

of section 40. But I think the clause alone applicable, either as to the common or special jury, where the day of trial is fixed by the Sheriff without the presence and consent of the claimant. In such a case there is a clear reason for notice being given by the promoters. In the present case, where the day of trial was fixed by an interlocutor pronounced in the presence of both parties, and, as I must presume, not only with the knowledge but consent of the claimant, further notice was not necessary, and I think was not required by the statute. At all events, I am very clear that if such notice was still requisite in point of form, the claimant waived his right to it, and is now barred, by personal exception, from pleading the want of it. It is indubitable that the statutory notice may be dispensed with. A letter dispensing with it would be clearly effectual. I think the conduct of the claimant equally dispensed with it in the present case. What can be more distinct evidence of waiver of notice than to take by personal concurrence an interlocutor appointing a day of trial, and on personal craving a diligence against havers, to be reported by that day, followed up by an examination of havers, and a successful opposition to the day of trial being postponed? It is, after this, altogether extravagant to object that notice of the day of trial was not given; and I think the judgment of the Lord Ordinary refusing the note clearly right.

The Court adhered, with additional expenses.

Agents for Complainer—Maclachlan & Rodger, W.S.

Agents for Respondents—Webster & Will, W.S.

Friday, May 26.

WM. WOOD (MENZIES' JUDICIAL FACTOR)
V. MENZIES AND OTHERS.

Donation inter virum et uxorem—Apportionment—Trust—Truster's Intentions—Liferent. (1) Where a husband had opened an account with a bank in his wife's name, upon which she had operated for some years, and into which during that time dividends of the husband's were paid, and which was not closed at his death, but contained a considerable sum standing at the wife's credit; where moreover a sum of £600 had been withdrawn from this account, and placed on deposit-receipt in name of the wife alone, and had not been disturbed during the remainder of the husband's life—*Held* that, though it was proved that a few days before opening the account in his wife's name the husband had received payment of a legacy belonging to his wife, but falling under his *jus mariti*, which in amount almost exactly tallied with the sum first placed to the wife's credit on opening the account, still there was no sufficient evidence that the husband had intended to make any donation to his wife.

(2) Where a truster directed his trustees to convert into money his whole estate, and invest it in certain specified ways, and pay "the whole free annual proceeds to his wife during all the days and years of her life"—*Held* that the mere fact that a portion of the testator's funds were invested in consolidated 3 per cent. annuities, and were left so invested by the trustees, did

not affect the question of vesting of the life-rent in the widow; that that was a matter to be determined by the testator's intention, and not by any legal rule of apportionment, and that his intention being to give her the universal life-rent of his estate as of a sum of money, the first dividend on the above-mentioned consols payable two days after the truster's death fell to be apportioned between the capital of the estate and the life-rent; as did also that for the half-year current at the life-rent's death, notwithstanding that under the then existing law consolidated annuities were not apportionable.

(3) Circumstances in which a testator was held to have validly disposed of the balance or savings made by his trustees and widow out of the annual income of the estate payable to the said widow, but so far only as these savings were still in the hands of the trustees, and had not been drawn by or paid over to the widow.

The late William Menzies, of 114 George Street, Edinburgh, left a trust-disposition and settlement, with codicil attached, whereby he left to trustees his whole means and estate. His directions to his trustees were, *inter alia*—"First, My said trustees or trustee shall, at such time or times after my death as they or he may think most advantageous, sell and convert into money my whole heritable and moveable estates, wherever situated, excepting my said house in George Street, Edinburgh, in the event of its being life-rented by my wife in manner after mentioned, and also excepting my household furniture and others hereinafter directed to be given to my said wife and to my daughter Emily respectively. *Second*, My said trustees or trustee shall, from the produce of my said means and estate, heritable and moveable, pay all my just and lawful debts, and deathbed and funeral expenses, and the expenses of executing this trust. *Third*, My said trustees or trustee shall invest the surplus or residue of my said means and estate in their names in or upon any of the parliamentary stocks or public funds of Great Britain, or at interest upon Government or heritable securities within Great Britain aforesaid (but not in Ireland), with power to vary the said stocks, funds, and securities, or any of them, into or for other stocks, funds, or securities of the same, provided that, during the lifetime of my said wife, Harriet Fordyce Menzies, such investments or variations shall be made with her consent in writing. *Fourth*, I direct my said trustees or trustee to pay over to my said wife the free annual proceeds of my said whole means and estate during all the days and years of her life, or permit the same to be received by her during her life, and also the whole annual produce of whatever heritable estate in Scotland I may be possessed of at the time of my death other than my said house in George Street, Edinburgh, while the same shall remain unsold."

There then followed directions as to the disposal of the estate in favour of the children of the truster after the termination of his widow's life-rent, as provided in the 4th purpose above quoted.

In the codicil there was found the following clause:—"And further, I declare that all moneys which shall be saved by my said trustees and my said wife out of the annual income payable to my said wife shall be given by my said trustees, after my wife's death, to my daughter Emily, for her sole use."

Mr Menzies died on 3d January 1861, and was survived by his wife Mrs Menzies, who lived until 19th April 1866. The trustees appointed in Mr Menzies' trust-disposition declined to accept, and Mr Wm. Wood, C.A., was appointed by the Court judicial factor on the trust-estate.

The present action was a multipointing at his instance, which it was found necessary to raise after the termination of Mrs Menzies' life-rent, calling the different beneficiaries as defenders, in order to determine several questions which had arisen concerning certain sums in his hands, about the disposal of which the beneficiaries and their advisers took different views.

The fund *in medio* consisted—

First, Of the sum of £754, 12s. 9d., being the amount (£608, 5s. 5d.), with interest (£146, 7s. 4d.), of the sum contained in a deposit-receipt with the Bank of Scotland, in name of the truster's widow Mrs Harriet Fordyce Callander or Menzies, dated 22d June 1851.

Second, Of the sum of £1089, 1s. 9d., being the balance including interest, to 3d January 1861, due by the bank on an account-current with the Bank of Scotland, in the name of Mrs Menzies, and on which she had been in the habit of operating for many years of her husband's lifetime. All the information attainable concerning these two sums was that in and shortly before the month of September 1848 there was paid into Mr Menzies' account with Coutts & Co. by the executors of his wife's mother Mrs Callander instalments of her share of her said mother's estate, amounting in all to about £990, and which fell under Mr Menzies' *jus mariti*. That he had this and other money transferred from his account with Messrs Coutts to his account with the Bank of Scotland, and on 15th September 1848 wrote the following letter to the Manager of the Bank of Scotland:—"Sir,—Of the sum of £1112, 8s. 11d., placed to the bank's credit by Messrs Coutts & Co. for my behoof, I wish £120, 8s. 1d. placed to my own account, and the remainder, £992, to the credit of an account in name of my wife Mrs Harriet Fordyce or Menzies, and which she is to operate on herself, by her own orders, when she requires money. I am, &c., (Signed) W. MENZIES." Upon this account so opened Mrs Menzies was in the habit of operating from 1848 to 1854, and during the same period dividends to considerable amounts were paid into it by her husband. After 1854 her operations ceased, but the account was not closed, and at Mr Menzies' death there was at the credit of the account the sum in question, viz.—£1089, 1s. 9d. One of these operations was the uplifting by Mrs Menzies on 23d January 1851 of £1008, 5s. 5d., of which she paid £400 into her husband's own account, and placed the balance, £608, 5s. 5d., on deposit-receipt with the bank in her own name. This sum, with interest thereon, forms the sum first above-mentioned—a part of the fund *in medio*.

The question regarding these two sums was whether they belonged to the estate of Mr Menzies at his death; or whether he had made an effectual donation of them to his wife, so that they should fall under her succession?

Third, The sum of £396, 3s. 1d., being the dividend for half-year from 5th July 1860 to 5th Jan. 1861, upon certain consols belonging to Mr Menzies.

The question with regard to this sum was, whether it fell to the capital of the estate, or to the income directed to be paid to Mrs Menzies? or whether it

was to be apportioned between the two? Mr Menzies' death having occurred on 3d Jan. 1861, two days before the dividend was due.

Fourth, The sum of £865, 2s. 2d., being the balance of the free annual proceeds of the estate during the years of Mrs Menzies' life-rent of it, but which had not been drawn by Mrs Menzies, or paid to her by the judicial factor, but had been allowed by her to remain in his hands. A question was raised by some of the beneficiaries as to the application of the clause above quoted from the codicil to Mr Menzies' trust-settlement to this sum, and also to

Fifth, The sum of £225, 1s. 3d., being a proportion of the dividends on the consols belonging to the estate effecting to the period from 5th Jan. 1866, the date of the previous dividend payment, to 19th April 1866, the date of Mrs Menzies' death. These two sums mentioned in the fourth and fifth place, were claimed by some of the claimants as in bonis of Mrs Menzies at her death, and they argued that the clause in the codicil was inoperative to carry them to Miss Emily Menzies, the truster's daughter.

Sixth, Certain articles of jewellery; about which the parties were ultimately agreed.

There appeared as defenders and claimants—(1) Emily Menzies or Simpson, the truster's daughter, and her husband, Richard Simpson, for his interest; (2) Bruce Hardinge Menzies, and Harriet Emily Menzies, the children of the truster's son, Kenneth Menzies, who died 3d August 1861; (3) John Gardiner, S.S.C., *curator bonis* to William Menzies, another son of the truster; and (4) Emily Menzies or Simpson, as executrix-dative of John Edward Menzies, her brother, third son of the truster.

SCOTT and CAMPBELL SMITH for the first parties.

MARSHALL and M'LAREN for the second parties.

HALL and BALFOUR for the third parties.

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh, 15th December 1870.*—The Lord Ordinary having heard the counsel for the claimants, and considered the closed record, joint minute for the parties, No. 22 of process, productions, and whole process—Finds that the sums of £754, 12s. 9d. and £1089, 1s. 9d., mentioned in the first and second articles of the condescendence of the fund *in medio*, form part of the residue of the trust-estate of the testator, the deceased William Menzies, and fall to be applied in terms of the directions in regard to the residue contained in his trust-disposition and settlement, dated 4th February 1856, and codicil dated 12th November 1858: Finds that the balance of the sum of £396, 3s. 1d., specified in the third article of the condescendence of the fund *in medio* as the amount of dividends on certain consols for the half-year ending and payable on 5th January 1861, which shall remain after deduction of that portion thereof corresponding to the period from 3d January 1861, the date of the death of the said William Menzies, to 5th January 1861, forms part of the residue of the said trust-estate, and falls to be applied in terms of the directions in regard to residue in the said trust-disposition and settlement and codicil: Finds that the interest and annual proceeds from 3d January 1861 to 19th April 1866, the date of the death of Mrs Harriet Fordyce Callander or Menzies, the widow of the said William Menzies, on said sums of £754, 12s. 9d., and £1089, 1s. 9d., and on the proportion of the said

sum of £396, 3s. 1d., corresponding to the period from 5th July 1860 to 3d January 1861, and also the proportion of said sum of £396, 3s. 1d. corresponding to the period from 3d to 5th January 1861, with any interest which may have accrued on such interest, and also the sums of £865, 2s. 2d. and £225, 1s. 3d., mentioned in the fourth and fifth articles of the condescendence of the fund *in medio*, with the interest thereon, fall to be applied in terms of the direction contained in the codicil of the said William Menzies, dated 12th November 1858, 'that all monies which shall be saved by my said trustees and my said wife out of the annual income payable to my said wife, shall be given by my said trustees, after my wife's death, to my daughter Emily, for her sole use.' Finds that the whole jewels and trinkets mentioned in the sixth article of the condescendence of the fund *in medio* became, on the death of Mrs Harriet Fordyce Callander or Menzies, the property, under the said trust-disposition and settlement, of the claimant Mrs Emily Menzies or Simpson, the daughter of the said William Menzies: Appoints the cause to be put to the roll for the application of these findings, and reserves all questions of expenses.

"*Note.*—The sum of £754, 12s. 9d., mentioned in the first article of the condescendence of the fund *in medio*, is composed of £608, 5s. 5d., deposited in bank by Mr Menzies on 23d January 1861 in name of Mrs Menzies, his wife, and of £146, 7s. 4d. of interest, which had accrued thereon down to 3d January 1861, when Mr Menzies died. The sum of £608, 5s. 5d. was received by Mr Menzies from the executors of Mrs Callander, the mother of Mrs Menzies. It was moveable, and fell under his *jus mariti*. Mrs Menzies never uplifted either principal or interest, and there is no evidence, except the placing of the sum in the deposit-receipt in name of his wife, to show that Mr Menzies intended to make a donation of it to her. Mr William Wood, the judicial factor on Mr Menzies' estate, uplifted, on 6th October 1864, the sum in the deposit-receipt, with the interest which had accrued thereon. The deposit-receipt was then indorsed both by Mrs Menzies and the judicial factor, and the sum of £754, 12s. 9d. was carried by him to the capital account of the trust-estate. It is not averred, and it does not appear, that Mrs Menzies ever claimed that sum, or any part of it, as her property, on the allegation that Mr Menzies made a donation of it to her, or that she objected to Mr Wood uplifting the principal and interest due on the deposit-receipt, and dealing with it in the manner above stated. Mrs Menzies was amply provided for, in the event of surviving her husband, by her marriage-contract and by her husband's settlement. The Lord Ordinary is of opinion that there is not sufficient evidence to prove that Mr Menzies gave the sum contained in the deposit-receipt as a donation to his wife.

"2. The account in name of Mrs Menzies, at the credit of which, on 3d January 1861, there was the sum of £1089, 1s. 9d., was opened by Mr Menzies in his wife's name. The money with which it was opened, and which was, from time to time, paid into it, was his property. In his letter of 15th September 1858 to the manager of the Bank of Scotland, desiring the account to be opened, Mr Menzies directed the sum of £992 to be placed 'to the credit of an account in name of my wife, Mrs Harriet Fordyce or Menzies, and

which she is to operate on herself, by her own orders, when she requires money.' This account was thereafter operated on by Mrs Menzies to a considerable extent, a very large proportion of the cheques being made payable to her husband. The last draft thereon was made by her on 3d March 1854. The only operations on the account after that date were the payment into the account of the dividends on certain consols and shares, the property of Mr Menzies. The whole sum in the account fell under Mr Menzies' *jus mariti*. It does not appear that Mrs Menzies ever claimed this money after Mr Menzies' death as her property by donation from her husband, and it was uplifted by the judicial factor on 7th December 1865 without, so far as appears, any objection on her part. The Lord Ordinary is of opinion that there is no sufficient evidence to show, as contended by Mrs Simpson, that Mr Menzies ever made, or intended to make, a donation to Mrs Menzies of the sums paid into this account.

"3. Mr Menzies conveyed by his trust-disposition and settlement of 4th February 1856 his whole estate to his trustees, and he directed them to convert the same into money, and to invest the residue in the parliamentary stocks or public funds, or in heritable securities in Great Britain, and to pay over to his wife 'the free annual proceeds of his whole means and estate during all the days and years of her life.' Mr Menzies died on 3d January 1861, and there became payable on 5th January 1861 £396, 3s. 1d., being the dividends on certain consols for the half-year ending on that date. The Lord Ordinary is of opinion that, as Mrs Menzies had only right to the free annual proceeds of Mr Menzies' estate during all the days and years of her life, and as these dividends were not connected with land, and the right thereto vested *de die in diem*, she was only entitled to the proportion of the said dividends on consols belonging to Mr Menzies at the time of his death corresponding to the period between 3d January 1861, the date of his death, and 5th January 1861, the day when these dividends for the preceding half-year became payable.

"4. In Mr Menzies' codicil of 12th November 1858, it is declared 'that all monies which shall be saved by my said trustees and my said wife out of the annual income payable to my said wife, shall be given by my said trustees, after my wife's death, to my daughter Emily, for her sole use.' There were saved by his trustees and his wife between 3d January 1861, the date of Mr Menzies' death, and 19th April 1866, the date of Mrs Menzies' death,—(1) The proportion of the fore-said sum of £396, 3s. 1d. corresponding to the period between 3d and 5th January 1861; (2) the sum of £865, 2s. 2d.; (3) the sum of £225, 1s. 3d.; and (4) the interest which has accrued on these sums since Mr Menzies' death. The two last-mentioned sums are those specified in the 4th and 5th articles of the condescendence of the fund *in medio*. The last of these consists of the proportion of the dividends on certain consols for the half-year ending 5th July 1866, corresponding to the period between 5th January and 19th April 1866, the date of Mrs Menzies' death. Although these dividends were not payable until 5th July 1866, Mrs Menzies had, it is thought, right to the dividends to the date of her death, in respect that Mr Menzies directed his trustees to pay her the free annual proceeds of his estate during all the days and years of her life, and that these dividends

vested *de die in diem*. The Lord Ordinary is of opinion that the direction in Mr Menzies' codicil in regard to all savings of the annual income by his trustees or wife must receive effect. It was a condition of the settlement under which she had the life interest of the annual proceeds of the whole estate, and it is binding upon her and her executors.

"5. It is admitted that the jewels and trinkets mentioned in the 6th article of the condescence of the fund *in medio* were the property of Mr Menzies. By his trust-deed he directed that his whole jewels and trinkets should become the property of his daughter Emily, now Mrs Simpson, in the event of her surviving Mrs Menzies. This she did, and these jewels and trinkets therefore became, on the occurrence of that event, her property, by the express directions of the testator."

Against this interlocutor Mrs Emily Menzies or Simpson and her husband reclaimed.

At advising—

LORD ARDMILLAN—This is an action of multiplicity at the instance of the judicial factor of the late Mr Menzies.

The questions raised in regard to the succession of Mr Menzies, and disposed of by the Lord Ordinary, are partly questions of alleged donation by Mr Menzies to his wife, and partly questions arising on the legal construction and effect of Mr Menzies' settlement.

The trust-disposition and settlement of Mr Menzies is dated 4th February 1856, and a codicil, which is of great importance, is dated 12th November 1858. He died on 8d January 1861, survived by his wife, and by three sons, (one of whom, Kenneth, died in August 1861) and a daughter, Emily Menzies, now Mrs Simpson. The trustees appointed by the testator declined to act, and a judicial factor was appointed.

Mrs Menzies, the widow of the testator, died on 19th April 1866, survived by her sons, William, and John Edward, and her daughter Emily. John Edward Menzies died unmarried on 7th May 1867.

The first question raised relates to a sum of £754, 12s. 9d., contained in a deposit-receipt with the Bank of Scotland, in name of Mrs Menzies, dated 22 June 1851, uplifted by the judicial factor.

The second question relates to a sum of £1089, 1s. 9d., being the balance of an account with the Bank of Scotland, opened by direction of Mr Menzies, and kept in name of Mrs Menzies.

These two sums are alleged to have been donations by Mr Menzies to his wife.

I concur with the Lord Ordinary in holding that donation has not been instructed in regard to either of these sums, and that, accordingly, both sums form part of Mr Menzies' trust-estate.

The sum in the deposit-receipt, though coming from a relative of Mrs Menzies, was not hers. It was a moveable fund, and was received by Mr Menzies, and it fell under the *jus mariti*; and except only in the fact that the deposit-receipt was in name of Mrs Menzies, there is nothing to instruct donation.

That fact alone is not sufficient. Donation is not presumed—it must be instructed; and it is quite settled that the mere words of a deposit-receipt, unsupported by evidence to instruct *quo animo* it was delivered, are not of themselves sufficient proof of donation. I am not able to perceive in this case any corroborative evidence.

The second sum, £1089, 1s. 9d., appears as the

balance on an account with the Bank of Scotland in name of Mrs Menzies. That account was opened by his orders. £992 was placed in the bank by Mr Menzies' instructions, as explained in the following letter:—(*His Lordship here read the letter already quoted.*)

The money placed or paid in to this account by Mr Menzies, with what was paid when the account was opened and subsequently, was his own. The purpose for which the account was opened by him plainly was, that his wife might operate by cheques on the account when, in the management of his establishment, she required money. To me this arrangement does not appear extraordinary or unnatural. It is just a mode of administering Mr Menzies' funds through the medium of operations left to the judgment and discretion of his wife. I cannot arrive at the conclusion that Mr Menzies intended to make a donation to his wife of all the sums paid into that account.

Mrs Menzies was otherwise well provided for, and the terms of the trust-settlement and codicil are to some extent inconsistent with the idea of donation of these large sums. At all events, they do not aid or support the plea of donation, but are rather unfavourable to it. I think that the Lord Ordinary has arrived at a sound conclusion in regard to these two sums.

The third point, relating to a balance of £396, 3s. 1d., stated to be the amount of dividends on certain consols belonging to the late Mr Menzies, the dividends being payable on 5th January 1861, and Mr Menzies having died on 8d January 1861, has been decided by the Lord Ordinary on the principle of apportionment, his Lordship being of opinion that these dividends vested *de die in diem*. I think that the result of the Lord Ordinary's opinion on this point is right. But I am disposed to reach that conclusion rather by considerations drawn from the provisions of Mr Menzies' settlement than from the application of any rules of apportionment apart from the express or clearly implied will of the testator.

By the trust-disposition and settlement Mr Menzies directed his trustees to convert his whole estate into money, and to invest the residue in Parliamentary stocks, or public funds, or in heritable securities in Great Britain; and then, assuming such conversion and investment to be made, he directs his trustees to pay over to his wife "the free annual proceeds of his whole means and estate during all the days and years of her life." That, of course, means during her life after his death—commencing with his death and closing with her own. The fund to which this question relates was, at the date of Mr Menzies' death, invested in consolidated three per cents. It was not specially dealt with by the trust-disposition, and we are not dealing with the case of a life interest in a special fund standing on investment on public securities. The provision for Mrs Menzies is that of a universal life interest, the enjoyment "during all the days and years of her life," of the free annual proceeds of Mr Menzies' whole estate. It appears to me clear that by this deed Mr Menzies has established a relation and proportionate measure between all the days and years of his wife's survival, and all the days and years of the annual proceeds of his whole estate. In other words, I think that he has substantially declared that her interest in her provision shall to its full extent vest in her *de die in diem*; that during no part of the days and years of her life shall she be with-

out her provision; and, on the other hand, there can be no claim on her part, or for her behoof, for proceeds of his estate arising either before or after her survivance of her husband as his widow.

It is not necessary here to discuss the question whether the Apportionment Act applies to these dividends. Apart from the Apportionment Act, I am humbly of opinion that the dividends, as part of the annual proceeds of Mr Menzies' estate, are, in so far as regards his widow, apportionable *de die in diem* by force of his trust-disposition and settlement. The principle of the Apportionment Act is equitable and salutary; and the enactments of that statute are framed for the purpose of providing a remedy for inequitable division in cases where the testator has given no directions.

The principle of apportionment is recognised and applied by the Lord Ordinary with reference to the sum of £225, 1s. 3d., being the amount of dividends falling due on the death of Mrs Menzies. She died on 19th April 1866, and it has been found, as I think rightly, that her estate is entitled to credit for the period between 5th January 1866, when the last dividend had been payable, and the date of her death on 19th April 1866. Now Mr Erskine is of opinion (b. ii, t. 9, § 66-7) first, that the interest on a personal bond is due *de die in diem*, and secondly that in dealing with a question regarding the liferent or jointure of a widow, "the commencement of the liferent is governed by the same rule as its duration." The law allows to a widow alimony from the day of her husband's death till the first term at which her liferent becomes payable. Where the will provides a liferent during all the days and years of the wife's survivance, so as to exclude the separate claim for alimony, the liferent must be held as commencing on the day when the alimony would have commenced, viz., on the death of the husband. On these grounds I am of opinion, apart from any question regarding the Apportionment Act, that the Lord Ordinary has rightly decided the question raised in regard to the sum of £396, 3s. 1d., being the proportion of dividends on consols payable in January 1861, and in regard to the sum of £225, 1s. 3d., being the proportion of dividends payable on the death of the liferentrix Mrs Menzies.

The next question relates to a provision in the codicil to Mr Menzies' settlement, by which it is declared that "all monies which shall be saved by my said trustees and my said wife out of the annual income payable to my said wife shall be given by my said trustees after my wife's death to my daughter Emily for her sole use."

On this point I must explain that in so far as any sums, being proceeds out of Mr Menzies' estate, were actually received by Mrs Menzies, I hold that it was not in the power of the testator by his will to direct that these sums, which had become her actual and absolute property, should pass to Emily Menzies. But the saving contemplated by the settlement is described as a saving by the trustees and Mrs Menzies, and there was such a saving in so far as the proceeds of the estate were left by Mrs Menzies in the hands of the trustees, and were retained by the trustees in their own hands. I am disposed to concur with the Lord Ordinary in holding that the sums so left and retained were "saved," according to the meaning of the settlement, and that the direction of the testator must receive effect. She, by not demanding the money, but with consent of the trustees leaving it in their hands, and the trustees by not

paying the money but with her consent retaining it in their hands, may be said to have concurred in "saving the money out of the annual income," and thus by their joint act bringing it, as a saving, within the direction of the testator. I have felt this point to be attended with some difficulty; but I am now of opinion that the Lord Ordinary is right.

The only remaining question relates to the jewels and trinkets. I understand it to be admitted that, with the exception of a very few articles of a peculiarly personal character and of no value, these jewels were the property of Mr Menzies, and accordingly it can scarcely be disputed that now, after the death of both father and mother, Mrs Emily Menzies or Simpson is entitled to them, in terms of the first settlement.

On the whole case I am of opinion that the judgment of the Lord Ordinary should be adhered to.

LORD KINLOCH—With regard to the two sums of £754, 12s. 9d. and £1089, 1s. 9d. first referred to in the Lord Ordinary's interlocutor, I agree in thinking that these have not been proved to have been donations by the late William Menzies to his wife, and have been rightly found by the Lord Ordinary to form part of the residue of Mr Menzies' estate.

The next sum brought into discussion is a sum of £396, 3s. 1d., part of a dividend on consolidated 3 per cent. annuities, falling due on 5th January 1861, two days after the death of Mr Menzies on the 3d of that month. The Lord Ordinary allocates this dividend in the proportion of two days to the widow, the liferentrix, and all the remainder to the estate of the deceased; and, according to the terms of his note, he appears to do so on the footing that such dividends vest like the interest of money *de die in diem*, and so are apportionable according to the period for which each creditor lived.

If this had been the ordinary case of a liferent, constituted in general terms over the estate of a deceased testator, I would not have felt prepared to adopt the view of the Lord Ordinary. In such a case the question is always what income had legally vested in the deceased anterior to his death, and is therefore part of the capital of the trust-estate, and what had not vested till after his death, and therefore belongs to the liferenter. So dealing with the matter, I would not have been prepared to hold that the dividend on 3 per cent. consols vests *de die in diem* like the interest on money; on the contrary, would have thought that, as in the general case of annuities termly payable, it vests at the term of payment, not sooner,—the result of which would in the present case be to throw the dividend wholly under the liferent. I say this without reference to the Apportionment Act, in operation at the death of Mr Menzies, which did not apply to his succession, which was that of an absolute fiar. But the terms of Mr Menzies' trust-deed are peculiar. He expressly instructs his trustees to "convert into money" his whole estates; and he provides to his widow "the free annual proceeds of my said whole means and estate, during all the days and years of her life." I think it may be fairly held to have been Mr Menzies' intention that his widow's annuity should be computed on the footing of its being the liferent of a sum of money, and according to the mode in which the interest of money is allocated, which is unquestionably on the principle of its

vesting *de die in diem*. On this special ground I concur in thinking that the Lord Ordinary's allocation is well founded. The instructions as to investment contained in the trust-deed are fairly to be viewed as only for security, and not as affecting the primary direction for distribution.

The sum of income, amounting to £225, 1s. 3d., arising on the dividend current at the widow's death, must, of course, be dealt with in the same manner, and the Lord Ordinary's apportionment similarly sustained.

The soundness of the Lord Ordinary's view as to the sum of £865, 2s. 2d., and other connected sums, depends on the interpretation to be put on the clause in the codicil, which declares "that all moneys which shall be saved by my said trustees and my said wife out of the annual income payable to my said wife shall be given by my said trustees after my wife's death to my daughter Emily for her sole use." I have found the construction of this clause to be attended with considerable difficulty. I am clear that it cannot apply to any funds actually received by Mrs Menzies, and so made completely her own; for as to these its effect would be simply to make a will for that lady. But I think it may be fairly held effectual as to any sums voluntarily left by her in the hands of the trustees, and arising due by them after her death. On this ground I think the finding of the Lord Ordinary on this head should be affirmed.

The finding as to the jewels was not, I think, seriously contradicted, and is clearly correct. And, on the whole matter, my conclusion is that, although on somewhat different considerations, the interlocutor of the Lord Ordinary ought to be *simpliciter* adhered to.

LORD DEAS—I have simply to express my unqualified concurrence in the opinion delivered by Lord Ardmillan, and will only add a word upon one point. I refer to the question, Whether the annual income from the 3 per cent. consols did or did not vest in the widow *de die in diem* at the commencement of the liferent, as it unquestionably did at the close? There is sometimes a mistake made, and I think it has here been made by my brother Lord Kinloch, in holding that a question of that kind depends on whether the income has legally vested in the deceased before death, or whether it has not. I do not think that the question here depends upon that point at all. But that in a matter of this kind, where the party dying is the party conferring the liferent voluntarily and gratuitously, the whole question is What was his intention? If he had given the lady the liferent of these consols as her sole provision, the fair inference would have been that the lady's liferent should be liable to the peculiarity attaching to the subject liferented. If he had had nothing else but these consols to give, this would have been the conclusion arrived at. But when he does, as here, give the liferent of his whole estate, the question is, what appears to have been his intention as to the commencement of this liferent? Now, so far as I am aware, the practice has been to hold that the income accrues to the liferenter *de die in diem*, unless from the deed there is some reason to believe that the testator meant differently. Now it seems to me that if ever there was a case in which the testator's intention was clear, it is this. For he says in the deed itself that he is giving Mrs Menzies the universal liferent of his estate. He directs his trustees to convert the whole into

money, and re-invest it, and give the widow the liferent from his death, through all the years of her life. In this case the intention of the testator is too evident to admit of any doubt whatever. That some of the funds were allowed to remain invested in consols does not alter the matter. If that, or any consequence of the testator's directions, had imposed any hardship upon the liferentrix, she might have made a claim for interim aliment; and if the circumstances had warranted it, she would have been entitled to receive it. But no such thing was necessary here. The testator's intention was clear, and I am of opinion that there is nothing which should lead us to depart from the usual and rational construction of it.

LORD PRESIDENT—I entirely concur with your Lordships and with the Lord Ordinary; and there is only one point of general importance on which I think it necessary to make any remark. I refer to the disposal of the sum of £396, 8s. 1d. Now, if certain consolidated annuities are settled on one person in liferent, and on another in fee—that is to say, if upon the lapse of the liferent the consolidated annuities are to become the absolute property of the *fiar*—then there is a rule of law, that the annuities which become payable during the subsistence of the liferent are payable to the liferenter, and those which fall due after the expiry of the liferent are payable to the *fiar*. But that is only the case where there is a pure and simple settlement in liferent and fee, and where the subject settled is one of the nature I have indicated. But the settlement in this case is not of that kind, nor the subjects of that nature. We are dealing here with a settlement of the *universitas* of Mr Menzies' property, only a portion of which is invested in consols; and in dealing with this settlement we are to be guided by what was the true intention of the testator. Now, when I find that his first direction to his trustees is to realise his estate and convert it into money, and then re-invest it in certain particular ways; and that he then provides that his widow shall have the liferent of the whole of his estate so invested, I cannot resist the conclusion, that he intended her to enjoy the liferent of that estate as money bearing interest. The rule with regard to money bearing interest is, that the interest runs from day to day; and the true intention of the trustor was that his widow should enjoy this liferent according to that rule. If the trustees, acting under the powers conferred upon them by the trustor, elected to invest all the funds, after realising them, in Government securities, I do not think that that course of proceeding would have altered the matter at all. It is not the trustee's exercise of discretion, as affecting the subjects of the liferent, nor any rule of law applying to funds of a particular nature, but simply the intention of the testator, which determines the question in the present case.

The Court adhered.

Agent for First Parties, Defenders—Andrew Webster, S.S.C.

Agents for Pursuer and for Second Parties, Defenders—Campbell & Lamont, C.S.

Agents for Third Party, Defender—J. & J. Gardiner, S.S.C.