."

Catherine M'Intosh or Henderson was on 12th October 1910, at the Southern Police Court, Glasgow, charged under the Summary Jurisdiction (Scotland) Act 1908, before Bailie Borland, a Magistrate of Glasgow, with the crime of theft. The accused pled guilty, and the Court, being of opinion that the charge against the accused was proved by judicial confession, and that the offence charged was committed by the accused while under the influence of drink, and being of opinion also that it was expedient to release the accused on probation, under the Probation