

the individual case, and the facts which have been here instructed do not bring home malice to the defender, considering, 1st, that the insertion of the injurious matter in the note of objections was not done by him or by his instructions or with his knowledge; 2d, that he is not proved to have on any occasion adopted or repeated the statement, but, on the contrary, seems to have taken an early opportunity of intimating to his agent that he did not wish it to be insisted in; 3d, that the said statement was pertinent to the issue of the competition between the defender and M'Lachlan, and although the defender did not formally withdraw it when it first came to his knowledge, this may have been because he supposed that his agent had not made it without probable cause; and 4th, that nothing has transpired to show that the defender was in point of fact actuated by malice to the pursuer; Therefore sustains the defences, and assolis the defender from the conclusions of the action; but, in respect the defender has alleged in the closed record, certain actings by the pursuer in Mitchell's sequestration which he maintains went to justify the statement complained of, and yet failed to prove any such actings, finds no expenses due, and decerns."

The pursuer appealed, and argued that the privilege attached to such a statement only so long as the party founded on it as relevant and intended to prove it, that here, as no attempt had been made to prove it, and as it still remained in process, the privilege had ceased.

Cases cited—*Smith*, 15 D. 549; *Bell v. Black*, 2 Scot. Law Rep. 58; *Logan*, October 26, 1872.

At advising—

LORD JUSTICE-CLERK—I think the pursuer has failed to make out that the statement was made maliciously. It was a statement made in a judicial process and was pertinent to the issue and therefore privileged, and if privileged when put on record it does not cease to be so when the party who makes it finds himself wrong. The defence is the utter want of justification, but I see no evidence of a real desire to injure the defender by making a false statement. I do not doubt the defender is responsible for those statements and he did not take any vigorous steps to withdraw them. But I think it is important that parties should be quite free to make relevant statements, and very inexpedient that they should be hampered by fear of a prosecution so long as these statements are honestly made.

The other Judges concurred.

Appeal dismissed.

Counsel for Pursuer—Rhind and Scott. Agent—W. Officer, S.S.C.

Counsel for Defender—H. Moncreiff. Agent—A. A. Hastie, S.S.C.

Thursday, December 12.

## SECOND DIVISION.

### SPECIAL CASE—ALLAN'S TRUSTEES.

#### Settlement—Construction—Vesting.

A died leaving a trust-disposition and settlement of the entirety of his estate for certain purposes. *Inter alia*, he directed his trustee on the death of his widow (who life-rented the

residue) to denude and pay over the fee of the said residue among the whole of his children who might survive him, and the issue of such as might predecease him; and declaring that the provisions hereby made in favour of females shall be purely alimentary to them, not alienable or assignable, and shall be exclusive of the *jus mariti* and right of administration of any husband they or either of them have or may have, and shall not be affectable by their own, or such husband's debts or deeds, or the diligence of their own or his creditors, all which are hereby excluded and debarred.

On the death of truster's widow, in a question between the trustees and the daughters of the truster—*Held* (1) that the trustees were bound to make payment to the daughters of their shares of the residue; (2) that the exclusion of the *jus mariti* and right of administration must be inserted in the receipts by the daughters; (3) that the clause declaring the shares alimentary and not alienable was to be held *pro non scripto*.

In a question between the issue of a son who predeceased the truster and the surviving children—*held* that the share of the son vested *a morte testatoris*.

*Aut jure coeca  
the life-renter*

Thursday, December 12.

## FIRST DIVISION.

### SPECIAL CASE—MORICE'S TRUSTEES AND OTHERS.

#### Succession—Fee and Liferent—Power of Apportionment.

A testator provided in his trust-disposition that the free residue of his estate should be divided amongst his children in just and equal proportions, and declared with respect to his daughter's portion, that the same, with the exception of £500 to be at her absolute disposal upon attaining twenty-one years of age, should be laid out on heritable security, and so remain until her marriage, when the same should be secured in the same way for her proper liferent use, and afterwards to her children in fee. At the date of this trust-disposition only one daughter had been born to the testator, but subsequently he had a large family, and was survived by four daughters, besides sons. By a codicil the testator provided that the division of his property should take effect among all his sons and daughters, share and share alike, and, excepting £500 payable on marriage to each of the daughters, and £500 more which each was permitted to bequeath, the entire residue of the shares of daughters dying unmarried or childless, was to revert to the surviving sons and daughters. On the marriage of one of the testator's daughters, a clause was inserted in her marriage-contract reserving to her the right to apportion the shares which her children were to have of the estate bequeathed to her by her father, at her death. In virtue of the power thus conferred upon her, the daughter executed a deed of apportionment. *Held* that she had only a liferent under her father's trust-disposition of the capital of the original share

there provided to her and her children, and that therefore she had no power to apportion that capital among her children.

This case was brought—(1) by the acting trustees under the antenuptial contract of marriage of David Robert Morice, advocate, Aberdeen, and Alison Anderson or Morice; (2) by William Yeats, advocate in Aberdeen, judicial factor in the trust-estate of the deceased Arthur Anderson of Deebank, in the county of Aberdeen; (3) by the daughters of the said David Robert Morice and Mrs Morice; (4) by the sons of the said David Robert Morice and Mrs Morice, who had attained majority; (5) by the sons of the said David Robert Morice and Mrs Morice, who had not attained majority.

The object of the case was to obtain the opinion of the Court—whether a deed of apportionment executed by the said Mrs Morice was valid. The parties of the fourth part had homologated and confirmed the deed, and took no part in the discussion of the question:

The circumstances which gave rise to the question were as follows:—Arthur Anderson of Deebank, in the county of Aberdeen, died on 12th August 1839, leaving a trust-disposition, dated 9th May 1816, and seven holograph codicils thereto.

The testator was twice married—first to Margaret Skene, who died on 25th April 1821, and secondly, in May 1831, to Harriet Maria Rawlins. At the date of the trust-disposition in 1816, only one daughter had been born to the testator. Upon his death the testator was survived by his second wife, Harriet Maria Rawlins or Anderson, afterwards Inverarity, who died in November 1870; and also by eight children—seven of his first marriage, four sons and three daughters (among whom was the said Mrs Morice); and one of his second marriage, a daughter. The said Mrs Morice was married on 1st September 1840, and died on 6th May 1871.

The trust-disposition of the said Mr Anderson of Deebank, of May 1816, contained, *inter alia*, the following provisions—“And after setting apart a sufficient principal sum to remain on heritable security for the period of her natural life, to yield her a free annuity of £200 sterling, to be paid as per marriage-settlement, half-yearly during her life, in full of all other claim anywise competent to her, to sell and dispose of the whole estate, heritable and personal, which I may die possessed of, and divide the free residue thereof, as well as the capital of Mrs Anderson's annuity, when her decease happens, amongst my children in just and equal proportions; but with this exception always in favour of my son Michie, or failing him the eldest son surviving at the time, that my lands of Deebank, together with my farm-stocking, household furniture, plate, bed and table linen, books, watch, and trinkets, shall be made over to him at a valuation of £5000 sterling, he being liable, in case the said lands and others as so valued should exceed his equal share with the other children, to pay the excess to my trustees, and entitled, on the other hand, in case they should, as so valued, fall short of an equal share, to receive from my trustees the deficiency. And declaring, with respect to my daughter's portion, that the same, with the exception of £500 to be at her absolute disposal upon attaining twenty-one years of age, shall be laid out on heritable security, and so remain until her mar-

riage, when the same shall be secured in the same way for her proper liferent use, and afterwards to her children in fee.” By a codicil, dated 24th January 1826, Mr Anderson provided—“It is of course my desire that the division of my property, with the exception in favour of my eldest son, shall fairly take effect among all my lawful sons and daughters, share and share alike, and excepting £500 payable on marriage to each of my daughters, and £500 more which each is permitted to bequeath, payable after the death of her the testatrix, the entire residue of the shares of such of my daughters as may die unmarried, or, being married, shall die childless, must revert to my surviving sons and daughters; but in case any of my married daughters leave a child or children in minority, a reasonable part of her annuity is to be applied for education, the remainder to accumulate, and with the stock, only in the event of no child of my deceased daughters reaching twenty-one years, is to be divided among my children.”

In the antenuptial contract of marriage between the said Mr and Mrs Morice, the share of Mrs Morice in the estate of her father was conveyed to the marriage-contract trustees. Mr Morice renouncing his *jus mariti* and right of administration, and in the deed it was, *inter alia*, provided “that the said trustees shall, after her (Mrs Morice's) decease, uplift and receive the annual produce of the remainder of her said fortune, and shall apply a reasonable part thereof to the maintenance and education of her children by this or any future marriage who shall survive her, until they reach the respective ages of twenty-one years, when the principal sum shall be payable to them in such proportions as shall be appointed by any writing executed by the said Alison Anderson, failing whereof, equally between them, in the event of there being more than one such child surviving.”

In virtue of the power thus conferred upon her, Mrs Morice, on 21st January 1870, executed a deed apportioning the shares which her children were to have in her estate. The effect of the apportionment was to give each of the daughters a larger share than the sons. This gave rise to the question whether such power of apportionment was not excluded by the terms of Mr Anderson's settlement, and the question submitted for the opinion of the Court was—“Had Mrs Morice power to apportion among her children the capital of the original share provided to her and her children under her father's testamentary deeds?”

It was argued for the first and third parties that the destination in the trust-deed of Mr Anderson, gave not only a liferent but the fee to each of the daughters. The destination was in liferent to the parent and in fee to the children *nascituri*, and it was established law that this carried the fee to the parent. If then the fee was in Mrs Morice, she had the right to apportion that fee in terms of the power conferred upon her in her marriage-contract. *Alexander v. Alexander*, Dec. 13, 1843, 12 D. 345; *Ross v. King*, June 22, 1847, 9 D. 1327; *Ralston v. Hamilton*, July 19, 1862, 4 Macq. H.L., 397; *Ferguson's Trustees v. Hamilton*, July 13, 1860, 22 D. 1442; *Mackintosh* (H.L.) April 17, 1845, 4 Bell, 105.

It was argued for the fifth parties that the destination in Mr Anderson's trust-deed was only in liferent to his daughters, and that a liferenter could not apportion the fee. The destination was clearly only a liferent to the daughters, as was

shown by the distinction which the testator drew between the money which he left them to be at their absolute disposal, and that which he left them for life use. It was further argued, that the expression "proper life use" meant life use as distinguished from fee, and imported the same thing as the expression life use alienary.

*Seton v. Seton*, March 6, 1793, M. 4219; *Denistoun v. Dalgleish*, Nov. 22, 1838, 1 D. 69; *Geiron v. Alexander*, 1781, M. 4402; *Grant v. Macpherson's Trustees*, June 15, 1872, Scot. Law Rep., 514.

At advising—

LORD PRESIDENT—Mrs Morice, the wife of Mr David Robert Morice, advocate, Aberdeen, made a deed of apportionment on 21st January 1870, and died soon thereafter, on 6th May 1871. By that deed she apportioned among her children a sum of money left to her by her father, the late Arthur Anderson of Deebank; the effect of this deed was to benefit her daughters in preference to her sons.

The question now raised is, Whether Mrs Morice had the power to make this deed of apportionment? It proceeds, in the first place, upon the power given her in her marriage-contract; no doubt the marriage-contract contains that power, and it was executed on 20th August 1841, after the death of her father. By it the bulk of her fortune is settled, and the power of apportionment, as she thinks fit, is reserved. The question remains, If she had such a power under her father's settlement? because, if she had not that power under it, the mere insertion of such a power in her marriage-contract would not give it to her. Had she then such power so to deal with her share of her father's fortune, which was settled upon herself and her children? The consideration of that question involves an inquiry as to whether she was a fiar or a liferenter; because, if she were not the fiar but only liferenter, it is not contended that she had any power to divide or apportion among her children in any other way than in equal shares. The only question is, Whether she was a liferenter or a fiar of anything she took from her father in whole or in part? Mr Anderson's original settlement, of date 9th May 1816, is not very long, and is expressed with tolerable clearness. He directs his trustees, among other things, "after setting apart a sufficient principal sum, to remain on heritable security for the period of her natural life, to yield his widow a free annuity of £200 sterling to be paid as her marriage-settlement, half-yearly during her life, in full of all other claim anywise competent to her, to sell and dispose of the whole estate, heritable and personal, which I may die possessed of, and divide the free residue thereof, as well as the capital of Mrs Anderson's annuity, when her decease happens, amongst my children in just and equal proportions." If the direction to the trustees had stopped there with nothing but a simple instruction to divide, then the whole residue would have been divided at the death of the testator, with the exception of the capital sum which was to be set apart for the widow's annuity. But there are other clauses—one making an exception in favour of his eldest son, which it is not necessary to notice; then, with regard to his daughter's portion, there being at that time only one daughter, he says "that the same, with the exception of £500 to be at her absolute disposal upon attaining twenty-one years of age, shall be laid out on heritable security, and so remain until her marriage,

when the same shall be secured in the same manner for her proper life use, and afterwards to her children in fee."

Now it has been contended to us, with regard to this clause, that as the right of the daughter is not restricted to her life use alienary she is the fiar, and her children have only a *spes successionis*; and, with regard to the trust, it is contended that a trust of such a nature will not alter that rule of law as to the effect of such a destination, and that therefore the fee is in the daughter, and not a life use only. That argument is not to my mind satisfactory even taking the deed alone, and without the subsequent codicils. A trust created for the purpose of paying money only will not make any difference certainly in such a destination of life use and fee. But where a continuing trust has been created, it has a very material effect upon the construction of such a destination. I am inclined to think here that, looking to the way the testator has expressed himself, he intended the money to remain in the hands of the trustees until the daughter is married, and then it is to be secured for her proper life use, and to her children in fee. The object of this is, I think, that the money may remain in the hands of the trustees in order to protect the respective rights of life use and fee here provided. It is not, however, necessary for us to rest our judgment upon that ground, because we have the codicils to look at to assist us in making out what was the testator's intention. After the execution of his settlement, more children were born, and among them at least two daughters, and when he died he was survived by eight children, seven of his first marriage, of whom four were sons and three daughters, and one of the second marriage, a daughter. In the codicil, dated 15th September 1835, we have a clear indication that the trust originally created in the deed of 1816 was to be a continuing trust for the benefit of his family, because it is thereby provided—"no part of my sons' portions, excepting interest at the current rate, to be paid till they attain the age of thirty years respectively, and I desire," (and this is very important), "that my properties of Charlton and Kinnaber be retained as part of my estate, so long as necessary for yielding securely these annuities to my sons and for my wife and daughters." The trust therefore was to be kept up so long as the interest of the income was to be paid to the widow and children—in the case of sons till they attained the age of thirty, and of daughters during the period of their natural life. The provision of the original deed, to lay out the fortunes of daughters on heritable security and to renew that heritable security in the event of the marriage of any of them, is superseded by the provision in this codicil, to retain the properties as a security for payment of the income of the daughters. Besides this there is another codicil, which precedes that of 15th September 1835 last quoted, being that one of date 24th January 1826. Two more daughters had been born between 1816 and 1826, and it was necessary for the testator to explain—"it is of course my desire that the division of my property, with the exception in favour of my eldest son, shall fairly take effect among all my lawful sons and daughters, share and share alike, and excepting £500 payable on marriage to each of my daughters, and £500 more, which each is permitted to bequeath, payable after the death of her the testatrix, the entire residue of the shares of such of my

daughters as may die unmarried, or, being married, shall die childless, must revert to my surviving sons and daughters; but, in case any of my married daughters leave a child or children in minority, a reasonable part of her annuity is to be applied for education, the remainder to accumulate, and with the stock, only in the event of no child of my deceased daughters reaching twenty-one years, is to be divided among my children." There is then a provision for the rights of the testator himself, should he survive any of his married sons or daughters. This codicil, I think, quite clear in point of meaning. He declares in it that, with one exception, he wishes the shares of his children to be equal, and as regards daughters £500 is to be payable to each on marriage and £500 more to each to bequeath, and the remainder, or what he calls "the entire residue," had been settled in the original deed in this way, "laid out in heritable security, and so remain until her marriage, when the same shall be secured in the same way for her proper liferent use, and afterwards to her children in fee." That is not revoked by this codicil, but then he adds, if any die unmarried, or if married childless, their portion shall revert to his surviving children. That is a provision of survivorship in case of any daughter dying unmarried or childless, and that is not dying before the testator, as that too is provided for. This is a clear provision in favour of brothers and sisters. This then appears clearly to show that no right of fee was meant to be given which could defeat that survivorship. Therefore, taking the original deed and these two codicils together, I have no difficulty in coming to the conclusion that nothing was meant to be given to daughters but a liferent. That leads me to the conclusion that, as they have only a bare liferent, there was no power given to Mrs Morice to divide or apportion these funds among her children, who already have the fee in them.

LORD ARDMILLAN—Mrs Morice executed a deed of apportionment by which she directed her marriage-contract trustees to divide the capital of her fortune among her children. The power of doing so was reserved by her in her marriage-contract, but the effect of this reservation must depend upon whether she had a liferent or a fee under her father Mr Anderson's settlement. It does not occur to me that there can be any serious question whether, if there is only a liferent given to the parent, and the fee is actually conveyed to the children, that parent, being a liferenter, can disturb this settlement of the fee, and regulate the share of the fee which each child is to take. But this is a question which we are not now called upon to decide. The true question is, Was the right given to Mrs Morice by her father a right of liferent, or a right to the fee? Now, where there is no trust, the law sustains the limitation of the parent's right to a liferent only when the word *allenary* is used. Thus a direct disposition to a parent in liferent and to the children *nascituri* in fee, is held to carry the fee to the parent. This result is prevented by the use of the word *allenary*—a disposition to a parent in liferent for his liferent use *allenary* carries nothing more to the parent than the liferent. Where there is a trust of an executorial character, merely for the purpose of payment, that trust does not take the case out of the general rules, but where there is a trust for holding and for continuing administration of the

estate, it is settled that the same strictness of construction is not to be applied, but that the intention and meaning of the testator, as expressed in the deed, is to be especially attended to. So we must consider the clause in Mr Anderson's settlement, in which he deals with his daughter's portion. In the first place, he gives her £500 to be at her absolute disposal, and then he directs that the rest shall be laid out on heritable security, and so remain until her marriage, when the same shall be secured in the same way "for her proper liferent use, and afterwards to her children in fee." Now the distinction which is here drawn between the power of absolute disposal given as to the £500, and proper liferent use given as to residue, is very obvious. The word *proper* is not a usual word in reference to a liferent, and it is important to inquire into its meaning. The word has two grammatical meanings. In the first place, it may mean "own," for example, as in Shakspeare, "our proper son," meaning "our own son;" or, as in Dryden, "at your proper cost," meaning at your own cost. It is obvious that this cannot be the meaning here. It cannot mean her own liferent as distinguished from the liferent of another. But, in the second place, the word *proper* may mean appropriate or peculiar, as for example in Milton, "by our proper motion we ascend," meaning by our appropriate motion. I think that this is the sense in which the word is here used, and that "for her proper liferent use," means for her use in proper liferent, or appropriately in liferent. Thus, I think, there can be no doubt but that Mrs Morice took only a liferent under her father's settlement. I agree with your Lordship that the codicils make this still more clear, but, for the reasons I have stated, I think the point sufficiently established by the deed itself. Having only a liferent she could not alter or disturb the destination of the fee, at least in so far as regards the original share. In regard to the accruing share, a different question may arise. But that is not at present before us. I am therefore of opinion that the answer to the question presented to us should be, that Mrs Morice had no power of apportionment of the original share.

The other Judges concurred.

The Court accordingly held that Mrs Morice had no power to apportion among her children the capital of the original share provided to her and her children under her father's testamentary deeds.

Counsel for the First and Third Parties—Watson and Pearson. Agents—Henry & Shires, S.S.C.

Counsel for the Second Party—Keir. Agent—D. Scott Moneriff, W.S.

Counsel for the Fourth and Fifth Parties—Dean of Faculty (Gordon) and Gloag. Agents—Goldie & Dove, W.S.

Friday, December 13.

#### FIRST DIVISION.

SPECIAL CASE—ROBERT MACKAY AND OTHERS AND LORD GLASGOW'S TRUSTEES.

*Marriage-Contract—Jus crediti—Trust—Approbate and Reprobate—Negative Prescription—Right of Election.*

In a case where a marriage contract had