in my opinion connotes and necessarily implies "leaving." I accordingly take the view that the tenant made an improvement in the sense of the Act. This, however, is not enough to entitle him to succeed in his claim for compensation. It is necessary that he should make out that what he did was a voluntary and not a contractual act —*Earl of Galloway*, 1915 S.C. 1062. On this point I am of opinion that the landlord is entitled to succeed. The condition of the farm as to grass at the termination of the tenancy was the necessary result of the fulfilment by the tenant of his contractual obligations. He was bound by his lease to turn into pasture the portion of the farm in respect of which compensation is claimed, and therefore his creation of pasture was not voluntary but an act of obligation. His abstention from breaking up the pasture so created was doubtless voluntary, but this was a negative and not a positive act, and statutory compensation is awarded only for voluntary positive acts. By abstaining from breaking up pasture created in virtue of contractual obligation the tenant did nothing more than refrain from doing what he might have done but did not choose to do. This is the real basis of his claim for compensation, and there is no statutory warrant for countenancing such a claim.

It follows that the first question of law should be answered in the negative. This renders it unnecessary to deal with the other two questions, which I therefore refrain from considering.

The LORD JUSTICE-CLERK and LORD DUNDAS were not present.

The Court recalled the interlocutor of the Sheriff, answered the first question of law in the negative, and found it unnecessary to answer the second and third questions.

Counsel for the Appellant—Chree, K.C. —D. Jamieson. Agents—Guild & Guild, W.S.

Counsel, for the Respondent—Macphail, K.C.—Hamilton. Agents—Lindsay, Howe, & Company, W.S.

Tuesday, February 27.

EXTRA DIVISION.

FARMER'S TRUSTEES *v.* FARMER.

Succession — Election — Legitim — Approbate and Reprobate—Special Destinations and General Settlement — "Residue" — Order of Preference for Payment of Legitim.

A testator died, survived by his widow and children, and leaving (*a*) funds invested by him in favour of himself and his wife or the survivor, (*b*) funds invested by him in name of himself and one or other of his children or the survivor, and (*c*) a testamentary settlement containing a dispositive clause in general terms in favour of trustees, and provisions, including a bequest of residue, to his children.

Held that the investments and settlement formed one scheme of disposal, that the children must elect between legitim and their conventional provisions, that the bequest of "residue" was not a special legacy, and that legitim was payable *primo loco* from the residue.

A Special Case for the opinion and judgment of the Court was presented by the trustees under the trust-disposition and settlement of the deceased George Honeyman Farmer, *first parties*, five of the six children of the testator who survived him, *second parties*, and the testator's widow, *third party*.

The Case set forth—"2. By his said *trust-disposition and settlement* the testator gave, granted, assigned, and disponed to the trustees therein named 'all and sundry my whole means and estate, heritable and moveable, real and personal, of every kind and denomination and wheresoever situated, presently belonging and owing to me at the time of my death, including therein all means and estate over which I have or shall have power of disposal by will or otherwise, together with the writs, vouchers, and securities thereof, but in trust always for the ends, uses, and purposes following.' 3. The said trust purposes were — (First) Payment of debts, &c.; (second) payment of a legacy to each accepting trustee; (third) power to carry on or sell the testator's business; (fourth) conveyance to his wife of his jewellery, personal effects, and furniture, and payment to her of £150 for mournings and interim aliment; (fifth) provision to his wife of the liferent of a dwelling-house or an equivalent thereto; (sixth) payment of certain small legacies; (seventh) payment to his wife of an alimentary annuity of £500, 'declaring that the foregoing provisions and annuity hereby granted to my said wife are and shall be in full satisfaction to her of terce, *jus relictæ*, and every other claim competent to her against my means and estate in the event of her survivance;" (eighth) to hold the whole residue and apply the annual proceeds, or such part thereof as the trustees might deem necessary, for the maintenance, education, and advancement of the testator's children until the youngest attained majority; and (lastly) on the youngest child reaching majority, for division of the whole residue equally among the children. The trustees were appointed executors, and clothed with the usual powers of administration and investment. 4. By codicil of 27th June 1910 the testator directed his trustees to convey a heritable property in Great Eastern Road, Glasgow, to his wife in liferent, and to his two youngest children equally between them and their heirs in fee, 'and that as an additional provision to my said wife and my said two youngest children.' . . . 5. The testator nowhere declared that his provisions for his children were to be accepted by them as in full of all claims on his estate for legitim and the like, nor that if they claimed legitim they were to forfeit their testamentary provisions. With regard to the provisions for the widow there is the clause quoted in article 3 hereof, but no clause of forfeiture. Further, there

is no clause of revocation. 6. Including the items after mentioned as part of the testator's estate, the testator left at his death moveable estate to the gross amount of £35,900, 15s. 10d., and heritage of the gross value of £16,900, making altogether £52,800, 15s. 10d. As part of that total were included the following items:—(1) £87, 18s. on current account with the Clydesdale Bank in name of himself and his wife, payable to either or survivor. (2) £2328, 10s. 2d. on thirteen deposit-receipts with the Clydesdale Bank and two with the Commercial Bank of Scotland, all in name of himself and his wife, payable to either or survivor. (3) £15,107, 2s. 6d. in various shares, bonds, debentures, and assignations in security, some in name of himself and his wife, either or survivor, others in name of himself and his wife and either or survivor of them, others in name of himself and his wife or either or survivor, and others in name of himself and his wife and the survivor of them. These items are set forth in the appendix, which sets forth the terms and dates of the various investments and renewals thereof, and is held to form part of this Special Case. They amount in value with interest as at the testator's death to £17,523, 10s. 8d. The testator's debts amounted to £408, 12s. 11d., and the net value of his estate, including the above sum of £17,523, 10s. 8d., was £52,392, 2s. 11d. 7. All the investments and deposits comprised in the appendix were made by the testator from funds belonging to himself. The securities and scrip were retained by him in his own possession and were found in his safe after his death, and during his life he himself uplifted and disposed of the revenue accruing from them. Certain share certificates standing in names of the deceased and one or other of his children, payable to either or the survivor, were also found in his safe after his death."

The *bequest of residue* was in the following terms—"(*Eighth*) On my death and after providing for payment of said annuity to my said wife should she survive me, I direct my trustees to hold the whole residue of my means and estate . . . and pay and apply the annual proceeds thereof, or such part thereof as my trustees may deem necessary, for the maintenance, education, and advancement of my children to and among such of my present children, Georgina Farmer, Robert Hannah Farmer, Alexander Farmer, George Honeyman Farmer, Hugh Anderson Farmer, Elizabeth Farmer, and James Farmer, and any child or children that may yet be born to me, that may then be in life, and the lawful issue of such of them as may have predeceased, such issue taking the share which their parent would have taken if in life, until the youngest of my children attains the age of twenty-one years complete; and (*Lastly*) on my youngest child attaining majority I direct my trustees to realise the whole of the residue of my means and estate, heritable and moveable, and pay and make over the same . . . to and among my said children Georgina Farmer, Robert Hannah Farmer, Alexander Farmer, George Honeyman Farmer, Hugh Anderson Farmer, Elizabeth Farmer, and James Farmer, and any child or children that may yet be born to me, equally among them, share and share alike, and the lawful issue of such of them as may have predeceased, such issue taking the share their parent would have taken if in life: Declaring that in the event of any of such respective issue not having reached the age of twenty-one years my trustees shall in that event hold the share of residue falling to such issue in trust for them till each of them respectively attain the age of twenty-one years, when the respective shares shall be paid, but the annual proceeds thereof shall be paid to them during their respective pupillarities and minorities: And with regard to such of the foregoing provisions, or any provision that may be made by me in any codicils hereto, as are in favour of or may fall to females, the same shall be purely alimentary and exclusive of the *jus mariti* and right of administration of any husband they may marry: And declaring that notwithstanding the postponement of the payment of the respective shares until the youngest of my said children shall attain majority, the same shall be held to have become at my death vested interests in their persons or in the persons of the lawful issue of such of my children as may have predeceased: And further declaring that notwithstanding the postponement of the payment of the respective shares as aforesaid to my said children, my trustees shall have full power to advance if they see fit (of which they are to be the sole judges) such sum or sums out of the capital of my estate to assist any one or more of my children in learning any business, trade, or profession, or in setting them up in any business or profession, or in providing any of my daughters with a marriage outfit or portion, which sum or sums shall form a proper charge against and be deducted from the share of residue falling to the said child or children to whom such advance shall be made."

Among the *powers* conferred upon the trustees to enable them to carry out the purposes of the settlement was power "without incurring any responsibility to retain unrealised and unaltered for such period as they may see fit any investments, securities, or property that may be held by me at the date of my death or any part thereof."

The *investments* enumerated in the appendix to the case consisted of sums in bank on current account or deposit-receipt, loans to the Glasgow Lunacy District Board, the Trustees of the Clyde Navigation, the Corporation of the City of Glasgow, and the Govan Combination Parish Council, and sums in bonds and dispositions in security over heritage. It was admitted that the sums in bank on current account and deposit-receipt were carried by the general settlement. Some of the other investments had been made before—others after—the dates of the settlement and codicils, and since those dates one or more of the investments had been renewed.

For the second and third parties the following *contentions* were stated in the

Case:—"10. The second parties maintain (1) that the documents comprised in the appendix are not testamentary writings, nor by law sufficient in themselves to constitute special legacies or donations in favour of the third party; that the testator did not donate to the third party the sums therein contained either *inter vivos* or *mortis causa*, and that if he did they were revoked by the trust-disposition and settlement; (2) that if the said documents or any of them operate as special gifts to the third party, the terms of the trust-disposition and settlement put her to her election between them, or such of them as may be held to fall to her, and her testamentary provisions; (3) that the second parties are entitled to take both legitim from the items set out in the appendix and their testamentary provisions. 11. The third party maintains (1) that the special destinations in her favour contained in the documents comprised in the appendix were not evacuated by the trust-disposition and settlement and codicils, but have testamentary effect and fall to be read along with the formal trust-disposition and settlement and codicils; (2) that she is not put to her election between the investments specially destined to her, or any of them, and the provisions in her favour contained in the trust-disposition and settlement and codicils; and (3) that the second parties are not entitled to take both legitim from the items set out in the appendix and the provisions in their favour contained in the trust-disposition and settlement and codicils."

The *questions of law* as amended were, *inter alia*—"1. (*a*) Do the investments . . . enumerated in the appendix, or any and, if so, which of them, belong to the third party in virtue of the special destinations attached to them; or (*b*) do they, or any and, if so, which of them, form part of the trust estate to be administered by the first parties? 4. In the event of question 1 (*a*) being answered in the affirmative, are the second parties entitled to take the provisions in their favour contained in the trust-disposition and settlement and codicils, and at the same time to claim legitim out of the said . . . investments? 5. (*a*) If question 1 (*a*) is answered in the affirmative, and the third party takes the said investments . . . or any of them, are the said investments . . . liable to contribute their share of the second parties' claim for legitim so far as such investments . . . fall to be computed in ascertaining the amount of the legitim fund, or (*b*) does legitim fall to be paid *primo loco* out of the residue of the estate?"

Argued for the second parties—The trust-disposition and the special destinations were not one settlement. The testator had divided his estate into parts, one of which he dealt with by the trust-disposition. That which he there called residue was not residue. Residue was the remainder of a whole estate, whereas the residue here so called was merely the overplus of one portion. The bequest was therefore not residuary, but a special legacy. Those parts of the estate which were conveyed by special destinations were subject to legitim. The children were entitled to legitim therefrom without sacrificing their conventional provisions under the settlement and codicils. Assuming, however, that the children must elect between legitim and the bequests to them, the effect of electing legitim would be that each investment specially destined must bear the proportion of legitim applicable thereto—*Howden*, 1821, 1 S. 16; *Collier* v. *Collier*, July 6, 1833, F.C.; *Dow* v. *Beith*, 1856, 18 D. 820; *Hood's Executors* v. *Hood's Executors*, 1869, 7 Macph. 774, 6 S.L.R. 503.

Argued for the third party—Legitim as well as testamentary provisions could not be payable to the second parties. They must approbate or reprobate the scheme of settlement constituted by the special destinations and the trust-disposition. The deeds must be treated as one settlement—*Breadalbane's Trustees* v. *Duke and Duchess of Buckingham*, 1840, 2 D. 731, at p. 741; *Black* v. *Watson*, 1841, 3 D. 522; *Crum Ewing's Trustees* v. *Bayly's Trustees*, 1910 S.C. 484, at p. 489, 47 S.L.R. 423 (1911 S.C. (H.L.) 18, 48 S.L.R. 401). That principle was not in conflict with the authorities cited for the second parties—*White* v. *Finlay*, 1861, 24 D. 38, *per* Lord Benholme, at p. 44. In terms and in substance the bequest to the children was a bequest of residue. Legitim was payable *primo loco* out of residue. Residue was what remained after payment of debts, including legitim—*Tait's Trustees* v. *Lees*, 1886, 13 R. 1104, 23 S.L.R. 782. The funds specially destined were on the same footing as special legacies and were payable from dead's part—*Trotter* v. *Rochead*, 1681, M. 2375, at 2376.

LORD DUNDAS—[*After stating his opinion that the trust-disposition and settlement did not revoke the destinations*]—The fourth question now stands—"Are the second parties entitled to take the provisions in their favour contained in the settlement and codicils and at the same time to claim legitim out of the said . . . investments?" I think that question must be answered in the negative. If the children elect to take legitim and so disturb the general scheme or design of the testator, I do not think they can claim their conventional provisions as well as their legitim. The cases of *Breadalbane's Trustees* and *Black* v. *Watson*, cited to us, seem to make that very clear. I think it is idle to argue, as Mr Dunbar attempted to do, that what is called the residue in this settlement is really in substance and effect nothing but a special legacy and not truly residue at all. Accordingly it seems to me that if the children elect to claim their legitim they must abandon the residue.

The fifth question is—"If question 1 (*a*) is answered in the affirmative, and the third party takes the said investments, or any of them, (*a*) are the said investments . . . liable to contribute their share of the second parties' claim for legitim so far as such investments . . . fall to be computed in ascertaining the amount of the legitim fund; or (*b*) does legitim fall to be paid *primo loco* out of the residue of the testate?" It seems to me that the first of these alternatives must be answered in the negative, and the second in the affirmative. The subjects

of all the special destinations to which I have referred must, it is true, be taken into account in assessing the amount of the legitim fund, which depends not upon the testator's testamentary dispositions but upon the amount of goods—the *bona*—which he has to dispose of at the time of his death. But the question remains as regards liability to pay between the widow on the one hand and the residue on the other. Here it is admitted that there is ample residue to pay the amount of the legitim if claimed, and that being so, it seems to me clear that the widow is entitled to relief as against the residue. I think the case to which we were referred — *Tait's Trustees* v. *Lees, &c.* — throws a good deal of light on this matter. We should therefore answer the branches of the question in the manner I have proposed.

LORD MACKENZIE — [*After stating his opinion that the trust-disposition and settlement did not revoke the destinations*] —With regard to the only other matter to which I think it necessary to refer, it was maintained to us for the second parties that the proper way to regard the special destinations and the general settlement was to look upon them as putting the different parts of the testator's estate into two water-tight compartments, and that no regard was to be had to the estate regulated by the special destinations when we are considering the rights of the children as in a question of legitim. It appears to me that the cases of *Breadalbane* and *Black* v. *Watson*, to which we were referred, are exactly applicable to the present case. I regard the investments made by the testator and his general settlement as parts of a general scheme to regulate the disposition of his estate on his death. There is one passage in the opinion of Lord Moncreiff in the case of *Black* v. *Watson* which I think applies—"There is no doubt of the principle that all a testator's deeds are to be taken as one settlement. But the question is, to what effects? It is clear that it is so in construing them to discover the true intention. It is clear also that it is so in this question of approbate and reprobate generally, and that if the party by making a claim at law which is adverse to the general design of the testator, and thereby his intention in the whole is deranged, that party cannot also take a special benefit given in any part of the deeds."

Accordingly the second parties will be put to their election as in a question between their legal and their conventional provisions. If they elect to claim legitim, then I think it is settled by the case of *Tait's Trustees* that the order of preference will be as stated in Lord M'Laren's work on Wills, vol. i, p. 588—"One question of abatement of general importance (amongst a multitude of cases which are circumstantial) has been decided, viz., that where the deficiency of the testamentary estate results from the election of a widow or child in favour of legal claims the order of abatement is unaltered, the order of preference being, 1st, the specific legacies, 2ndly, general legacies, and lastly, the residue." Accordingly the children being residuary legatees under the settlement it does not seem to me that they can claim any part of their legitim at the expense of the widow who is the beneficiary in the special destinations.

LORD CULLEN—I concur. I think the residue clause of the testator's settlement does not constitute a special legacy within the meaning that Mr Dunbar attached to these words. The settlement in its conception is a universal one, and the clause of residue is a general clause. In these circumstances it appears to be in accordance with the authorities cited to us that the legitim claim lies primarily against the residue.

The Court found, in answer to the foregoing questions of law, 1 (*a*) that all the investments enumerated in the appendix to the case belonged to the third party in virtue of the special destinations; (*b*) that none of these investments formed part of the trust estate to be administered by the first parties; and answered questions 4 and 5 (*a*) in the negative and 5 (*b*) in the affirmative.

Counsel for First and Third Parties—A. O. M. Mackenzie, K.C.—D. Jamieson. Agents—Hyslop & Shaw, W.S.

Counsel for Second Parties—Hon. W. Watson, K.C.—Dunbar. Agents—Drummond & Reid, W.S.

Thursday, March 1.

FIRST DIVISION.

BATTYE'S TRUSTEES *v.* BATTYE AND OTHERS.

Succession—Foreign—Marriage Contract—Wife's "Own Heirs, Executors, and Assignees"—Construction—Lex domicilii—Lex loci actus.

By antenuptial contract of marriage between a domiciled Englishman and a domiciled Scotswoman it was, *inter alia*, provided that the funds settled by the wife should, in the event, which happened, of their being no issue of the marriage, belong to her "own heirs, executors, and assignees." The contract, which was prepared by Scottish agents in Scotland, was in Scottish form; the funds settled by the wife were in part secured over Scottish heritage; the *jus mariti* and right of administration of the husband were excluded and the funds conveyed not to be affectable by the diligence of his creditors; the provisions in favour of the issue of the marriage were declared to be in full satisfaction of legitim. The contract also contained a clause of consent to registration for preservation and execution. The wife died domiciled in England. *Held*, in a special case, that