be extended to reclaiming-notes of this kind, which must be lodged within six days of the interlocutor granting proof.

The pursuer argued—The statutory words "present a reclaiming-note" were very indefinite. The intention of the Act was fulfilled if one of the two things necessary in presenting a reclaiming-note were done timeously; these were lodging the principal note in the clerk's hands and boxing copies of the note to the Court. The six days expired in vacation, and on the first day it was possible to do so, viz., February 12, the note was boxed—*Henderson* v. *Henderson*, October 17, 1888, 16 R. 5; *Allan's Trustee* v. *Allan & Son*, October 23, 1891, 19 R. 15. These cases held that where it was impossible to do what was ordered by the statute a reasonable compliance was all that could be asked.

At advising—

LORD RUTHERFURD CLARK—I think this reclaiming-note is incompetent, and that the Act of Sederunt does not apply. The statute says that a reclaiming-note of this kind ought to be presented within six days, and I think it must be presented within that time.

LORD TRAYNER—I agree. I think that the provisions of the statute are imperative. I think that the boxing of the prints on the first day they could be boxed is not enough; there must be presentation of the reclaiming-note to the Court within six days.

LORD YOUNG—It seems to me not at all doubtful that in deciding this question, exactly the same considerations must weigh with the Court which had weight when the Court passed the Acts of Sederunt which regulated the way in which reclaiming-notes against judgments which might be reclaimed against in twenty-one days, or in ten days, should be lodged in vacation. I pointed out during the discussion that these Acts of Sederunt were founded upon considerations of good sense and expediency as to what should be done in such cases, and I thought that the same considerations were applicable to this case. No Act of Sederunt, moreover, regulating reclaiming-notes which must be presented within six days has been passed, and the only question therefore is whether a Division of the Court may not act upon the same considerations of good sense and expediency which actuated the Court in passing these Acts of Sederunt.

I think it would be standing out for matters of form for the Court not to act upon such considerations, and the result is that we refuse this reclaiming-note.

The LORD JUSTICE-CLERK was absent.

The Court dismissed the reclaiming-note as incompetent.

Counsel for the Reclaimer—Salvesen—Dewar. Agent—James Ross Smith, S.S.C.

Counsel for the Respondents—Dundas. Agents—Dundas & Wilson, C.S.

Friday, February 16.

SECOND DIVISION.

CLARK'S TRUSTEES *v.* CLARK.

Succession—Trust—Liferent with Power of Testing—Exercise of Power.

A truster directed his trustees to hold and apply, pay, and convey the residue of his estate for behoof of all his children and their respective issue equally, one-half of the shares falling to his sons to be paid to them on attaining the age of twenty-five, after his death, and the other half of the shares falling to sons to be held and applied, paid, and conveyed to and for their behoof in liferent, for their respective alimentary uses only, and to and for behoof of their respective children *per stirpes* in fee. He further provided "that in the event of any of my sons dying without leaving issue, it shall be competent to him to test upon the share of residue that may have been liferented by him, and that in favour of such person or persons, or for such uses and purposes, and in such way and manner, all as he may think fit."

A son, who survived the truster, and died aged thirty without issue, by his will, bequeathed certain legacies, and provided "the residue and remainder of my real and personal estate I give, devise, and bequeath unto my brothers equally," whom he appointed his executors.

Held that the will was a valid exercise of the power of testing conferred by the trust-disposition and settlement of his father.

Hyslop v. *Maxwell's Trustees*, February 11, 1834, 12 S. 413, *followed.*

James Clark, thread manufacturer and merchant in Paisley, died on 3rd August 1881, leaving a trust-disposition and settlement dated 17th August 1880, and recorded 28th July 1881. He was survived by six sons and two daughters. By his trust-disposition and settlement he disponed and made over his whole means and estate to certain trustees, and directed them to pay an annuity to his wife and sundry bequests —"and (lastly) with regard to the residue of my means and estate, I direct my trustees to hold and apply, pay and convey, the same to and for behoof of all my children equally and their respective issue as follows, viz., one-half of the shares falling to sons to be paid and conveyed on my death to such of them as shall then be twenty-five years of age, and to such of them as shall not then have attained that age, on their respectively attaining the age of twenty-five years; and the other half of the shares falling to sons and the whole of the shares falling to daughters to be held and applied, paid, and conveyed to and for their behoof in liferent, for their respective alimentary uses only, and to and for behoof of their respective children *per stirpes* in fee:... Declaring, with regard to the shares

of residue before directed to be held for behoof of my sons and daughters respectively in liferent, and their respective issue in fee, that in the event of any of my said children dying without leaving issue, or in the event of any of them dying leaving issue, but of such issue not surviving to take, in terms of the destination hereinbefore contained, then the share of the residue (whether original or as augmented by accretion) which may have been liferented by such child, shall devolve upon his or her surviving brothers and sisters, along with the issue of any brother or sister who may have deceased leaving issue, such issue always taking the share which their parent would have taken on survivance, but subject always such accretion, in as far as in favour of sons, to the extent of one-half thereof, and in as far as in favour of daughters to the whole extent thereof to the same liferent, and also to the same destination, declarations, and conditions in all respects as are herein contained with regard to the original shares of residue provided to them respectively in liferent, and their respective issue in fee." He also provided and declared "that in the event of any of my sons or daughters dying without leaving issue, or of any of them dying leaving issue, but of such issue not surviving to take in terms of the destination hereinbefore contained, it shall be competent to him or her to test upon the share of residue (whether original or as augmented by accretion) that may have been liferented by him or her, and that in favour of such person or persons, or for such uses and purposes, and in such way and manner, all as he or she may think proper."

One of the truster's sons James Alexander Clark died on 8th January 1893, aged thirty and unmarried. He was survived by two brothers and one sister, and by the children of two brothers and one sister who predeceased him. He left a holograph will dated 13th October 1892 and recorded 16th February 1893, whereby he provided thus—"And the residue and remainder of my real and personal estate I give, devise, and bequeath unto my brothers Kenneth Mackenzie Clark and Norman Clark equally, and I hereby appoint Kenneth Mackenzie Clark and Norman Clark, or the survivor of them, executors of this my will."

James Alexander Clark never received any portion of his father's estate into his hands, although he drew the interest of the share liferented by him, and it was not admitted that he knew the terms of his father's will. At the time of his death he was entitled to one-eighth part of the residue, one-half in fee and one-half in liferent.

Questions having arisen regarding the effect of the holograph will as a valid exercise of the power of testing contained in James Clark's trust-disposition and settlement, a special case was presented by (1) the trustee under James Clark's settlement, and (2) the executors under James Alexander Clark's holograph will, for the opinion of the Court on the following Questions—"(1) Are the first parties entitled to retain and administer, as trustees of the said James Clark, the portion of the residue of the estate of the said James Clark liferented by the said James Alexander Clark? or (2) Are the first parties bound to pay to the second parties the portion of the residue of the estate of the said James Clark liferented by the said James Alexander Clark?"

The first parties argued—The holograph will was not a proper exercise of the power of testing. James Alexander Clark could only test upon what was actually in his estate, but the share liferented by him never was in his father's settlement. The terms under which it was given were too indefinite and more general than had ever been recognised before—*Smith* v. *Milne*, June 6, 1826, 4 S. 679; *Dalgleish*, June 29, 1893, 20 R. 904; *Glendonwyn* v. *Gordon*, &c., May 19, 1873, 11 Macph. (H.L.) 33; *Whyte* v. *Murray*, November 16, 1888, 16 R. 95; *Bowie's Trustees* v. *Paterson*, July, 16, 1889, 16 R. 983. This case was not ruled by *Hyslop* v. *Maxwell's Trustees*, February 11, 1834, 12 R. 413, because in *Hyslop's* case there was no destination to children. It fell rather under the rule laid down in *Mackenzie* v. *Gillanders*, June 19, 1874, 1 R. 1050.

The second parties argued—The case of *Hyslop* v. *Maxwell's Trustees* had never been called in question, and was identical with the present in all material points. It was not necessary in exercising a power of testing which the testator possessed, to make mention of the deed which conferred the power—*Grierson* v. *Miller*, July 3, 1852, 14 D. 939. In a general settlement such as this, or in any deed, according to the law of Scotland, it must be presumed that a testator has exercised all the powers which he actually possessed, unless it be shown that his intention was otherwise—*Cameron* v. *Mackie*, August 29, 1833, 7 W. & S. 106.

At advising—

LORD YOUNG—The question which is raised in this case is, whether a will, although it in terms refers only to property of which the testator had the fee, may be read as including also other property of which he had the liferent with an absolute power of disposal of fee. That question is not now raised for the first time, for it was raised and determined in the affirmative in the case of *Hyslop* v. *Maxwell's Trustees*. The maker of the will which is here in question had, I understand, a large fortune of his own, part of it consisting of a share of his deceased father's estate, which he had permitted to remain in the hands of his father's trustees. With respect to another part of that estate, it was not his own, but he had the liferent of it, together with an absolute power to dispose of the capital. It is not disputed that the will which he left is applicable to that part of his father's estate of which he had the fee, although it remained in the hands of his father's trustees. But the contention is, that it is not applicable to the fee of the other part, of which he had the liferent with an absolute

power of disposal. I am unable to agree in that view. I think the case is indistinguishable from *Hyslop* v. *Maxwell's Trustees*, only that it appears to me to be a stronger and clearer case for the application of the rule there established. The circumstances here are altogether favourable to the inference of an intention on the part of the testator to dispose of the fee of the property of which he had the liferent with an absolute power of disposal, for it would be making a distinction not likely to occur to an ordinary testator to suppose that he understood that he was disposing of that part of his father's estate of which he had the fee, but not of that other part of which he had the liferent, but with an absolute power of disposing of the fee of it. That circumstance makes this case an exceedingly clear case for the application of the rule. We must of course be satisfied that the rule is in accordance with the true meaning of the will in the particular case, and if there is anything to hinder us from giving effect to the rule, of course it will not hold, but here I can find nothing, and therefore I apply the rule established in *Hyslop* v. *Maxwell's Trustees*, and give that effect to the will here which makes it carry the property of which the testator had the liferent with an absolute power of disposal. I am of opinion accordingly that we should answer the first question in the negative and the second in the affirmative.

LORD RUTHERFURD CLARK — I am of opinion that we must follow the rule of the case of *Hyslop* v. *Maxwell's Trustees*. I cannot distinguish the present from it. I have examined the case of *Mackenzie* v. *Gillanders*. I am satisfied that it was decided on special grounds, viz. (1) because of the form of the will, and (2) because of the peculiarity of the power.

LORD TRAYNER—I come to the same conclusion. I think this case cannot be distinguished in any material respect from the case of *Hyslop* v. *Maxwell*, the decision in which has never been overruled, but has, on the contrary, been referred to with approval in subsequent cases. I do not regard the decision in the case of *Mackenzie* as derogating from or competing with the authority of *Hyslop* v. *Maxwell*. *Mackenzie's* case was very special in its circumstances, and was decided in respect of specialties.

The LORD JUSTICE-CLERK was absent.

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

Counsel for the First Party—C. S. Dickson—Moffat. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Second Party—Salvesen—M'Lure. Agents—Drummond & Reid, S.S.C.

Friday, February 16.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

LORD ADVOCATE *v.* MORAY.

Superior and Vassal—Entry—Casualty—Composition—Relief—Implied Entry—Conveyancing (*Scotland*) *Act* 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4.

A, the heir in possession under a new entail of the lands of Abercairney, was impliedly entered with the superior in 1874 by the operation of the Conveyancing Act of that year. At this date A was not the heir *alioqui successurus* to the entailed lands, but no casualty was demanded from him until 1876, by which time he had become the heir *alioqui successurus* owing to the death of his elder brother. The superior accepted relief duties from A. After A's death B succeeded in terms of the destination in the deed of entail, and having taken infeftment was impliedly entered with the superior.

In an action by the superior against B for payment of a composition, *held* that a new investiture was created by A's implied entry, and that a casualty of composition might have been exacted from him by the superior; that the superior's failure to exact a composition from A could not affect B; and that B, as the heir of the existing investiture, was liable only in relief-duty.

William Moray Stirling of Abercairney was heir of entail of the lands of Abercairney and others, under a deed of entail dated in 1769. In the year 1849 he disentailed the said lands, and executed a new deed of entail to and in favour of himself and the heirs whatsoever of his body, whom failing Mrs Christian Moray or Home Drummond, his sister, whom failing to Charles Home Drummond, her second son, and the heirs whatsoever of his body, whom failing certain other heirs. The deed contained a provision that in case any of the heirs of entail succeeding under the deed should succeed to the estate of Blair Drummond, and should, at the time of his death, have (in addition to an eldest son, or descendant of an eldest son) a second or other younger son, or descendant of such, then the estate of Abercairney should, upon the death of such heir, descend to and devolve upon his or her second or younger sons successively in their order, and the heirs whatsoever of their bodies respectively. Infeftment followed in favour of William Moray Stirling, on 27th September 1849.

William Moray Stirling died on 9th November 1850, and Mrs Christian Moray or Home Drummond was thereafter duly served as his nearest and lawful heir of tailzie and provision. Sasine, dated 14th October 1851, followed on the decree of service in her favour, but no entry was