defenders' 3rd plea-in-law is sound, with the result that they should be assoilzied on the ground that no relevant case has been averred against them.

LORD DUNDAS—I am entirely of the same opinion. I think the learned Sheriff-Substitute went wrong in allowing parole proof. I do not find on this record any relevant averment by the pursuer of acquiescence in or *rei interventus* following upon the verbal agreement to modify this decree. In the case of *Kirkpatrick* v. *Allanshaw Coal Company*, 8 R. 327, 18 S.L.R. 209, Lord President Inglis said—"The acquiescence or *rei interventus* which is necessary to fortify that"—by "that" he meant a verbal variation of an important clause in a formal written contract—"must be something done which is inconsistent with the terms of the written contract." As the Lord Justice-Clerk has pointed out, there is nothing of that sort here.

LORD SALVESEN and LORD GUTHRIE concurred.

The Court recalled the interlocutor of the Sheriff-Substitute and assoilzied the defenders.

Counsel for the Pursuer and Respondent—Wark. Agents—Laing & Motherwell, W.S.

Counsel for the Defenders and Appellants—Maclaren—Burnet. Agent—James G. Bryson, Solicitor.

Saturday, January 25.

FIRST DIVISION.

WOODARD'S JUDICIAL FACTOR *v.* WOODARD.

Succession — Testament — Construction — Heritage—Titles to Land Consolidation (Scotland) Act 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 20.

A testator left a last will and testament, in which after bequeathing two legacies of money he directed the "remainder to be invested as my trustees may direct and the interest paid to my son." He thereafter appointed two trustees and directed "the principal sum invested for my son to remain until his children reach the age of twenty-one. In the event of no children the principal sum to be disposed of to charities as my trustees may think best." The testator left sufficient cash to meet the legacies, and he also left other moveable estate. He also left a dwelling-house in which he and his son had resided up to his death. *Held* that the testator's last will and testament did not carry the house referred to, and that his son as his heir in heritage was entitled to it.

Robert Cockburn Millar, C.A., judicial factor on the estate of the deceased Charles John Woodard, *first party*, and Frank Robert Woodard, only child of Charles John Woodard, *second party*, brought a Special Case to determine whether the last will and testament of Charles John Woodard applied to heritable estate left by him.

Charles John Woodard died on 6th August 1918 leaving a holograph will in the following terms:—"89 *Willowbrae Avenue, Edinburgh*, 14/6/18.—This is my last will and testament. I request that—One hundred pounds to my step-sister Mrs Hunter of West St., Wallsend-on-Tyne, be paid. One hundred pounds to my daughter-in-law Mrs F. Woodard be paid. Remainder to be invested as my trustees may direct, and the interest paid to my son, F. R. Woodard. I appoint as my trustees Mr George Gray and Mr George Tod, of Currie & Co., Limited, to whom shall be given twenty pounds (£20) each for their services. The principal sum invested for my son to remain until his children reach the age of twenty-one. In the event of no children the principal sum to be disposed of to charities as my trustees may think best.—C. J. WOODARD. Mary Dickson (*witness*), clerkess, 11 Forth St., Edinburgh. Bessie Cross (*witness*), book-keeper, 28 Barony St., Edinburgh."

The trustees nominated in the will having declined to accept office Robert Cockburn Millar, C.A., Edinburgh, was on 13th September 1918 appointed judicial factor on the estate of the testator.

The Special Case set forth—"1. [The testator's] wife predeceased him. He was survived by the second party, [who] is of full age and married, but has no issue. The second party resided with his father, and still resides at 89 Willowbrae Avenue aforesaid. . . . 3. The estate left by the said Charles John Woodard belonging to him at his death was as follows:—(1) *Heritage.*—His house 89 Willowbrae Avenue, Edinburgh, which he purchased some years ago for £655, valued at, say, £600, but which at deceased's death was burdened with a bond for £400. (2) *Moveables.*—(*a*) Furniture, &c., in his said house, valued at £174, 17s. 6d. (*b*) Policy with the Lancashire Insurance Company for £300, with bonuses £29, 18s. 3d. (*c*) 200 ordinary shares of £5 each, fully paid, in Messrs Currie & Company, Limited, of the nominal or face value of £1000. (*d*) Cash in hands of Messrs Currie & Company, Limited, £723, 13s. 10d. (*e*) Small sums due to deceased, £12, 0s. 4d. (*f*) One share of £1, fully paid, in the Hanover Billiard Rooms Limited, 19 Rose Street, Edinburgh, say £1. The amount of debts due by the deceased was trifling."

The *questions of law* were—"1. Does the said last will and testament of the deceased Charles John Woodard carry his house, 89 Willowbrae Avenue, Edinburgh, and is the first party, as judicial factor foresaid, entitled to hold the same for the purposes expressed in the said last will and testament? or 2, Has the said house devolved on the second party to this case as heir of the said Charles John Woodard, unaffected by the said last will and testament?"

Argued for the first party—A will could carry heritage if the words used showed with reasonable certainty that the testator intended it to apply to heritage—Titles to Land Consolidation (Scotland) Act 1868 (31

and 32 Vict. cap. 101), section 20. Here the word "remainder" was used. That was a relative term, and the remainder of the whole estate was what was intended to be referred to. The following authorities were referred to:—*Smith's Executors* v. *Smith*, 1918, 55 S.L.R. 716; *Crowe* v. *Cooke*, 1908 S.C. 1178, *per* Lord Kinnear at p. 1184, 45 S.L.R. 904; *Jack's Executor* v. *Downie*, 1908 S.C. 718, *per* Lord Kinnear at p. 721, and Lord M'Laren at p. 720, 45 S.L.R. 545; *Urquhart* v. *Dewar*, 1879, 6 R. 1026, 16 S.L.R. 602; *Copland's Executors* v. *Milne*, 1908 S.C. 426, 45 S.L.R. 314; M'Laren, Wills and Succession, vol. i, p. 332.

Argued for the second party—The terms of the will indicated that the word "remainder" referred to the cash left by the testator, or, if not the cash, to his moveable estate. The legacies were payable out of cash, and the remainder was what was left after paying the legacies. The principal of the remainder was to be "invested," and there was no direction or power to realise heritage. Interest and not rent was referred to. In any event the provisions of the Act of 1868 were a statutory relaxation of the common law, and it was for the first party to show that he came within its provisions. *Jack's* case, *Copland's* case, and *Smith's* case were distinguishable. So was *Crowe's* case, for in it there was not enough moveable estate to meet the legacies. Here the result might have been different if the legacies could not have been paid out of the moveable estate. *Bryden* v. *Cormack*, 1913 S.C. 209, *per* Lord Dundas at p. 212, 50 S.L.R. 76, was referred to.

LORD PRESIDENT—We have before us here a last will and testament which in the view of the average layman was a deed calculated to convey and deal with moveable property, and moveable property only. But we are invited to answer this question, Does this particular last will and testament purport to convey heritage? In other words, does it convey the dwelling-house in which the testator and his only son resided at the time of his death. This dwelling-house is the family home in which the son still resides. In legal phraseology the question is, as Lord M'Laren put it in the case of *Crowe* v. *Cook*, 1908 S.C. 1178, at p. 1183, 45 S.L.R. 904—Have we in this will "evidence of an intention to dispose of a remainder which includes heritable estate," or otherwise, Is there in this deed "evidence of intention to bring the heritable estate within the scope of the will?"

To these questions so put I unhesitatingly answer No. The testator directs his trustees to pay a legacy of £100 to one person and a legacy of £100 to another person, and then proceeds to deal with the "remainder" of his estate, which he directs to be invested as his trustees may direct. That is a direction to invest money, and I think it is out of the question to read it as a direction to sell the family home and invest the small proceeds which might be realised as the result of the sale after the amount of the bond had been paid.

"Remainder" is, undoubtedly, a flexible term, and its proper construction depends upon the context. As Lord M'Laren observed in the case I have mentioned, "The word remainder is ambiguous, or at least incomplete, because it means the result of subtraction, or what is left over out of property which the testator has announced an intention of dealing with." Now the only property which the testator here has announced an intention to deal with is money. The context here is the two pecuniary legacies. It appears to me that the reasoning of Lord M'Laren in *Crowe's* case is applicable in its terms to this case. We have to determine from what thing the remainder is to be subtracted. That thing I pronounce to be the testator's moveable property. It is unnecessary to decide whether it is the cash, as I think it is, or the whole moveable estate of the testator. I do not think the testator could possibly have intended that the family home should be sold and the probably trifling proceeds be invested. To attribute such an intention to him in the absence of express directions to that effect would be, I think, ridiculous.

I move your Lordships that we should answer the first question in the negative and the second question in the affirmative.

LORD MACKENZIE—I agree that the question should be answered as your Lordship proposes. We are not asked in this case to decide how much is covered by the term "remainder" used in the will of the testator. All that we are asked to decide is whether "remainder" covers the house 89 Willowbrae Avenue, in which the testator lived, and in which his son and his son's wife lived with him. I am unable to find in the will sufficient evidence of an intention to include in the term "remainder," as used by this testator in this will, heritable estate. A remainder can only be arrived at by a process of subtraction, and when one finds that the testator had an unusual amount of cash to dispose of, when one sees that he deals first of all with what is to be paid over in pounds, I think one starts with the idea that what was in his mind when he was writing this will and used the term "remainder," was something which was to be subtracted from, and was *ejusdem generis* with, the money with which he had been dealing.

I think that confirmation of that opinion is to be derived from the fact that he directs the remainder to be invested. You cannot invest a house; you require to go through the preliminary process of selling it; and one would naturally expect that if the testator had intended the house in which he and his son were living to be sold he would have said so. There is, further, the direction to pay interest.

Accordingly I am of opinion that on the special terms of this will the house in question is not included in the word "remainder" as used.

LORD SKERRINGTON—Every person who claims that a particular asset is carried by a will is under a duty to make that reasonably clear. If a testator has used technical language, as by appointing an executor, it

is not necessary to show a specific intention to deal with the whole personal estate. Or again, if the testator has used a word such as "estate," which *prima facie* includes everything, that may in itself be enough. In other cases, like the present one, where no technical or general words have been used, the pursuer of the issue must show that the testator intended to dispose of the particular asset which is claimed. We do not require, because we are not asked, to decide whether this will carries corporeal moveables, such as furniture. Is there anything either in the language of the will or in the circumstances of the testator or of his estate which ought to lead us to the conclusion that when he bequeathed two pecuniary legacies of £100 each, and directed "the remainder to be invested," he intended that the house in which he and his son resided should be sold and the proceeds invested. If a satisfactory indication of such an intention can be discovered, then the 20th section of the Act of 1868 entitles, and therefore requires, us to give effect to it. This enactment, however, did not create any presumption that a testator intended to dispose of his heritable estate. It merely abolished a technical impediment which, according to the common law as explained by Erskine (iii, 8, 20) prevented the will of a testator, however clearly expressed, from taking effect in the case of heritable estate. I can discover no indication of an intention that the house should be sold and the proceeds invested. I therefore answer the first question in the negative and the second in the affirmative.

LORD CULLEN—I agree. The testator may possibly have intended the word "remainder" to include his heritable estate. But if so I think he has not so expressed himself as sufficiently to manifest such an intention. On the terms of the will, the word is, I think, sufficiently explained as relating either to the moveable estate as a whole or to the money part of it in particular) and I do not think there is any good ground for extending its meaning further by necessary implication.

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

Counsel for the First Party—R. C. Henderson. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Second Party—D. R. Scott. Agents—Hamilton, Kinnear, & Beatson, W.S.

HOUSE OF LORDS.

Friday, January 24.

(Before Lord Buckmaster, Lord Finlay, Lord Dunedin, and Lord Atkinson.)

SELLAR *v.* HIGHLAND RAILWAY COMPANY.

(In the Court of Session, May 16, 1918, 55 S.L.R. 593, and July 19, 1918, 55 S.L.R. 752.)

Arbitration — Arbiter — Disqualification — Arbiter Holding Stock in Incorporated Company Nominating Him.

Arbiters having disagreed devolved the reference upon the oversman, who issued proposed findings. One of the parties then discovered that the arbiter nominated by the other party, a railway company, held £3700 ordinary stock therein, and intimated that in consequence he considered that the arbiter was disqualified from acting and that he would not hold himself bound by the award. In an action of reduction of the decreet-arbitral *held* that the arbiter in question was disqualified, and that the decreet-arbitral was in consequence reducible at the instance of the other party to the reference.

Dimes v. *Proprietors of the Grand Junction Canal*, 1852, 3 Cl. H.L. 759, *followed.*

Contract — Arbitration — Implied Term — Damages — Obligation of Company Appointing Arbiter to Satisfy Themselves that Arbiter not Disqualified — Expenses of Reference — Consequential Damages — Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 19), *sec.* 24.

In an arbitration the arbiter appointed by one of the parties, a railway company, held stock in that company; the other party reduced the decreet-arbitral by the oversman on the ground that the arbiter referred to was disqualified, and claimed the expenses incurred by him in the abortive reference. *Held* (*rev.* judgment of the First Division) that he was not entitled to recover his expenses in respect that there was no contract between the parties from which it could be inferred that the other party was bound to appoint an arbiter against whom no objection could be taken; that there was no statutory duty imposed on the railway company to examine their registers to see that the arbiter appointed was not a shareholder; and that, even assuming there had been a breach of duty, the damages claimed were too remote.

The case is reported *ante ut supra.*

The defenders, the Highland Railway Company, appealed to the House of Lords.

LORD BUCKMASTER—So long ago as 1852, in the case of *Dimes* v. *Proprietors of the Grand Junction Canal*, 3 Cl. H.L. 759, your Lordships decided that the possession by Lord Cottenham, who was then the Lord Chancellor, of a certain shareholding in the