ligation to pay rent would be the counterpart of the possession. If the tack had been valuable, the pursuer—not as executor, but as succeeding to the tack—must have enjoyed the possession and paid the rent. Therefore the rent is a condition of the possession rather than a debt exigible from the executor. Whoever succeeded to the tack must have paid the rent. The pursuer succeeded to the tack, but not as executor—as tacksman the rent was due. It seems to have been an unprofitable lease — indeed, a losing transaction. Had it been otherwise, the annual returns would have been under deduction of the rents. We are of opinion that, except to the extent of the sum due for rents at the date of Lovat's death, being £292, 16s. 3d., this claim in respect of the Merkinch rents, as due annually for 293 years, cannot be sustained as a charge against the entailed estate.

The amount of the whole items of debt which we consider to be instructed by the pursuer as debts of Lovat at his death, and to be proved to have been paid by or for the pursuer, and to be chargeable on the entailed estate, is £17,750, 14s. 6⁶d., and that sum has been allowed accordingly, with interest from the respective dates of payment.

A state has been directed to be put into process explanatory of this judgment, shewing the pecuniary result of the findings in the interlocutor of the Court.

The whole other claims by the pursuer have been disallowed.

The Court have derived most valuable assistance from the reports and states prepared by the accountant Mr Gillies Smith, in this elaborate and complicated accounting.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Recall the said interlocutor, and, *primo*, Find that, *first*, the sums stated in article first of the state No. 1217 of process, prepared by the Accountant, and which the Lords have appointed by interlocutor of this date to form part of the process, and amounting, the said sums, to £9655, 0s. 6⁸d.; *second*, the sums stated in article second of the said state, and amounting to £275, 3s. 11⁶d.; *third*, the sums stated in article third of the said state, and amounting to £181, 12s. 5⁶d.; *fourth*, the sum of £10, 10s., stated in the fourth article of the said state, being a fee to Dr Nicol, physician, Inverness; *fifth*, the sums stated in the fifth article of the said state, and amounting to £545, 11s. 6⁶d.; *sixth*, the sums stated in the sixth article of the said state, and amounting to £32, 12s. 8d.; *seventh*, the sums stated in the seventh article of the said state, and amounting to £1779, 6s. 8⁶d.; *eighth*, the sums stated in the eighth article of the said state, and amounting to £4978, 0s. 5d.; *ninth*, the sum of £292, 16s. 3d., stated in the ninth article of the said state—have all, as respectively above specified, been instructed to be debts of the deceased Honourable Archibald Fraser of Lovat, due by him at the date of his death, and paid by or on behalf of the pursuer as executor of the said Lord Lovat: *secundo*, Find that the said sums, amounting in all, as appears on the said state, to £17,750, 14s. 6⁸d., being debts of the said deceased Honourable Archibald Fraser of Lovat, and paid by the pursuer as his executor, with interest on the said sums from the respective dates of payment thereof by the said pursuer, are sums which the pursuer is entitled to charge against the entailed estate, in terms of the deeds of the said Honourable Archibald Fraser: *tertio*, Find that the other claims by the pursuer, and the other sums alleged by him to be debts of Lovat paid by him as executor, have not been sufficiently instructed, and therefore disallow the same: With these findings, remit the cause to Lord Shand in place of Lord Jerviswoode, as Lord Ordinary: Find the pursuer and defenders conjunctly and severally liable in payment of the expense of the reports and states by the Accountant: *Quoad ultra* reserve the question of expenses."

Counsel for Pursuer—Millar Q.C., and Strachan. Agents—Macbean & Malloch, W.S.

Counsel for Defender—Balfour and Pearson. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Tuesday, March 18.

FIRST DIVISION.

SPECIAL CASE—JAMES MERRY AND ROGER DUKE AND OTHERS.

Annuity — Apportionment — Legacy — Discretion of Trustees.

In a case where a truster left an annuity to his sister "during all the days and years of her life," and a legacy "for their liferent alimentary use allenarly" to each of her daughters, to be paid when the trustees should find it "suitable and convenient,"—*held*—(1) that though the sister died during the currency of a term her representatives were not entitled to any share of that term's annuity; (2) that the trustees were not bound to make immediate payment of the capital of the legacies.

This was a Special Case presented for the opinion of the Court by James Merry of Belladrum, M.P., and others, trustees of the late Alexander Cuningham of Craigends, of the first part, and Roger Duke and others, of the second part.

The questions submitted to the Court were (1) Whether Mrs Duke's annuity was payable in advance, from the 11th November 1866? or, Whether a proportional part is due for the period from 15th May 1871 till 27th October 1871, the date of her death? (2) Whether Mrs Duke's daughters are entitled to payment of the lagacies to them at once, on their own receipt and discharge? or, Whether the trustees are bound or entitled to continue to hold the capital?

The parties of the second part contend (1) that Mrs Duke having died during the currency of the term from Whitsunday to Martinmas 1871, her representatives are entitled to a proportionate part of the annuity which would have been payable to her at the term of Martinmas had she survived till that term; and (2) that the female legatees are each entitled to payment of the legacy of £1000 at once, on her own receipt and discharge, and that the trustees are bound to make immediate payment thereof.

The parties of the first part contend (1) that

the annuity which was payable and paid to Mrs Duke at Whitsunday 1871 was paid in advance for the term from Witsunday to Martinmas 1871, and that her representatives are not entitled to claim any farther sum in name of annuity for the period from Whitsunday 1871 till the date of Mrs Duke's death; and (2) that the trustees are not entitled to pay the legacies of £1000 each to the female legatees, but are bound to hold the same for their liferent alimentary use allenarly; or, otherwise, that it is in the discretion of the trustees either to pay or continue to hold said legacies, and that they are therefore not bound to make payment thereof until they shall consider it to be suitable to do so.

Authorities—*Cruickshank* v. *Sandeman*, Feb. 16, 1843, 5 D. 643; *Paul* v. *Anstruther*, Nov. 14, 1862, 1 Macph. 14, 2 Macph. 1, H. L.; *Wood* v. *Menzies*, May 26, 1871, 9 Macph. 775.

At advising—

LORD PRESIDENT—The first question in this case is regarding an annuity left by the testator Mr Cuninghame to his sister Mrs Duke, who died on 27th October 1871, the annuity being payable at Whitsunday and Martinmas. The parties of the second part are her children, and they contend that, she having died during the currency of a term, her representatives are entitled to a portion of the annuity. The trustees contend that the annuity payable and paid was paid in advance. I am not sure that I can affirm either the one or the other of these propositions. It is not necessary to say whether the annuity is payable in advance, and still less are the children entitled to the amount they claim; that depends on the precise words of the settlement. The trustees are desired to pay to Mrs Duke "an annuity of £200 sterling yearly, during all the days and years of her life," and besides a legacy to each of her children, another annuity of £200 yearly to the testator's other sister Mrs Main, payable, both annuities, half yearly, by equal portions, at the usual terms of Martinmas and Whitsunday in each year, commencing the first year's payment of each of said annuities at the first term of Martinmas or Whitsunday after my death, and continuing the same half-yearly thereafter; and it is further provided that these "annuities to my said sisters, and legacies to the children, where female, of my said brothers and sisters, are hereby specially provided and given for the liferent alimentary use allenarly of my said annuitants and female legatees, exclusive of the *jus mariti* and right of administration of their present or future husbands."

It is impossible to read this settlement without seeing that the testator intended that Mrs Duke should have an annuity corresponding in amount to the time which she survived him, aud the question is, whether she has not received an annuity corresponding to every day which she lived after her brother. Mr Cunninghame died 9th November 1866, and Mrs Duke on 27th October 1871, so that she survived him four years, eleven months and thirteen days. As regards payment, she received a full year's annuity of £200 at Martinmas 1866; she received nothing at the following Whitsunday, but at every subsequent term, the sum of £100, being a full half-year's annuity. That amounts, including the first payment, to £1000, which is five years' annuity, so that she has in fact received more than she was entitled to. I am of opinion therefore that her children have no claim to any share.

The next question regards the legacies left by Mr Cunninghame to each of Mrs Duke's children. The terms of the bequest are as follows—"and after her death, each of her children shall be paid a legacy of £1000 sterling when my trustees find it suitable and convenient to pay the same, and which shall be so secured to said children as my trustees may consider best for their welfare and benefit." No distinction is made here between sons and daughters; but further on it is provided that these "legacies to the children, where female, of my said brothers and sisters, are hereby specially provided and given for the liferent alimentary use allenarly of my said annuitants and female legatees, exclusive of the *jus mariti* and right of administration of their present or future husbands; and the said annuities and legacies shall in no ways be liable to or affectable by the debts or deeds of such husbands, or in any way subject or liable to the diligence of their creditors; and further, declaring that the simple receipt and discharge of my said sisters and female legatees respectively, without the consent or concurrence of their respective husbands, shall be a sufficient exoneration, acquittance, and discharge to my trustees for said annuities and legacies."

Now the daughters of Mrs Duke contend that they are entitled to immediate payment on their own receipt. The trustees, on the other hand, contend that they are not entitled to pay, but are bound to hold, or otherwise that it is in their discretion either to pay or to hold till they think it suitable and convenient to pay. There seems to me to have arisen some little confusion. The trustees are not to pay the legacies until they find it suitable and convenient; that seems to me to point to their management of the trust-estate. But when the suitable and convenient time comes there is another condition that the money "shall be so secured to said children as my trustees may consider best for their welfare and benefit;" and the right of the daughters is limited to a liferent only; the trustees must so settle the money as to give them a liferent alimentary use of it. The only difficulty in regard to this last condition is that the simple receipt and discharge by the said daughters, without consent of their husbands, is to "be a sufficient exoneration, acquittance and discharge to my trustees for said annuities and legacies"—which rather suggest the idea of a payment of capital; but taking that in connection with the other provisions, I think it simply means that the daughters may by themselves discharge whatever they receive—and even supposing capital to be meant, it is quite possible to read it in harmony with this; the testator's leading idea being that a settlement should take place when the daughters married. I have no doubt that the daughters of Mrs Duke are not entitled to payment immediately. What the trustees may be bound to do I cannot at once say, but I am clear they are not bound to pay immediately, and that is the question we have to decide. The circumstances may change, but at present all the answer which we can make to the second question is that Mrs Duke's daughters are not entitled to payment of the legacies to them at once on their own receipt and discharge.

The other Judges concurred.

Counsel for Merry—Solicitor-General (Clark) and W. J. Mure. Agents— Maclachlan & Rodger, W.S.

Counsel for Duke—Marshall and Macdonald. Agents—Mackenzie & Black, W.S.