regard to the interpretation of the will of the late Mr Muirhead, who died so long ago as 1865. His widow repudiated the provisions of his settlement immediately after his death, but parties proceeded with the administration of the estate on the assumption that the death of the widow was the time when the beneficiaries under the will acquired a vested interest in their provisions, and when it behoved that the estate should be realised for distribution. Shortly, however, before the raising of the action some of those interested took up a different view, and the point now to be decided is, what is the true import of the will. Had the widow accepted of the provisions which were left to her no controversy could have arisen. The words used by the testator are plain enough. She was to have her annuity, and until her death the rights of other beneficiaries could not vest, because in every case the death of the widow was specified as the time at which the rights conferred by the settlement were to take effect. The interest of those who predeceased either fell into residue, or transmitted to those who had been conditionally instituted. But the widow repudiated her testamentary provisions, betaking herself to her legal rights, and the consequence was that her annuity ceased, and the only impediment to vesting which was apparently in view of the testator was then removed. What is now to be decided is, whether the death of the widow, which was in the view of the testator, or the lapse of her annuity by her repudiation of her conventional provisions, was to be the period of vesting. The question is one of difficulty, and but for the decisions of the Court in the cases of *Annandale* and *Alexander's Trustees*, to which reference has been made, I should have found it difficult to adopt the latter period as the date of vesting. It is always more or less unsafe to depart from the words of a will where these are plain. The risk which is encountered is the making of a new will in place of merely interpreting the words of the testator as we find them in the deed. Whatever conclusion we adopt we must be sure that it is the will of the testator in the one case as well as in the other. Reading the will as a whole, I think the inference is that the death of the widow was specified only because that was the period at which, according to the anticipation of the testator, her annuity would cease. This, I think, is shown by the fourth purpose of the trust-deed, whereby his trustees are "hereby directed to draw the revenue of my estates not above disposed of during the life of my said wife, and to accumulate the revenue, after paying my wife's said annuity, with the principal." Thus the payment of the annuity was assumed to be coincident in point of duration with the life of the widow, and but for this consideration her death, so far as we can see, would not have been chosen as the period at which the rights of the other beneficiaries were to become effectual. An earlier period—the lapsing of the annuity—would have been chosen, and accordingly it is only reasonable, I think, to conclude that the termination of the annuity was the end of the time during which the vesting was to be in suspense. This is certainly a reasonable interpretation, and as the presumption is for vesting at the earliest period compatible with the purposes of the trust, and as there are decisions the authority of which has never been questioned, to the effect that the repudiation is the same in its consequences upon the other trust arrangements as the death of the beneficiary would have been, my opinion has come to be that the date of the repudiation is here the date of vesting.

The interlocutor of the Lord Ordinary ought to be altered so that effect may be given to the views of the Court, and the cause remitted to the Lord Ordinary that such order as may be necessary for carrying out the testamentary arrangements of the trust consistently with what has now been decided may be pronounced.

Lord Rutherfurd Clark—I think we must follow the decisions.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the reclaiming-note for the claimant James Basil Crellin against Lord Fraser's interlocutor of 10th June last, Recal the said interlocutor: Find that the right to the provisions made by the truster Charles Muirhead in his trust-disposition and settlement vested in the beneficiaries on his death; and with this finding, remit the cause to the Lord Ordinary with instructions to proceed therein as accords: Find all the claimants entitled to payment out of the fund *in medio* of the expenses incurred by them respectively as between agent and client," &c.

Counsel for James B. Crellin—Gloag—Low. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Counsel for James Muirhead—Asher—Watt. Agent—Robert Denholm, S.S.C.

Counsel for the Judicial Factor and for Charles Muirhead and Others—Sol.-Gen. Robertson—Blair. Agent—George M. Wood, S.S.C.

Saturday, December 24.

FIRST DIVISION.

MINTY AND OTHERS, PETITIONERS

Succession—Trust-Deed—Presumption of Life Limitation (Scotland) Act 1881 (44 *and* 45 *Vict. cap.* 47), *secs.* 4 *and* 8.

A testator directed his trustees to pay the revenue of his whole estate to his son and daughter, with "full power to pay such part of the principal sums or stock of my estate to my son and daughter at any time my said trustees may think proper, ... but my said son and daughter shall have no right to demand payment from my said trustees of the said principal sum and stock of my estate, or any part thereof, it being my wish and intention that my said trustees shall have full and discretionary power either to pay the whole or part of my estate to them, or to withhold the same from them altogether." There was then a declaration that in case of the death of the son

and the daughter or either of them, before receiving payment, leaving issue, the trustees should pay one-half of the whole principal remaining unapplied to the issue of the son, and one-half to the issue of the daughter, or in the event of only one of them leaving issue, that they should pay the whole to such issue.

The testator died in 1853, survived by his son and daughter. The son emigrated in 1850, and disappeared in 1853. The daughter's representatives presented a petition, under the Presumption of Life Limitation Act, 1881, for authority to make up a title to the son's share. *Held* that under the deed the children of the testator had no right to the portions of the estate until they were actually paid to them; that the effect of the son's death was not to open to the petitioners a right of succession to him, but to open to them a right of succession under the will, and that the petition was therefore incompetent.

This was a petition under the Presumption of Life Limitation (Scotland) Act, 1881, for authority to make up a title to the moveable estate of the late Gordon Ellis junior.

By his trust-disposition and settlement Gordon Ellis senior, who died in February 1853, conveyed to trustees his heritable and moveable estate of the value of about £650, and directed his trustees after his death to turn the whole of his heritable and moveable estate, or such part as they might consider advisable, into cash, and conferred on them power of sale and of reinvestment. He then directed his trustees to pay over to his wife the income, with power to encroach upon the capital if necessary, for her comfortable maintenance. He also provided—"Upon the death of my said spouse I appoint my said trustees and their foresaids to pay the whole annual rents, interest, and revenue which they may receive from my said whole estate, or the remainder thereof, to Gordon Ellis my son, and Margaret Ellis my daughter, and that yearly or half-yearly, as they receive the same, and they shall have full power to pay such part of the principal sums or stock of my estate to my said son and daughter, at any time my said trustees and their foresaids may think proper, my said trustees having full power either to withhold payment to my said son and daughter of any part of the principal or stock of my said estate, or they may pay the same to them equally by one payment, or by various payments, as to them may seem proper; but my said son and daughter shall have no right to demand payment from my said trustees and their foresaids of the said principal sum or stock of my estate, or any part thereof, it being my wish and intention that my said trustees and their foresaids shall have full and discretionary power either to pay the whole or part of my said estate to my said son and daughter, or to withhold the same from them altogether: Declaring further, that in case of the death of my said son and daughter, or either of them, before receiving payment of the whole or any part of the principal sums or stock of my estate, and leaving lawful issue, my said trustees and their foresaids shall in that event pay the whole principal sums or stock of my estate remaining unapplied as aforesaid, if any, one-half thereof to the lawful issue of my said son, and the other half to the lawful issue of my said daughter, equally among them, or in the event of only one of my said son and daughter leaving lawful issue, then to pay the whole to such issue equally among them."

Gordon Ellis senior was survived by his wife Margaret Rough or Ellis, and by his daughter Margaret Ellis, afterwards wife of James Minty, Aberdeen. Mrs Ellis enjoyed, in terms of the trust-disposition and settlement, the liferent of the trust-estate down to the date of her death on 12th June 1865. Margaret Ellis or Minty died on 22nd November 1874, leaving issue George Cumming Minty, William Minty, and Margaret Rough Minty or Mowat, who were the petitioners. They averred that Gordon Ellis junior, son of the deceased Gordon Ellis, left Scotland for Melbourne, Australia, in August or September 1850, his age at that time being twenty-one. He was then unmarried. They stated that the last letter, the date of which was unknown, had been received from him by Mrs Minty in 1853, some time subsequent to the date of her father's death.

The petitioners further averred—"Under the settlement of the said Gordon Ellis, the said Gordon Ellis junior became entitled to one-half the residue of the said Gordon Ellis's trust-estate, subject to his mother's liferent, and subject also to certain discretionary powers conferred upon his trustees by the said Gordon Ellis. By the Presumption of Life Limitation (Scotland) Act, 1881, section 4, it is provided that 'in the case of any person who has been absent from Scotland, or who has disappeared for a period of fourteen years or upwards, and who has not been heard of for fourteen years, and who at the time of his leaving or disappearance was possessed of or entitled to moveable estate in Scotland, or who has since become entitled to moveable estate there, it shall be competent to any person entitled to succeed to the said absent person in such moveable estate to present a petition to the Court setting forth the said facts, and . . . the Court may grant authority to the petitioner to make up a title to receive and discharge, possess and enjoy, sell or dispose of the said moveable estate in the same manner as if the said absent person were dead.' By the said Act it is also provided, section 8, that, 'for the purposes of this Act, in all cases where a person has left Scotland or has disappeared, and where no presumption arises from the facts that he died at any definite date, he shall be presumed to have died on the day which will complete a period of seven years from the time of his last being heard of at or after such leaving or disappearance.' In the circumstances above set forth, the said Gordon Ellis junior has been absent from Scotland for a period of fourteen years and upwards, and has not been heard of for fourteen years, and there being no presumption arising from the facts that he died at any definite date, he is by virtue of the 8th section of The Presumption of Life Limitation (Scotland) Act 1881 to be presumed to have died at some date in the year 1860, and not later than 31st December 1860, being the date which will complete a period of seven years from the time of his last being heard of after he so left Scotland. At the date when he is so presumed to have died his next-

of-kin was his sister, the now deceased Margaret Ellis or Minty, who is represented by the petitioners, who are her whole children. Assuming the said Gordon Ellis junior to have died in the year 1860, the petitioners are entitled to succeed to him in his share of the estate of the said Gordon Ellis, either as representing his next-of-kin, being his sister the said Margaret Ellis or Minty, or as themselves substituted or conditionally instituted to him under the settlement of the said Gordon Ellis."

The trustees lodged answers, and stated—"The statements in the petition, other than those regarding the absence and disappearance of Gordon Ellis junior, and other than the statement that, subject to his mother's liferent and certain powers conferred upon the trustees, he became entitled to one-half of the residue of the estate, are admitted. The facts stated regarding the said Gordon Ellis junior are not known to or admitted by the respondents. The trust-disposition and settlement is referred to for its terms. The respondents submit that the said Gordon Ellis junior, if he is presumed to have died not later than 31st December 1860, never became entitled to any part of the trust-estate, and that therefore the petition is incompetent."

Argued for the petitioners—There was no doubt that Gordon Ellis junior survived his father. His right to the property therefore vested. The petitioners were included under the last clause of the will. The statute was remedial in character, and was intended to give relief in circumstances like the present. If the statute were not held applicable, the petitioners could not obtain the property, there being no presumption at common law that the absentee was dead.

Counsel for the respondents was not called upon.

At advising—

LORD PRESIDENT—It may perhaps be regretted that the Act of 1881 was not so framed as to cover the present case. But the only question is as to whether the Act applies. I am of opinion that there is no room for doubt. The testator's directions to his trustees were to pay such portions of his estate to his son and daughter as they might think fit. The whole thing was left to the discretion of the trustees, and until they actually paid the portions the children had no right to them. In short, it depended on the will of the trustees whether the children were to receive anything. What has happened is this—According to the presumption of the statute the son has disappeared long enough to make it applicable, and must be presumed to have died in 1860. The effect of his death is not to open to the petitioners a right of succession to him, but it opens to them a right of succession under the will, and they therefore take in their own right, not as coming in place of the absent man. Now, the section of the statute on which the petition proceeds only applies to the case of a person entitled to succeed to an absent man. I have come to the conclusion that the petition is incompetent for the reasons assigned in the answers. I think ways and means may be found for the petitioners obtaining what they desire in a different process.

LORD MURE and LORD ADAM concurred.

LORD SHAND was absent from illness.

The Court refused the petition.

Counsel for the Petitioners—H. Johnston. Agents—Hagart & Burn Murdoch, W.S.

Counsel for the Respondents—Law. Agents—Wallace & Guthrie, W.S.

COURT OF JUSTICIARY.

Monday, December 26.

GLASGOW CIRCUIT COURT.

(Before Lord M'Laren.)

H.M. ADVOCATE *v.* LYON.

Justiciary Cases—Criminal Procedure (Scotland) Act, 1887 (50 *and* 51 *Vict. cap.* 35), *secs.* 31 *and* 41—*Withdrawal of Plea.*

Held that the provisions of section 41 of the Criminal Procedure (Scotland) Act 1887, in regard to the withdrawal by the accused at the second diet of a plea of guilty, do not apply to a case where the procedure has been under section 31, and the accused has been remitted by the Sheriff to the High Court for sentence.

The Criminal Procedure (Scotland) Act 1887 (50 and 51 Vict. cap. 35) provides by section 31—"Where a person accused shall give written notice to the Crown agent through his own procurator that he desires to have his case at once disposed of, and declares his intention to plead guilty, it shall be lawful to serve such person with an indictment and a notice conform to Schedule L to appear at a diet not less than four clear days after such notice before the sheriff before whom under this Act he would be cited to a first diet, and it shall not be necessary to lodge or give notice of any list of witnesses or productions, other than productions to prove previous convictions, and at such diet the sheriff, if any plea of guilty is tendered which shall be accepted by the procurator-fiscal, shall deal with the case in like manner as cases are required to be dealt with under this Act where a person accused pleads guilty at a first diet: Provided always, that if the case is one suitable for punishment in the Sheriff Court, he shall forthwith pronounce sentence, and if the case is such as can only be tried in the High Court of Justiciary, or is of such an aggravated nature that the sheriff shall hold that the question of punishment should be disposed of by that Court, the sheriff shall by an interlocutor written on the record copy of the indictment conform to Schedule M appended to this Act, remit the accused to that Court for sentence, and such remit shall be a sufficient warrant to bring the accused person, without any further notice, before the High Court of Justiciary for sentence at any sitting at any place that may be convenient, as the Lord Advocate may order, and the original warrant of commitment of such person till liberated in due course of law shall remain in force until he is brought before the High Court of