enter the harbour at night, or, alternatively, for failing by means of the landmarks to check the position of the buoy if he were able to see them, as they say he was. I cannot impute negligence to the pilot on either head. It was the recognised practice of pilots who brought in vessels at night to Whitehall to indicate the position of the buoy by a light placed upon it or by a light exhibited in a boat close by, and this was approved of by the harbour-master. This practice could only have grown up on the footing that the buoy constituted a reliable guide to navigation. It may be that the pilot might have discovered that the buoy was not in place by using the landmarks, but he says that he was unable to see them at the time, and the contrary is not proved. In any case if he was entitled to rely on the buoy being in position I could not hold it to be negligence on his part not to have also made use of the landmarks, for the very object of placing the buoy there was to make such a precaution unnecessary. It is perhaps true that if he had waited half-an-hour before bringing in the ship there would have been sufficient light for him to navigate by the landmarks alone, as he says he always preferred to do when these were visible, but he had a perfect right to take in the ship as soon as there was sufficient depth of water in the channel to enable her to enter. I am unable therefore to attribute any blame to the pilot, who I think acted exactly as a prudent and skilful navigator would have done in the circumstances, and who would undoubtedly have brought the vessel safe into port but for the initial fault of the defenders.

[*His Lordship then proceeded to deal with the question whether the damage was sustained on Crampie shoal or not.*]

LORD GUTHRIE — I am of the same opinion.

LORD DUNDAS—I am authorised to intimate the LORD JUSTICE-CLERK'S concurrence in the proposed judgment. I did not hear the case.

The Court adhered.

Counsel for the Pursuers and Respondents—Horne, K.C.—Normand. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders and Reclaimers—Murray, K.C.—Carmont. Agents—Beveridge, Sutherland, & Smith, S.S.C.

HOUSE OF LORDS.

Friday, March 12.

(Before Earl Loreburn, Lord Kinnear, Lord Dunedin, Lord Atkinson, Lord Parker, and Lord Sumner.)

REID'S TRUSTEES *v.* DAWSON.

Succession — Legacy — Construction — "Prefer"—Fund Demonstrative or Taxative.

A testator directed—"Recognising as I do the necessity, in the event of my death, of making some provision for Miss Christina Dawson and her son Robert, I hereby instruct you to pay to her on the first of each month after my death the sum of twelve pounds ten shillings, being at the rate of £150 a-year. But in lieu of this I would prefer that as soon as you conveniently can that the sum of £3000, say three thousand pounds, should be taken from my life insurance funds and paid over to her through her law adviser Mr Maitland, or her brother Mr William Dawson, London, the latter of whom I wish to nominate trustee for same if he will accept. I trust this arrangement can be carried out without any friction. I had hoped to make this bequest from another source, but have found it impracticable."

Held (1) that the bequest was of the capital sum, to be paid as soon as conveniently could be, the word "prefer" conferring no discretion on the trustees, and (2) that it was of the full amount of £3000, the reference to the insurance fund being only demonstrative and not taxative.

Henry Reid, manufacturer, Dunfermline, and others, trustees acting under the trust-disposition and settlement of the late Robert Reid, manufacturer, Dunfermline, dated 5th November 1907 and registered 8th March 1911, *first parties;* Miss Christina Dawson, residing at 66 Braid Road, Edinburgh, to whom a bequest was made, *second party;* and Robert Reid, her son, *third party,* presented a Special Case to determine the nature of the bequest to the second party.

The Case stated—"2. Mr Reid addressed to the said James Young, one of the trustees under his will, and also his law agent, a holograph letter, dated 6th December 1910, which was in the following terms:—

'13 *Corrennie Gardens, Edinburgh, 6th December* 1910.

'James Young, W.S.,
55 Constitution Street, Leith.

[. . . *quoted supra in rubric.* . . .]

'Yours very truly, (Signed) ROBERT REID.' This letter, which was in a closed envelope addressed to Mr Young, had been handed by Mr Reid to Miss Dawson, and was in her possession at the time of his death. It was handed to Mr Young by Miss Dawson's said law agent, Mr R. A. Maitland, solicitor, Edinburgh, on 2nd March 1911.

"3. Mr Reid had a policy of insurance on his life for £5000 effected with the Scottish Amicable Life Assurance Society, the capi-

tal value of which, with bonus additions thereon, amounted at the date of his death to £5202, 15s. 3d. During his lifetime, however, he had borrowed from the Scottish Amicable Society the sum of £1000 on 16th May 1898, and the sum of £1200 on 26th November 1908, and in security for these loans had assigned the said policy to the society. Mr Reid had also borrowed from the said James Young the sum of £900 on 26th November 1908, and the sum of £200 on 28th April 1909, for which sums he had granted bills in favour of Mr Young. On 26th November 1908 he also granted in favour of Mr Young an *ex facie* absolute assignation of the said policy, and on 8th December 1910 he and Mr Young executed an agreement to the effect that the policy was to be held by Mr Young in security of all sums due to him by Mr Reid. Certain payments to account of his indebtedness to Mr Young were made by Mr Reid during his lifetime, and at his death the sum due by him to Mr Young was £824, 2s. 4d. If the sums due under these various loans fall to be charged against the said policy, the amount thereof remaining in the trustees' hands, after paying estate and legacy duty and expenses, will be £1900 or thereby. . . .

"The first parties admit that the said holograph letter gives them a positive direction to pay to Miss Dawson an annuity of £150 by monthly instalments. With regard to the further construction of the document, they *maintain* — (1) That the said annuity is only payable to Miss Dawson during her lifetime, and is not payable to her son in the event of his surviving her. (2) That the provision with regard to the payment of capital is not imperative but merely discretionary, and imposes no obligation on the trustees to pay any capital sum in lieu of the annuity. (3) That they have a discretionary power to pay a capital sum, but that power is limited to the balance of £1900 arising from the policy of assurance.

"The second party maintains that the first parties have no discretion entitling them to withhold from her payment of the capital sum of £3000, and that the capital sum payable to her is not limited to the amount realised from the testator's life policy, but that the first parties are bound to make up any deficiency out of the testator's general estate. The third party maintains that the provision of the annuity is not limited to the lifetime of his mother, but that it is payable to him during his lifetime in the event of his surviving her. He further maintains that in the event of the trustees either electing or being bound to pay over a capital sum, they are bound to pay over the full sum of £3000 provided by the letter of 6th December 1910. He also maintains that any capital sum that may be paid over by the first parties falls to be held in trust for his behoof."

The *questions of law* were—"3. (*a*) Is the provision in the letter with regard to the payment of capital in lieu of the annuity imperative on the first parties? Or (*b*) Does it merely give them a discretionary power? 4. (*a*) Have the first parties a right or duty, as the case may be, to pay a capital sum of £3000 in lieu of the annuity? Or (*b*) To pay a capital sum of £1900 or thereby in lieu of the annuity? Or (*c*) To pay a capital sum of £1900 or thereby, the annuity being in that event proportionally diminished?"

On 28th October 1913 the Second Division pronounced an interlocutor in which, *inter alia*, question 3 (*b*) was answered in the affirmative; 3 (*a*), 4 (*a*) and (*c*) in the negative; and 4 (*b*) by declaring that the first parties in their discretion were entitled on a request by the second party to pay over to her the capital sum of £1900 or thereby in lieu of the annuity dealt with in the case; and gave these opinions—

LORD DUNDAS—The questions in this case relate to the meaning to be given to a holograph letter by the late Mr Robert Reid. I see no reason to doubt—and I think there was no serious argument on this point—that the letter must be taken to be a valid and effectual testamentary writing of Mr Reid. It was addressed by him to his solicitor Mr Young, but given into the hands of the second party to retain it during Mr Reid's lifetime. It is true that the letter does not bear to be addressed to his trustees or even to Mr Young as a trustee, but any difficulty on that head is removed by the admission which I have no doubt is perfectly properly made by the first parties, that the letter gives them a direction to pay an annuity to Miss Dawson. The trustees accordingly decided that the letter has to be given effect to as if it had been addressed to them. I think that the whole matter must depend very much upon impression and construction, rather than upon general principles of law or other cases. The letter begins by recognising the necessity in the event of Mr Reid's death of making some provision for the second party and her son, and says—"I hereby instruct you to pay to her on the first day of each month after my death the sum of £12, 10s., being at the rate of £150 a year." If the letter had stopped here I should have had no difficulty about its meaning or effect. I should have thought that it imported a provision for the lady and her son by way of an annuity payable to her during her life. The letter, however, goes on—"But in lieu of this I would prefer that as soon as you conveniently can, that the sum of £3000 should be taken from my life insurance funds and paid over to her through her law adviser Mr Maitland, or her brother Mr William Dawson, London, the latter of whom I wish to nominate trustee for same if he will accept. I trust this arrangement can be carried out without any friction; I had hoped to make this bequest from another source, but have found it impracticable." The word "prefer" may, no doubt, have a perfectly good testamentary effect, but I cannot hold that this clause has the effect of evacuating the sentence immediately preceding it. An alternative (and preferable) scheme is mooted, the trustees are given a discretionary power, but the original direction is not thereby written out of the instrument. The trustees are given power, if they think fit, instead of paying

the annuity, to pay a sum of £3000 to the lady, through her law agent or a trustee—and that is in effect to pay to herself—out of Mr Reid's life insurance funds. It appears that the alternative scheme, in its literal and complete sense, is not practicable, because the insurance funds have been reduced by deeds in favour of various creditors which are beyond dispute to a sum of £1900. It seems to me upon the terms of the letter quite plain, although I listened attentively to an excellent argument, that this £3000 was to be taken, if it could be taken, from the insurance funds, and from no other source. I am confirmed strongly in that view by the words at the end—"I had hoped to make this bequest from another source but have found it impracticable." That puts the matter beyond doubt that the fund from which the £3000 was to be taken was the insurance fund and nothing else; and I therefore think it unnecessary to comment upon any of the cases cited to us with regard to the distinction between demonstrative and taxative legacies. It stands then that it is an instruction to the trustees to pay this annuity. It was admitted that there could be no question of working out the two schemes of the testator cumulatively. They are alternative schemes. It is not contended that the lady might get the capital sum of £1900 and also the annuity. That was discarded. But there is a question remaining which requires consideration, and that is whether the trustees have a discretion between giving the lady an annuity and giving her a capital payment of £1900. The words of the letter would not, I think, justify the trustees in saying, "You are not to have this annuity, but you shall have and accept this sum of £1900." But we were informed at the bar that the lady would prefer to have the £1900 down rather than the annuity, and it seems to me that if she were to request the trustees to make that payment to her instead of the annuity they would be entitled, if they thought right, to accede to her demand, but they would not be bound to do so. The position therefore seems to me to be that the trustees will either pay the annuity of £150 to the lady, or if she should ask them, and they should think fit to accede to her request, they may give her the £1900 down in full of the provisions of the letter. It only remains to say a word upon the position of the third party, and in spite of all that Mr Leadbetter said in favour of his client, it is to my mind clear that the child has no separate or independent right in this matter as apart from his mother, whether the provision should take the form of an annuity or of a capital sum. I think it is clear that so far as the annuity goes that it must be for the mother's life and no longer. As for the capital sum, that would be payable to the mother as a provision for herself and the child, and there is no room for the suggestion of a trust for the mother in liferent and the child in fee, or for the other alternatives which were put forward at the discussion.

The first question will be answered in the affirmative; the second question (*a*) in the affirmative, (*b*) in the negative; question 3 (*b*) in the affirmative, and (*a*) in the negative. As regards 4, (*a*) and (*c*) would fall to be answered in the negative, but as regards (*b*) we should probably find that the first parties would be entitled in their discretion if the second party should so ask, to pay her a capital sum of £1900 in lieu of the annuity. 5 (*a*) should be answered in the affirmative, and the other branches in the negative.

LORD SALVESEN—I agree in the result at which your Lordship has arrived, and substantially for the same reasons. I reject the view that the words "But in lieu of this I would prefer that as soon as you conveniently can, that the sum of £3000 should be taken from my life insurance fund and paid over to her," destroy the effect of what goes before. It might have turned out that the sum was very much less than the amount which the testator indicated. If it had only been a few hundreds it would have been absurd to hold that Miss Dawson must accept these few hundreds in lieu of the annuity. On the other hand, if the trustees think that it is more in the interests of the trust that she should be paid off by a sum of £1900, and she agrees to accept that sum in full of the provisions made for her in this testamentary writing, I see no obstacle to parties giving effect to this arrangement. As regards the child, it is very obvious that the wording of the document satisfies the view that if you provide for the mother you provide also for the son. Accordingly I think one cannot spell out from the casual expression in the letter to which we have been referred any substantive right in the child, and that the only rights conferred are conferred on the mother. A construction was suggested by Mr Anderson that the annuity was only to be held until the trustees could conveniently realise the capital sum, and that they were then bound to pay over the capital sum and extinguish the obligation imposed upon them by the first clause, but if this had been the testator's intention I should have expected that there would have been an indication that the payment of the annuity was only to continue until the trustees could obtain a sufficient sum to pay the capital sum to the lady, and in addition that the testator would not have used the words "I would prefer," which point to a discretion, but the words "I desire," or some other words indicating a direction to his trustees to pay the capital sum.

LORD GUTHRIE—This case does not raise any general question. Mr Anderson remarked that anyone reading the holograph letter for the first time would imagine that no difficulty arose in its construction, and it seems to me that the testator has so expressed his intention that in all respects except one his request can receive effect. He desired that a trust should be created. It is quite clear that this cannot receive legal effect, but on the other matters it seems to me that he has so expressed himself as to lead to a clear conclusion. In the first place, the fund is for Miss Dawson and not for the child; second, the benefit to Miss Dawson is alternatively either £150

per annum or £3000; third, the discretion is not in Miss Dawson but in the trustees; fourth, if the £3000 alternative is chosen, that sum is to be taken by the trustees out of the life insurance fund and not to any extent out of the general estate. I am therefore of opinion that but for the expressed willingness of Miss Dawson to take the £1900 the trustees would be bound to pay her the annuity of £150, but she being willing to take the £1900 that seems to remove all difficulty, and if the trustees choose to do so they have a discretion to pay her the £1900.

The second party appealed to the House of Lords, referring to Bell's Prin. sec. 1886; *Melvin* v. *Nicol*, May 20, 1824, 3 S. 31 (21); *Douglas Trustees*, February 5, 1869, 7 Macph. 504; *in re Walford*, [1912] 1 Ch. 219; M'Laren, Wills and Succession, 576; *Duncan*, 27 Beaven 386; *Chalmers* v. *Chalmers*, November 19, 1851, 14 D. 57; *Bothamly* v. *Sherson*, L.R., 20 Eq. 304; *Knight* v. *Davis*, 3 M. & K. 358; Jarman on Wills, 6th ed. 1035.

At the conclusion of the argument—

EARL LOREBURN — The question here turns upon the construction of a holograph letter addressed by the late Mr Robert Reid to his solicitor, which it is admitted is a testamentary writing. I will just read the document—". . . [*quotes, v. sup. in rubric*]. . . ."

This letter was a letter written by a layman, and I think in construing letters written by laymen those who are familiar with the law and its difficulties are sometimes apt, as I feel myself sometimes apt, to overthink the meaning of the particular expressions, and therefore to overstrain the language. I desire to avoid that danger if I can. I read this will myself as having the following effect—it is a bequest of a monthly payment of £12, 10s. without any period to the duration of that payment being fixed in the document, but it is expressed to be terminable upon the payment of a capital sum of £3000, which at 5 per cent. yields the same sum annually, namely, £150. It is evident to my mind from the scheme of the document itself that Mr Young was intended to pay the capital sum, and then to discontinue the payment of the monthly sum. I think that in substance he was directed to pay that capital sum. The document, I need hardly say, is not skilfully expressed, but the £3000 is spoken of in it as a bequest, and that seems to me to settle any doubt that might have existed as to whether there was a direction to pay that sum or not. The monthly payment and the capital payment do not appear to me to have been intended or expressed as being alternative payments at the option either of the trustee or of the lady herself, but the one is to follow the other as soon as it conveniently can; and that is the only thing, it seems to me, that is left to the discretion of the trustees. The use of the word "prefer" indicates, not an alternative for selection by the trustee, but that there has been an alternative in the mind of the testator, which he proceeds to resolve in the document before your Lordships. The trustee is bound to pay this money—he is bound and entitled to pay it at a time that he thinks convenient, but he is liable of course to do so in good faith and in the same way as in the case of all other trust funds.

In this letter the testator expresses a preference; he uses the words "I prefer," which I think is equivalent practically to the words "I wish" in its present connection. The word "prefer" does seem to me to import an alternative, but I think that alternative is one which has been raised and which is solved by the testator himself in the document. But it is the use of this word "prefer" which has given rise to the idea that Mr Young was left trustee, but he was to make a choice between payment of the monthly allowance or payment of the capital. I think that is an erroneous construction. In my opinion the document means really that the testator preferred or wished the capital sum to be taken from the insurance fund rather than from other funds. He says he had endeavoured to arrange for another source, but it had not been practicable, and therefore he arranges for this source.

That being so, the only question remaining is whether or not this legacy, this bequest of £3000 which he said should be taken "from my life insurance fund," is a demonstrative or a specific bequest. I do not deny that there may be a doubt upon the particular wording of this document, and it is a difficult question, but upon the whole I accede to the view which has prevailed with your Lordships, and I think upon the whole it means, not that the money is to be paid only out of those funds if those funds suffice, but that the money is to be paid. In my opinion that is the result of this document.

LORD KINNEAR—I agree with my noble and learned friend on the woolsack upon both points.

LORD DUNEDIN—The initial fallacy which I think influenced the judgments of the Court below was to consider the first words as creating a bequest of an annuity of £150 per annum. If that was so, I could understand the view of alternatives depending on discretion. But the first words are not the bequest of an annuity; they are a direction to pay a monthly allowance, beginning one month after the testator's death. This monthly allowance is to continue until it is superseded by the payment of a capital sum as soon as that can conveniently be made forthcoming—a very natural arrangement, and one that is consonant with the method in which the bequest is conveyed, namely, a direction in a letter to his solicitor. The constitution of an annuity would necessitate a continuing trust—an arrangement not contemplated by his trust-disposition and settlement, and therefore if made would be appropriately made by a direction to his body of trustees. The word "prefer" can, I think, without violence be taken as a polite form of command.

Then comes the question, out of what is the capital sum to be paid? *Prima facie*

it is unlikely that it should represent less than the value of the monthly payment of £12, 10s. As a fact, £3000 almost exactly represents the capital value at 5 per cent. of a perpetual payment of £12, 10s. a month. But further, it is clear from the circumstances which are here admitted that if the sum bequeathed is truly not £3000, but the proceeds of the policies under burdens of such sums as they were pledged for, then the legatee could never get anything like £3000 out of this. To my mind this makes it clear that the *enixa voluntas* of the testator was that the legatee should get £3000, and that the indication of the fund was a mere direction as to the moneys from which primarily his trustees should take the same, the reason I think not being far to seek, to wit, that he thought they would be more or less immediately available, while the rest of his capital, in his business, could only gradually be realised.

Taking this view, it is unnecessary to consider the question, which would arise supposing this provision was to be made out of the proceeds of the policies alone, as to whether the general direction to pay the debts would bind the general estate to clear the policies—in other words, whether the law, which is undoubtedly the law as to heritage, ever since the case of *Fraser*, which came to your Lordships' House shortly after 1804 (*Fraser* v. *Spalding*, 1812, 5 Paton 642), is applicable to moveables. Notwithstanding the authority of Lord Kyllachy in the case of *Stewart* (*Stewart* v. *Stewart*, December 10, 1891, 19 R. 310, 29 S.L.R. 907) which was quoted, I think that is a very difficult question, and one on which I would be willing entirely to reserve my opinion. I apprehend that the case will be answered in a way consonant with the judgment that is proposed by my noble and learned friend on the woolsack.

LORD ATKINSON—I concur. I agree with my noble and learned friend on the woolsack that the word "prefer" *prima facie* means a choice between two alternatives, but at the same time I think that in this particular will this clause about "to pay as soon as you conveniently can" is absolutely inconsistent with any discretion being given to Mr Young at all as to whether he should pay or should never pay. I think they indicate clearly that he is to pay, and therefore I construe the words "I prefer" as if they were "I wish."

With regard to the other portions of the letter, I think it is clear upon the face of the letter that the testator, if so he may be called, intended that the sum of £3000 should be given to this lady, not merely such a sum as the insurance would produce after all the incumbrances upon it had been paid. I think he intended that she should get £3000, and that the reference to the policy of insurance was merely meant to indicate that that was the first fund that he wished to apply for payment of it, but that if it were insufficient she was still to get £3000—that that dominant intention was not to be defeated.

I abstain with the greatest prudence from venturing to express an opinion as to the fund which is the primary fund generally under the Scottish administration for the payment of debts.

LORD PARKER—I have come to the same conclusion, and in coming to that conclusion I am influenced by two facts. The first is that the testator at the commencement of his letter explains what his object in view is, and that is to provide for the lady and her child towards whom he felt a moral obligation. It would be entirely insufficient as provision for the child merely to provide an annuity for the life of the lady, and it is on the other hand very common to provide for children by giving their parents a lump sum.

The second point to which I attach importance is the concluding words of the letter, which appear to me to show that not only the gift or bequest of £3000 was not to be in the discretion of the trustees, but appear to me also to show that it was contemplated by the testator as a sum which was to be payable in any event, and not only if the specific fund alluded to proved sufficient for the purpose. The words are that the testator "had hoped to make the bequest from another source." I consider that that is entirely inappropriate language to indicate a discretion given to the trustees to pay or not to pay at their will and option as a bequest to a person in whose favour the payment might or might not be made; and on the other hand I consider it an inapt way of alluding to a specific legacy to say that he had hoped to make that legacy out of another source. Had he really meant it as a specific and not as a demonstrative legacy I think he would have used other words. He might have said "I had hoped to make other provision or a specific legacy of another nature," but he has referred to the £3000 as a sum which might or might not be payable out of one source or another source, and that is really the essence of a demonstrative legacy as opposed to a specific, or, as I understand the Scotch call it, a special legacy.

For these reasons I agree with the motion about to be made by the noble and learned Earl on the woolsack.

LORD SUMNER—I concur, for the reasons stated.

Their Lordships allowed the appeal, answering question 3 (*a*) in the affirmative, with the addition of the words "so soon as they conveniently can," and 3 (*b*) in the negative; 4 (*a*) in the affirmative that there was a duty, and 4 (*b*) and (*c*) in the negative; with expenses to all parties out of the estate.

Counsel for the First Parties—Lawrence, K.C.—C. M. Aitchison. Agents—Boyd, Jameson, & Young, W.S., Leith—Stibbard, Gibson, & Company, London.

Counsel for the Second Party—The Lord Advocate (Munro, K.C.)—Ingram—T. A. Menzies. Agents—J. G. Reid, Edinburgh—D. Graham Pole, London.