must be regarded as having been settled by a special destination which will remain effectual unless and until it has been shown to have been evacuated. Nothing short of a direct and binding authority would induce me to extend the application of a technical rule which experience has, I think, proved to be in violation of the wishes of the ordinary testator. So far as regards the marriage-contract fund there are, I think, sufficient reasons why the ultimate trust purpose in favour of the bride's heirs *in mobilibus*, ascertained as at the date of division according to the law of Scotland, should be regarded as an ordinary legacy and not as a special destination made by her in their favour. She did not resort to the form of an *inter vivos* trust with the object of making this bequest, but finding it necessary for other reasons to place a fund in the hands of trustees she incidentally bequeathed the reversion of it by informing her trustees of her wishes in regard to it. Nor can a testamentary and revocable direction given by the beneficial owner of a reversion to her own trustees whose duty it was to ascertain and give effect to her final wishes, be assimilated to a loan made to a stranger, as to which the lender has stipulated that it shall be repaid to a particular person or to a particular class of heirs. The residue fund is in much the same position. By a transaction between the lady and her father's testamentary trustees (which I must in this process assume to be valid) a part of her fortune was vested in the residue trustees, and was settled so as to give her the alimentary liferent thereof and the fee to her issue. Failing issue the deed of trust and assignation directed the residue trustees to pay the fund to her "*mortis causa* disponees or assignees, whom failing her heirs *in mobilibus*." By her marriage contract she afterwards exercised this power of appointment by directing the residue trustees to pay the income to her husband for his aliment during his lifetime after her death so long as he did not re-marry, and on his death or re-marriage to pay the capital to her heirs *in mobilibus*, ascertained as at the date of division according to the law of Scotland. This latter direction was a revocable exercise of a general testamentary power of appointment. It was not a special destination in any sense of the expression but an ordinary bequest.

As regards the questions of law, the first and second were not argued, and may by consent be answered in the affirmative. The third question should be answered in the negative, the fourth in the affirmative. Branch (*a*) of question 5 should be answered in the negative, and as regards branches (*b*) and (*c*) it should be declared that the residue will fall to be paid to the fourth party upon and in the event of his re-marriage, or to his legal representatives if he does not re-marry. The sixth question should be answered in the negative and the seventh in the affirmative. Branch (*a*) of the eighth question should be answered in the negative, and as regards branches (*b*) and (*c*) it should be declared that the marriage trust estate will fall to be paid to the fourth party upon and in the event of his re-marriage, or to his legal representatives if he does not re-marry.

LORD CULLEN was absent.

The Court pronounced this interlocutor—

"Answer question 3, branch (*a*) of question 5, question 6, and branch (*a*) of question 8, all in the negative, questions 4 and 7 in the affirmative: In answer to branches (*b*) and (*c*) of question 5 and branches (*b*) and (*c*) of question 8 it is declared that the marriage trust estate will fall to be paid to the fourth party upon and in the event of his re-marriage, or to his legal representatives at his death if he does not re-marry, and, of consent of parties, answer questions 1 and 2 in the affirmative: Find and declare accordingly and decern."

Counsel for First, Second, and Third Parties—Dean of Faculty (Constable, K.C.) —Duffes. Agents—Cowan & Stewart, W.S.

Counsel for Fourth Party — Sandeman, K.C.—Cooper. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, October 16.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

WILLIAM C. GRAY & SONS *v.* WILLIAM M'COARD & SONS.

Process—Reclaiming Note—Competency—Whether Timeously Presented—Interlocutor Pronounced in Vacation—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 94—*C.A.S.* 1913, *D* (*i*) 4.

Held that a reclaiming note against a final interlocutor pronounced in vacation more than twenty-one days before the second box-day was competently presented on the first ensuing sederunt day.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100) enacts—Section 94—"It shall be lawful for the Lords Ordinary at any time in vacation or recess to sign interlocutors pronounced in causes heard in time of session, or at any extended sittings, or at the trial of causes by jury or by proof before such Lord Ordinary; provided that where any such interlocutor is dated at or prior to the first box-day in vacation the same may be reclaimed against on the second box-day; and where the interlocutor is dated after the first box-day, then on the first sederunt day ensuing, or within such number of days from the date of such interlocutor as may be competent in the case of a reclaiming note against such interlocutor dated and signed during session. . . ."

The Codifying Act of Sederunt 1913, D (i) 4, provides—"In all cases where the days allowed for presenting a reclaiming note against an interlocutor pronounced by a Lord Ordinary in the Outer House expire during any vacation, recess, or adjourn-

ment of the Court, such reclaiming note may be presented on the first box-day occurring in said vacation, recess, or adjournment after the reclaiming days have expired; and if there be no such box-day, then on the first ensuing sederunt day."

William Gray & Sons, *pursuers*, brought an action of damages for breach of contract against William M'Coard & Sons, *defenders*.

On 1st September 1920 the Lord Ordinary (ORMIDALE) dismissed the action. The box-days in the vacation during which the interlocutor was pronounced were 12th August and 23rd September. On 15th October, the first sederunt day ensuing after the date of the interlocutor, the pursuers presented a reclaiming note.

In Single Bills of 16th October the defenders objected to the competency of the reclaiming note, and argued that it should have been presented on the second box-day—*Countess Dowager of Seafield* v. *Kemp*, 1898, 25 R. 873, 35 S.L.R. 680, was cited.

LORD PRESIDENT—I do not think that there is any difficulty involved in this matter. The Act of Sederunt says that when the reclaiming days expire during vacation the "reclaiming note may be presented on the first box-day occurring in said vacation, recess, or adjournment after the reclaiming days have expired; and if there be no such box-day then on the first ensuing sederunt day." The Act of Sederunt permits the use for the purpose of presenting a reclaiming note of whichever one of the two appointed box-days occurs first after the reclaiming days have expired; but this permission leaves unaffected the provisions of section 94 of the Court of Session Act 1868, which allows a reclaiming note against an interlocutor dated subsequent to the first box-day to be presented on the first sederunt day ensuing. In other words, there is nothing contradictory between the Act of 1868 and the Act of Sederunt, although the latter provides somewhat wider —or rather additional—facilities. There is nothing in the Act of Sederunt to qualify the competency of a reclaiming note presented in terms of the Act. Therefore I think this reclaiming note is competent.

LORD MACKENZIE—I agree.

LORD SKERRINGTON—I am of the same opinion.

LORD CULLEN—I also concur.

The Court repelled the objection.

Counsel for the Pursuers — Gentles. Agents—Fyfe, Ireland, & Company.

Counsel for the Defenders—MacRobert, K.C. — Maclaren. Agents — Cumming & Duff, W.S.

HIGH COURT OF JUSTICIARY.

Monday, December 6.

(Before the Lord Justice-General, the Lord Justice-Clerk, Lord Dundas, Lord Mackenzie, and Lord Anderson).

HIS MAJESTY'S ADVOCATE *v.* BREEN.

Justiciary Cases — Statute—Mental Deficiency and Lunacy (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 38), *sec.* 9—*Interpretation of Statute—Procedure.*

Where it is proposed to invoke the procedure prescribed by section 9 of the Mental Deficiency and Lunacy (Scotland) Act 1913 on behalf of a person accused, due notice thereof must previously be given, and the notice must specify to which of the categories described in section 1 of the statute the alleged mental deficiency belongs.

Mental deficiency does not found a plea in bar of trial which can be initially disposed of by the judge before the jury is empanelled, and accordingly evidence as to the mental deficiency of the accused must like the evidence as to the charge be laid before the jury.

If the jury find that the specific facts charged are proved they must then proceed to find affirmatively or negatively as to the mental deficiency of the accused. If they find that the accused is a defective the judge may, without proceeding to interpret the verdict finding the charge proved as amounting to a conviction of "guilty as libelled," adjourn the proceedings to a definite date and direct the case to be reported to the procurator-fiscal with a view to the presentation of a petition by him for a Judicial Order under the Act, and with an order on him to report in turn to the Court the result of his petition.

Where conviction has followed upon a plea of guilty the procedure prescribed by section 9 of the statute does not apply, and the remedy is by application to the Secretary for Scotland for an order under section 10 of the statute.

The Mental Deficiency and Lunacy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 38) enacts—Section 9—"(1) Where a person is charged with any offence punishable in the case of an adult with penal servitude or with imprisonment . . . and the Court is of opinion that the charge is proved . . . the Court, if it appears to it that such person . . . is a defective within the meaning of this Act, may without proceeding to convict . . . adjourn the proceedings and report the case to the local authority concerned, or to the procurator-fiscal, with a view to the presentation of a petition by them or him for a judicial order under this Act, provided that for the purposes of this Act a person shall be deemed to be a person found guilty of an offence where the Court is of opinion that the charge is proved. (2)